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\* This article was outlined and much material collected by the late Mr. Giddings. Upon his death the work was taken up and carried to completion by Mr. Garland.





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1. **DEFINITION.**—A trust is defined by Mr. Justice Story as “an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof.”<sup>1</sup> This definition has, however, been criticised as describing the beneficial interest of the person in whose favor the trust is created, rather than the trust itself. Sir Edward Coke’s definition of a use has been adopted by Mr. Lewin and Mr. Perry as a correct definition of a trust; it is as follows: “A confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land, for which the *cestui que trust* has no remedy but by subpoena in Chancery.”<sup>2</sup> This definition seems, however, to be applicable to real estate only. It is exceedingly difficult to frame an accurate definition of a trust, but the following is submitted as more nearly correct than either of the definitions given above: A trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence.<sup>3</sup>

The position or relationship of an executor, administrator, guardian, assignee, bailee, factor, agent, commission merchant, common carrier, or officer of a public or private corporation, may be said to be one of trust, in the broadest sense of that term; but

1. 2 Story’s Eq. Jur., § 964. Substantially the same definition is given by Mr. Spence and Mr. Snell. See 2 Spence Eq. Jur. \*875; Snell’s Princ. of Eq. (Lawson’s Am. Ed.) 59.

“A trust exists where the legal interest is in one person and the equitable interest in another.” Wallace v. Wainwright, 87 Pa. St. 263.

“A trust is where property is conferred upon and accepted by one person on terms of holding, using, or disposing of it for the benefit of another.” Per Owen, C. J., in Mannix v. Purcell, 46 Ohio St. 102; 15 Am. St. Rep. 562. 2. Co. Litt. 272b; 1 Perry on Trusts, § 13; 1 Lewin on Trusts \*13.

A trust is “an obligation upon a

person arising out of a confidence reposed in him, to apply property faithfully and according to such confidence.” Willies on Trustees 2, quoted, with approval, in Sinking Fund Com’rs v. Walker, 6 How. (Miss.) 143; 38 Am. Dec. 435.

3. See 1 Perry on Trusts, § 2; 2 Bouv. Law. Dict., tit. “Trust;” Smith’s Princ. Eq. 22; Beers v. Lyon, 21 Conn. 614.

Mr. Abbott says that, in its most general sense, it is a “confidence reposed in a person that he will act in certain matters for the benefit of another; but, technically, it signifies a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by

these subjects are treated elsewhere in this work under the proper titles, and this article will be confined to the treatment of trusts in the more limited and technical sense of the term.

**II. ORIGIN AND HISTORY.**—"The elementary notion of trusts," says Mr. Pomeroy, "like so many other doctrines of equity, was borrowed from the Roman law."<sup>1</sup> The *fidei commissa*<sup>2</sup> of the Romans doubtless suggested the doctrine of uses and trusts to the early English chancellors and ecclesiastical lawyers, but a new structure has been built on the old foundation. At common law, the only mode of conveying land was by livery of seizin, or transmutation of possession. The power of alienation was greatly restricted, and the innumerable fines and reliefs required by the feudal law of tenure led to the introduction of uses and trusts, to the adoption of which additional impetus was given by the prohibitions imposed by Magna Charta and the Statute of Mortmain. The doctrine was greatly abused, however, and its application gave rise to the perpetration of so much fraud<sup>3</sup> that the celebrated Statute of Uses<sup>4</sup> was finally passed, with the intention of abolishing uses altogether by the statutory transfer of the legal estate from the *feoffee to use* directly to the *cestui que use*. But the statute was so construed as not to apply to a use upon a use or equitable estate capable of creation without being merged into the legal estate.<sup>5</sup> Thus arose the modern doctrine of trusts, which are, in effect, uses not executed by the Statute of Uses.<sup>6</sup>

It was held that the Statute of Uses applied only to passive uses, and not to express active trusts in which some active duty was imposed on the trustee, rendering it necessary that the legal estate should remain in him.<sup>7</sup> So, it was held also that leaseholds

the person from whom it was derived." 2 Abbott's Law Dict., tit. "Trust."

1. 2 Pom. Eq. Jur., § 976. This is the accepted doctrine. 2 Story's Eq. Jur., § 965; Tiedeman on Real Prop., § 438; 2 Washb. Real Prop., 384-386; 1 Spence Eq. Jur., 439-442.

2. See Saunder's Justinian, 337, 338; 2 Pom. Eq. Jur., §§ 976, 977; 2 Story's Eq. Jur., § 966.

3. According to an old English counsellor, the parents of uses and trusts were fraud and fear, and a court of conscience was the nurse. Atty. Gen'l v. Sands, Hard. 491.

4. 27 Hen. VIII., ch. 10.

5. Thus, where A, the legal owner, is directed to hold the land to the use of B, who is directed to hold it to the use of C, the Statute of Uses will carry the land to B, at law, but no further; and the ultimate use to C, being a use upon a use, will remain unaffected by the statute. Tiedeman on Real Prop., § 463; 2 Pom. Eq. Jur., § 985; 2 Washb. on Real Prop., 406, 409, 457, 460; Ram-

say v. Marsh, 2 McCord (S. Car.) 252; 13 Am. Dec. 718; Wyman v. Brown, 50 Me. 157; Croxall v. Shererd, 5 Wall. (U. S.) 282; Guest v. Farly, 19 Mo. 147; Cueman v. Broaduax, 37 N. J. L. 508; Hutchins v. Heywood, 50 N. H. 496; Reed v. Gordon, 35 Md. 183; Hurst v. McNeil, 1 Wash. (U. S.) 70; Hopkins v. Hopkins, 1 Atk. 591.

6. Ware v. Richardson, 3 Md. 505; 56 Am. Dec. 769; Cushing v. Blake, 30 N. J. Eq. 698; 1 Spence's Eq. Jur. 494; 2 Pom. Eq. Jur., § 986.

7. Wright v. Pearson, 1 Eden 125; Pybus v. Smith, 3 Bro. C. C. 340; Nevil v. Saunders, 1 Vern. 415; Harton v. Harton, 7 T. R. 654; Philadelphia Trust, etc., Co.'s Appeal, 93 Pa. St. 209; Kay v. Scates, 37 Pa. St. 31; 78 Am. Dec. 399; Shallcross' Estate, 13 Phila. (Pa.) 374; Rife v. Geyer, 59 Pa. St. 393; 98 Am. Dec. 351; Turley v. Massengill, 7 Lea (Tenn.) 353; Meacham v. Steele, 93 Ill. 135; Preachers' Aid Soc. v. England, 106 Ill. 129; Kellogg v. Hale, 108 Ill. 164; Manice v.

and chattel interests were not executed by the statute.<sup>1</sup> And

Manice, 43 N. Y. 203; Wood v. Wood, 5 Paige (N. Y.) 596; 28 Am. Dec. 451; Morton v. Barrett, 22 Me. 257; 39 Am. Dec. 575; Nickell v. Handly, 10 Gratt. (Va.) 336; Howard v. Henderson, 18 S. Car. 189; Exeter v. Odiorno, 1 N. H. 232; Hutchins v. Heywood, 50 N. H. 500; Sprague v. Sprague, 13 R. I. 701; Chamberlain v. Thompson, 10 Conn. 243; 26 Am. Dec. 390; Hearst v. Pujol, 44 Cal. 230; Cooper v. Cooper, 36 N. J. Eq. 121; Norton v. Leonard, 12 Pick. (Mass.) 152; Phelps v. Phelps, 143 Mass. 570. And see the extended discussion in Leggett v. Perkins, 2 N. Y. 297. See *infra*, this title, *Nature of the Trustee's Estate*.

Trusts for married women being favored, the legal estate will remain in the trustee to enable him to carry out the trust, even in some cases in which it would otherwise pass to the beneficiary, under the Statute of Uses. Robinson v. Grey, 9 East 1; Richardson v. Stodder, 100 Mass. 528; Williman v. Holmes, 4 Rich. Eq. (S. Car.) 475; Rogers v. Ludlow, 3 Sandf. Ch. (N. Y.) 104; Francis v. Reigart, 4 Watts (Pa.) 109; Steacy v. Rice, 27 Pa. St. 75; 67 Am. Dec. 447. But see Lancaster v. Dolan, 1 Rawle (Pa.) 231; 18 Am. Dec. 625; Snyder's Appeal, 92 Pa. St. 504.

So it has been held in a recent case that where the duty imposed upon the trustee is an active one, even though merely to convey the estate, the trust is not executed by the Statute of Uses until such duty has been performed, or may properly be presumed to have been performed. Sprague v. Sprague, 13 R. I. 701. And where there was a devise to trustees directing them to permit the beneficiary to receive such sums from the rents and profits of the subject-matter of the trust as he should deem proper for his support, "in such manner, however, that the same shall not be liable for his debts," and providing that he should be allowed, within certain limitations, to exercise control over the property, it was held to create an active trust not executed by the Statute of Uses. Hooberry v. Harding, 10 Lea (Tenn.) 392. But it was held by the same court that where property is given in trust by an instrument providing that it should not be liable for the debts of the beneficiary, but that he was to have

only the rents and profits with power to dispose of it by will only, and not to sell it or otherwise control it, the beneficiary takes both the legal and equitable estate, and that the trust, being merely a dry trust, fails. Turley v. Massengill, 7 Lea (Tenn.) 353.

In *Pennsylvania*, where an estate was devised in trust for a woman for life, remainder to the heirs of her body lawfully begotten, and she was neither married nor contemplating marriage, the trust was held to be a dry trust merely, executed by the Statute of Uses, and her estate, therefore, an estate tail. *Pennsylvania Trust, etc., Co.'s Appeal*, 93 Pa. St. 209.

But in *Pennsylvania* the doctrine in regard to trusts for married women is peculiar. If there be no marriage in fact, or actually in contemplation, the trust for coverture will fail, notwithstanding the trust also imposes active duties on the trustee. Kuntzleman's Estate, 136 Pa. St. 142; 20 Am. St. Rep. 909; Ogden's Appeal, 70 Pa. St. 501; Williams' Appeal, 83 Pa. St. 377.

Where property is given by will upon a dry trust, the beneficiary may be treated as the absolute owner, and if the estate is such that a court of equity would compel a conveyance, the legal title will be treated as already conveyed. Shallcross' Estate, 13 Phila. (Pa.) 374. See also Allen v. Craft, 109 Ind. 476; 58 Am. Rep. 425.

In *Georgia*, it has been held that where a conveyance was made after the Married Woman's Separate Property Act of 1866, to a trustee for a married woman, without remainder over, and nothing was prescribed for the trustee to do, the trust was executed and the legal title passed to her at once. Sutton v. Aiken, 62 Ga. 733. But see Boyd v. England, 56 Ga. 598.

In *New York*, it has been held that where the beneficial use declared by deed cannot take effect as a legal estate in the beneficiary, it will, providing it can take effect as a trust consistently with the rules of the common law, take effect as a trust in the same manner as if the Statute of Uses had never been enacted. Vander Voigen v. Yates, 3 Barb. Ch. (N. Y.) 242. See *infra*, this title, *Nature of the Trustee's Estate*.

1. Ramsey v. Marsh, 2 McCord (S. Car.) 252; 13 Am. Dec. 717, 720; Scott v. Scholey, 8 East 468; Schley v. Lyon,



the statute did not purport to execute trusts of things in action or other kinds of personal property.<sup>1</sup>

The Statute of Uses has been substantially adopted, either wholly or in part, in most of the states, but it is not in force in all.<sup>2</sup>

**III. KINDS OF TRUSTS—1. Express and Implied.**—Considered with reference to their inception or creation, trusts are of two kinds, express and implied. An express trust is one created by words evincing an intention to create a trust.<sup>3</sup> Such trusts are generally created by instruments which expressly indicate or point out the persons, property, and purposes of the trust—hence they are called express or direct trusts, in contradistinction from such as are implied or presumed by law from the language, conduct, or relation of the parties.<sup>4</sup> They may be either discretionary or imperative, absolute or on condition.<sup>5</sup>

Implied trusts are such as arise by operation of law, or are presumed, without any express declaration of trust, in order to prevent fraud and satisfy the demands of justice.<sup>6</sup>

**2. Simple and Special.**—With reference to the nature of the duty imposed upon the trustee, trusts may be either simple or special. A simple or passive trust is a trust in which the trustee is a mere passive depositary of the trust property, with no active duties to perform.<sup>7</sup> In such a case, the law regulates the trust, and the trustee has nothing to do but convey the property upon the request of the beneficiaries.<sup>8</sup>

6 Ga. 530; *Slevin v. Brown*, 32 Mo. 176; *Denton v. Denton*, 17 Md. 403; *Doe v. Routledge*, 2 Cowp. 709; 1 *Saunders on Uses*, 86.

1. 2 Pom. Eq. Jur., § 984; *Rice v. Burnett*, 1 Spear's Eq. (S. Car.) 579; 42 Am. Dec. 336; *Watson v. Pitts*, 2 McMull. (S. Car.) 298.

2. See 1 *Perry on Trusts* (4th ed.), § 299, and notes; 4 *Lawson's Rights and Remedies*, § 1974; *REAL PROPERTY*, vol. 19, p. 1056. See the statutes of the various states.

3. *Underhill on Trusts and Trustees*, 12; 2 Pom. Eq. Jur., § 987. See *infra*, this title, *Creation of Trusts*.

4. 1 *Perry on Trusts*, § 24; *Flint on Trusts and Trustees*, § 5; *Sheldon v. Harding*, 44 Ill. 68; *Kingsbury v. Burnside*, 58 Ill. 328; 11 Am. Rep. 67; *Gibson v. Foote*, 40 Miss. 792; *Farnham v. Clements*, 51 Me. 426; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198.

5. *Little v. Wilcox*, 119 Pa. St. 439; 1 *Perry on Trusts*, § 24.

**Trustee of Express Trust.**—As to who is within the meaning of statutes authorizing suits by trustees of an express trust, see *PARTIES TO ACTIONS*, vol. 17, pp. 552-554, and the following

recent cases: *Platt v. Iron Exch. Bank*, 83 Wis. 358; *Landwerlen v. Wheeler*, 106 Ind. 523; *Rinker v. Bissell*, 90 Ind. 375; *Holmes v. Boyd*, 90 Ind. 332; *Coffin v. Grand Rapids Hydraulic Co.*, 61 N. Y. Super. Ct. 154; *Catron v. La Fayette County*, 106 Mo. 659; *Clark v. Fosdick*, 118 N. Y. 7; 16 Am. St. Rep. 733.

6. *IMPLIED TRUSTS*, vol. 10, p. 2; *Underhill on Trusts and Trustees*, 12. Resulting and constructive trusts are intended to be included in implied trusts, and are treated under that heading in the article above referred to.

7. *Underhill on Trusts and Trustees*, 14; 2 *Abbott's Law Dict.*, tit. "Trusts"; *Tiedeman on Real Prop.*, § 494; *Bowen v. Chase*, 94 U. S. 819; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 588. Sometimes called a dry, passive, or naked trust. See *Philadelphia Trust, etc., Co.'s Appeal*, 93 Pa. St. 209; *Turley v. Massengill*, 7 Lea (Tenn.) 353; *Fisher v. Wister*, 154 Pa. St. 65.

8. 1 *Perry on Trusts*, § 18; *Lewin on Trusts*, \*18; *Flint on Trusts and Trustees*, § 3; *Fisher v. Wister*, 154 Pa. St. 65. Express passive trusts in land are not common in the *United States*, and

A special or active trust is one in which the trustee is not a mere depositary, but has special and particular duties to perform, which are pointed out by the settlor or creator of the trust.<sup>1</sup> It may be either ministerial or discretionary.<sup>2</sup>

**3. Legal and Illegal**—*a.* **GENERALLY.**—With reference to the purpose or object in view, trusts are either legal or illegal. A legal trust is one for an honest and lawful purpose, while an illegal trust is one for some dishonest purpose or contrary to public policy or some statute.<sup>3</sup> If part of a trust is legal and part

in many states they have been abolished by statute, the effect of which is to vest the entire estate, legal as well as equitable, in the beneficiary. 2 Pom. Eq. Jur., §§ 988, 1003, 1004. See also *Thompson v. Conant*, 52 Minn. 208.

1. 1 Perry on Trusts, § 18; Underhill on Trusts and Trustees, § 3; Lewin on Trusts, \*18; 2 Abbott's Law Dict., tit. "Special Trust." See also *Steere v. Steere*, 5 Johns. Ch. (N.Y.) 1; 9 Am. Dec. 256; *Cole v. Wade*, 16 Ves. 27; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 588; *Earp's Appeal*, 75 Pa. St. 119; *Butler v. Butler*, 9 Phila. (Pa.) 269; *Phillips' Appeal*, 80 Pa. St. 472; *Goodrich v. Milwaukee*, 24 Wis. 422.

2. 1 Perry on Trusts, § 19; Flint on Trusts and Trustees, § 3; Lewin on Trusts, \*18; *Atty. Gen'l v. Gleg*, 1 Atk. 356; *Hibbard v. Lamb*, Amb. 309; *Atty. Gen'l v. Scott*, 1 Ves. 417; *Gower v. Mainwaring*, 2 Ves. 89.

3. 1 Perry on Trusts, § 21; Flint on Trusts and Trustees, § 4; Lewin on Trusts, \*19; *Servis v. Nelson*, 14 N. J. Eq. 94; *Sloan v. Birdsall*, 58 Hun (N. Y.) 317; *Myers v. Little*, 60 Miss. 203. See *PERPETUITIES*, vol. 18, p. 335; *CHARITIES*, vol. 3, p. 122; *SPENDTHRIFT TRUSTS*, vol. 23, p. 5.

A trust founded upon an illegal contract, or created in contravention of the general policy of the law, is illegal. *Bettinger v. Bridenbecker*, 39 Barb. (N. Y.) 395.

A trust for the future illegitimate children of another is illegal. *Bladwell v. Edwards*, Cro. Eliz. 509; *Metham v. Devonshire*, 1 P. Wms. 529; *Dorin v. Dorin*, L. R., 7 H. L. 568; *Re Ayles' Trusts*, 1 Ch. Div. 282.

So, a trust in restraint of marriage, *Lloyd v. Lloyd*, 2 Sim. N. S. 255; or upon condition and in encouragement of the future separation of husband and wife, is illegal. *Westmeath v. Westmeath*, 1 Dow. N. S. 519; *Proctor v. Robinson*, 15 W. R. 138; *Bindley v. Mulloney*, L. R., 7 Eq. 343.

Where the trustee is neither vested with the right to possession, nor to the rents and profits for any purpose, either for himself or another, the deed of trust is void. *Hotchkiss v. Elting*, 36 Barb. (N. Y.) 38.

Where the trustees of a will were directed to purchase in the names of the testator's children, real estate for their benefit, a direction to the trustees to take the rents and profits for the benefit of the children, was held void, and that no estate or interest vested in the trustees, but that they held the fund as testamentary guardians merely. *Wood v. Wood*, 5 Paige (N. Y.) 596.

An authority, given by a will to a trustee, to pay the interest on the incumbrances of the trust estate out of the rents and profits, and apply the residue to the reduction of the principal, is valid. *Parks v. Parks*, 9 Paige (N. Y.) 107.

Where an executor was directed by his testator to send certain slaves to Africa and sell the balance of his estate and pay the proceeds to the American Colonization Society for their maintenance, and that of their descendants, the trust was held valid. *Walker v. Walker*, 25 Ga. 420.

A trust to receive the rents and profits of real estate, and pay certain annuities for the period of five years to two of the testator's sons, if they shall so long live, and to pay the surplus rents and profits to one of them, is a valid trust under the provisions of the *New York* statute, and will continue for five years, notwithstanding the death of one of the annuitants within that time, or until the trust is terminated by the death of both annuitants within that period. *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329.

A trust to accumulate rents and profits for the benefit of the testator's wife and minor children is void, such trust being allowed under the *New York* statute only for the benefit of minors; but a devise of lands in trust to receive

illegal, the former will be upheld if it can be separated from the latter.<sup>1</sup>

the rents and profits and apply them to the use of the testator's family, will be valid and pass the title to the trustees. *Boynton v. Hoyt*, 1 Den. (N. Y.) 53.

In *Louisiana*, a disposition in a will, having for its object the foundation and maintenance of colleges under the administration of a municipal corporation as trustee forever, is a prohibited *fidei-commissum* and substitution. *Perrin v. McMicken*, 15 La. Ann. 154.

In *Michigan*, a conveyance to certain persons in trust for the stockholders of a company, to be subsequently incorporated, but at the time a partnership, of which the trustees named in the conveyance were trustees and, together with others, entitled to shares on certain contributions, was held to be a conveyance of a partnership, some of the partners being named and others to be determined, and not void as failing to comply with the Statute of Uses and Trusts. *Turner v. Ontonagon River Improvement Co.*, 77 Mich. 603.

It has been held in *Pennsylvania* that the fact that the settlor conveyed the property to the trustee, with the intention of evading the collateral inheritance tax, will not invalidate the trust. *Tritt v. Crotzer*, 13 Pa. St. 451. See also *Millbank v. Jones*, 127 N. Y. 370.

**Conflict of Laws.**—It is sometimes difficult to determine by what law trusts will be governed, where the settlor is in one state and the property in another, but the following cases will show the views of the different courts upon the question. Where a will directs property to be invested in real estate upon trusts, illegal by the law of the testator's domicile, it will be held invalid, though the trust would be valid in the state where the investment is directed to be made. *Wood v. Wood*, 5 Paige (N. Y.) 506; 28 Am. Dec. 451. See also *Bascom v. Nichols*, 1 Redf. (N. Y.) 340. And generally the validity of a trust directed by will is determined by the law of the testator's domicile. *Bascom v. Albertson*, 34 N. Y. 584; *Ward v. Starr* (Pa.), 11 Pitts. L. J. 155.

Property conveyed in trust to manage and pay over the profits was situated in *Tennessee*, where the conveyance was made; the trustee resided in *Mississippi*, but there was nothing in the deed requiring the property to be removed to the latter state, nor did it

appear to be the intention of the parties that the trust should be performed there. The conveyance was held to be governed by the laws of *Tennessee*, and the subsequent removal of the property to *Mississippi* did not change the rights of the parties. *Wyse v. Dandridge*, 35 Miss. 672; 72 Am. Dec. 149.

Where a citizen of *Louisiana*, while in the state of *New York*, executed a deed of trust in conformity with the laws of *New York*, conveying to a citizen of that state a sum of money, in cash, for the use and benefit of other parties, it was held that, since the deed was made and executed in *New York*, and bore upon a fund in that state, and was admitted to be in accordance with its laws, it was not in violation of the laws of *Louisiana*. *Hullin v. Faure*, 15 La. Ann. 622.

The effect of a trust deed executed in another state, but recorded in *Louisiana*, in a parish where the land lies, must be determined by the laws of the latter state. *Ricks v. Goodrich*, 3 La. Ann. 212. Compare *Antignance v. Central Bank*, 26 Miss. 110. Where in another state the legal title to slaves is vested by deed of trust in the father, who covenants to transfer the title to his children at their majority, if the slaves are brought into *Louisiana* by him, upon his change of domicile they will become subject to the laws of that state, which recognize no such right of property in the children. *Terrell v. Alden*, 7 La. Ann. 46.

It would seem that, notwithstanding the general rule that personal property is governed by the *lex domicilii*, the validity of a deed of trust executed in the state in which the personalty is actually situated, is to be determined by the law of that state, although the settlor lives in another state. See *Pond v. Sweetzer*, 85 Ind. 145; *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Clark v. Tarbell*, 58 N. H. 88; *Green v. Van Buskirk*, 7 Wall. (U. S.) 139. But see also 31 Cent. Law J. 224-227.

**1. Trusts Illegal in Part.**—*Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Underwood v. Curtis*, 127 N. Y. 523; *Leavitt v. Wolcott*, 65 How. Pr. (N. Y. Supreme Ct.) 51; *Knot v. Jones*, 47 N. Y. 389; *Dupre v. Thompson*, 8 Barb. (N. Y.) 537; *Butler v. Huestis*, 68 Ill. 594;

A trust to sell or lease the trust estate may be supported as a trust to sell, even though void as to the power to lease.<sup>1</sup>

*b. SECRET TRUSTS.*—"A court of equity will compel the discovery of a secret trust, to enforce it, if lawful, or declare it void, if unlawful, whenever the fact of its not being declared in the conveyance, creating the legal estate, is caused by fraud or circumvention, or is the result of accident or mistake, or the omission is by design, the trust being unlawful and the object of secrecy being to evade the policy of the law; the court in all these cases proceeds upon the idea of preventing fraud."<sup>2</sup> A secret trust created for the purpose of defrauding creditors, may be proved by parol evidence, and, when so proved, will vitiate the entire transaction.<sup>3</sup> Equity will not permit an insolvent debtor to convey real estate, without any apparent reservation, and yet

<sup>2</sup> Am. Rep. 589; *Delbert's Appeal*, 83 Pa. St. 462. But see *Fisk v. Atty. Gen'l*, 4 L. R. Eq. 531; *Magistrates of Dundee v. Morris*, 3 Macq. 134; *Mitford v. Reynolds*, 1 Phil. 185; *Re Rigley's Trust*, 15 W. R. 190. Compare *Curtis v. Smith*, 6 Blatchf. (U. S.) 537. And see *Dawson v. Small*, 18 L. R. Eq. 114; *Hunter v. Bullock*, 14 L. R. Eq. 45; *Re Williams*, 5 Ch. Div. 735; *Champney v. Davy*, 11 Ch. Div. 949.

This rule will not be applied, however, where it would result in defeating the testator's entire scheme and do injustice to the beneficiaries. *Tilden v. Green*, 130 N. Y. 29; *Manice v. Manice*, 43 N. Y. 303; *Benedict v. Webb*, 98 N. Y. 460; *Kennedy v. Hoy*, 105 N. Y. 135; *Holmes v. Mead*, 52 N. Y. 332; *Howse v. Chapman*, 4 Ves. 404; *Atty. Gen'l v. Bayley*, 2 Bro. C. C. 429.

Where an estate was devised to a trustee in trust, to be divided at a certain time, and, until such time, to pay the rents and profits to the testator's widow for her life, and, after her death, to the support of his children until the time appointed for the division, the trust, though void under the statute as to the residuary provisions for the children, was held valid as to the provision for the widow. *Irving v. DeKay*, 9 Paige (N. Y.) 521; 5 Den. (N. Y.) 646.

Where a tract of land was conveyed by R. to W., upon a parol trust that W. would put upon it twenty negroes and, at his death, convey them and their increase, together with the land, to M., and W. entered into the possession of the land, it was held that although a court of equity could not enforce a parol trust of lands in the absence of fraud, yet the trust of personalty was one

which it would execute against the representatives of W., in favor of M. *Robson v. Harwell*, 6 Ga. 589.

So, where a declaration of trust recited that the trustees should collect the rents of the trust property and apply them to the maintenance of the plaintiff during her life, and for the benefit of her husband after her death; should divide the property among her issue after the death of herself and husband; and should mortgage or otherwise dispose of it, should it appear to be beneficial to the trust, the court held the first trust to be valid, and that even if the others were void they could be so easily separated from the first that it should be upheld. *Culcross v. Gibbons*, 130 N. Y. 447.

But, where invalid trusts were united and coupled with a direction to the trustees to use a portion of the income of the trust fund for the printing and circulation of books of a religious character, it was held that the latter trust, though valid, must fall with the rest, as it could not be determined what portion of the income belonged to the valid trust, and what to that which was invalid. *Kelley v. Nichols*, 17 R. I. 306.

1. For a devise of real estate in trust may be good, if any of the purposes of the devise are legal. *Van Vechtan v. Van Veghtan*, 8 Paige (N. Y.) 104.

2. *Per Pearson, J.*, in *Brown v. Clegg*, 6 Ired. Eq. (N. Car.) 90; 51 Am. Dec. 413. See also *Thompson v. Newlin*, 3 Ired. Eq. (N. Car.) 338; 42 Am. Dec. 169, and note 175; *Catalani v. Catalani*, 124 Ind. 54. See IMPLIED TRUSTS, vol. 10, pp. 1, 59.

3. *Hills v. Elliot*, 12 Mass. 26; 7 Am. Dec. 26; *Harris v. Sumner*, 2 Pick.

secretly retain an interest therein or the right to occupy and use it for his own benefit.<sup>1</sup> Such a transaction, although founded upon a good consideration, constitutes a fraud upon creditors.<sup>2</sup> And a bill of sale, privately understood between the parties to be merely a mortgage, is a secret trust as to the surplus over the debt secured for the benefit of the vendor, and is void as to creditors.<sup>3</sup> But a conveyance upon a secret trust may be purged of the fraud, where the fraudulent intent is abandoned, and the conveyance afterwards confirmed and made absolute in good faith for a valuable and adequate consideration.<sup>4</sup>

c. SPENDTHRIFT TRUSTS.—(See SPENDTHRIFT TRUSTS, vol. 23, p. 5.)

4. Public and Private.—With reference to the beneficiaries or

(Mass.) 137; Rice v. Cunningham, 116 Mass. 469; Robinson v. Bliss, 121 Mass. 430.

1. Lukins v. Aird, 6 Wall. (U. S.) 79. See also Wait on Fraudulent Conveyances, § 272; Wooten v. Clark, 23 Miss. 76; Arthur v. Commercial, etc., Bank, 9 Smed. & M. (Miss.) 394; Towle v. Holt, 14 N. H. 61; Paul v. Crooker, 8 N. H. 288; Smith v. Lowell, 6 N. H. 67; Sparks v. Mack, 31 Ark. 670; Moore v. Wood, 100 Ill. 454; Plunkett v. Plunkett, 114 Ind. 484; Blythe v. Thomas, 45 Fed. Rep. 784.

So, where the owner of lands caused foreclosure proceedings to be instituted against himself at his own expense, and the premises were sold to the son, whose creditors afterward attached his interest therein, to which proceedings his son entered an appearance and in which the creditors recovered judgment and sold the property on execution, it was held that the original owner could not assert a secret trust therein, since the son had dealt with it as his own, leasing it and receiving the rent, and had attempted to negotiate a loan upon it. Conover v. Beckett, 38 N. J. Eq. 384.

2. Twyne's Case, 3 Rep. 80; 1 Smith's Lead. Cas. 1; Young v. Heermans, 66 N. Y. 382; Crouse v. Frothingham, 27 Hun (N. Y.) 125; Giddings v. Sears, 115 Mass. 505; Beidler v. Crane, 135 Ill. 92; 25 Am. St. Rep. 349; Dean v. Skinner, 42 Iowa 418; Blennerhassett v. Sherman, 105 U. S. 117; Lyons v. Leahy, 15 Oregon 8; Sims v. Gains, 64 Ala. 397; Coolidge v. Melvin, 42 N. H. 510; Winkley v. Hill, 9 N. H. 31; 31 Am. Dec. 215; North v. Belden, 13 Conn. 376; 35 Am. Dec. 83, and note. But it has been held that a secret trust, inconsis-

ent with the terms of a sale, is merely evidence of fraud, and not fraudulent *per se*. Harvey v. Varney, 98 Mass. 120; Oriental Bank v. Haskins, 3 Met. (Mass.) 332; 37 Am. Dec. 140; Lynde v. McGregor, 13 Allen (Mass.) 181; 90 Am. Dec. 188. See also Bigelow v. Topliff, 25 Vt. 273; 60 Am. Dec. 264; Beidler v. Crane, 135 Ill. 92; 25 Am. St. Rep. 349; Lobstein v. Lehn, 120 Ill. 549. See FRAUDULENT CONVEYANCES, vol. 8, pp. 761, note 2, and 770, note 10.

3. Chenery v. Palmer, 6 Cal. 119; 65 Am. Dec. 493; Hodgkins v. Hook, 23 Cal. 584; McCulloch v. Hutchinson, 7 Watts (Pa.) 434; 32 Am. Dec. 776; Passmore v. Eldridge, 12 S. & R. (Pa.) 201. See also Chamberlin v. Jones, 114 Ind. 458.

So, a *bona fide* purchaser of corporate stock will be protected against a secret trust in favor of a stranger. Crocker v. Crocker, 31 N. Y. 507; 88 Am. Dec. 291; Scott v. Gallagher, 14 S. & R. (Pa.) 333; 16 Am. Dec. 508. See also Beidler v. Crane, 135 Ill. 92; 25 Am. Rep. 349. But see and compare Pell v. McElroy, 36 Cal. 268; Borland v. Clark, 26 Kan. 349; Gray v. Turley, 110 Ind. 254; De Arusmant v. De Lagerty, 9 Lea (Tenn.) 188; Wheat v. Moss, 16 Ark. 243; Conover v. Beckett, 38 N. J. Eq. 384; Knox v. Thompson, 1 Litt. (Ky.) 350; 13 Am. Dec. 246.

Where knowledge of the trust on the part of the purchaser is relied upon, it must be clearly proved. Willson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347.

4. Oriental Bank v. Haskins, 3 Met. (Mass.) 332; 37 Am. Dec. 140; Langsdale v. Woollen, 99 Ind. 575; Parker v. Tiffany, 52 Ill. 286; Matthews v. Buck,

persons whom they concern, trusts are either public or private. Public or charitable trusts are for public charities or for the general public good,<sup>1</sup> while private trusts are for the benefit of individuals and are limited in duration.<sup>2</sup>

**5. Voluntary and for Value.**—With reference to the consideration, trusts may be either voluntary or for value. Voluntary trusts are those in favor of mere volunteers, not based on a valuable consideration, while trusts for value are such as have a sufficient consideration to support them.<sup>3</sup>

**6. Executed and Executory.**—With reference to their completeness and the rules of construction applicable to them, trusts may be either executed or executory. An executed trust is one fully and finally declared by the person creating it, so that nothing further remains to be done in order to make it effective.<sup>4</sup> It is construed in conformity with the strict legal rules governing limitations of estates.<sup>5</sup> An executory trust is one which is not fully and finally declared, but requires some other act or acts in order to perfect it and carry out the intention of the settlor.<sup>6</sup> A court of equity will endeavor, in such a case, to discover the intention of the testator or settlor, and carry it out without regard to the strict legal rules applicable to executed trusts.<sup>7</sup> On the other hand,

43 Me. 265; Bump on Fraud. Convey. (3d ed.) 452.

A secret trust cannot, however, be revoked by the trustee alone. *Tyler v. Tyler*, 25 Ill. App. 333.

1. See CHARITIES, vol. 3, p. 122.

2. 1 Perry on Trusts, §§ 22, 23; Flint on Trusts and Trustees, § 4.

3. Flint on Trusts and Trustees, § 4; 2 Abbott's Law Dict., tit. "Trusts;" *Eastwood v. Kenyon*, 11 Ad. & El. 438; 39 E. C. L. 137; *Jeffries v. Jeffries*, 1 Craig & P. 138; *Moore v. Crofton*, 3 Jones & L. 443. See also *Bowen v. Chase*, 94 U. S. 820, 822; *Lynn v. Lynn*, 135 Ill. 18.

A voluntary trust upon a meritorious consideration, perfectly created and fully executed, is irrevocable, and may be enforced in equity. *Rycroft v. Christy*, 3 Beav. 238; *Barry v. Lambert*, 98 N. Y. 300; 50 Am. Rep. 677; *Souverbye v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Hildreth v. Eliot*, 8 Pick. (Mass.) 293; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Andrews v. Hobson*, 23 Ala. 219; *Howard v. Windham County Sav. Bank*, 40 Vt. 597; *Gaylord v. Lafayette*, 115 Ind. 423; *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632. But where it is merely executory, equity will not enforce it in ordinary cases. *Badgley v. Votrain*, 68

Ill. 25; 18 Am. Rep. 541; *Clarke v. Lott*, 11 Ill. 115; *Milroy v. Lord*, 4 De G. F. & J. 264; *Evans v. Pattle*, 19 Ala. 398; *Swan v. Frick*, 34 Md. 141; 2 Pom. Eq. Jur., § 1001. See *infra*, this title, *Creation of Trusts—Consideration*.

4. *Lewin on Trusts*, \*111; Flint on Trusts and Trustees, § 4; 2 Abbott's Law Dict., tit. "Trusts;" *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 506; *Lynn v. Lynn*, 135 Ill. 18; *Gaylord v. Lafayette*, 115 Ind. 429; *Ireland v. Geraghty*, 15 Fed. Rep. 35.

5. 2 Pom. Eq. Jur., § 1000; *Underhill on Trusts and Trustees*, 137; *Wright v. Pearson*, 1 Ed. 125; *Brydges v. Brydges*, 3 Ves. 125; *Jervoise v. Northumberland*, 1 Jac. & W. 571. See *infra*, this title, *Construction of Trusts*.

6. 2 Abbott's Law Dict., tit. "Trusts;" *Underhill on Trusts and Trustees*, 137; *Tiedeman on Real Prop.*, § 495; *Ellison v. Ellison*, 6 Ves. 656; *Egerton v. Brownlow*, 4 H. L. Cas. 1, 210; *Cushing v. Blake*, 30 N. J. Eq. 689; *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311; *Tillinghart v. Coggeshall*, 7 R. I. 383; *Gaylord v. Lafayette*, 115 Ind. 423; *Schley v. Lyon*, 6 Ga. 530.

7. 2 Pom. Eq. Jur., § 1000; "Executory Trusts," 15 Sol. J. & Rep. 54, 76; *Cushing v. Blake*, 30 N. J. Eq. 689; *Humbertson v. Humbertson*, 1 P. Wms. 332; *Glenorchy v. Bosville*, 1

courts of equity will generally enforce an executed voluntary trust resting upon a good or meritorious consideration, while they will generally refuse to enforce a mere executory trust in favor of a volunteer.<sup>1</sup>

Lead. Cas. Eq. 1; Griffith v. Buckle, 2 Vern. 13; Davies v. Davies, 4 Beav. 54; Sackville West v. Holmesdale, L. R., 4 H. L. Cas. 543; Blackburn v. Stables, 2 Ves. & B. 369. Compare Howel v. Howel, 2 Ves. 358; Powell v. Price, 2 P. Wms. 535. See *infra*, this title, *Construction of Trusts*.

1. In the recent case of Gaylord v. Lafayette, 115 Ind. 429, the distinction between executed and executory trusts is well drawn, and the difference between the rule applicable to voluntary trusts completely executed and that applicable to voluntary trusts which are merely executory, is tersely and forcibly stated by Mitchell, J., as follows: "A trust may be said to be executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed, or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done, except that the trustee, without any further act or appointment from the settlor, carry into effect the intention of the donor as declared. In such a case, even though there was no valuable consideration upon which the trust was originally declared, a court of chancery will enforce it in favor of one whose relation to the donor was such as to show a good or meritorious consideration. Crawford's Appeal, 61 Pa. St. 52; 100 Am. Dec. 609; Stone v. Hackett, 12 Gray (Mass.) 227; Ellison v. Ellison, 6 Ves. 656; Kekewich v. Manning, 1 De G. M. & G. 175; 2 Pom. Eq. Jur., § 1001; 1 Perry on Trusts, § 98. Where, however, property has been conveyed upon a trust, the precise nature of which is imperfectly declared, or where the donor reserves the right to define or appoint the trust estate more particularly, although it may be apparent that the creator of the trust has, in a general way, manifested his purpose ultimately, at a time and in a manner thereafter to be determined, either by himself or by the trustee, to bestow the property upon a person named, the trust is incomplete and executory, and not within the jurisdiction of a court of chancery, the rule being

that courts of equity will not aid a volunteer to carry into effect an imperfect gift or an executory trust. Adamson v. Lamb, 3 Blackf. (Ind.) 446; Harmon v. James, 7 Ind. 263; Dillon v. Coppin, 4 Myl. & C. 647; Colyear v. Mulgrave, 2 Keen 81; Edwards v. Jones, 1 Myl. & C. 226; 2 Story Eq. Jur. 793 b; 2 Pom. Eq. Jur., § 1001."

In determining whether or not a trust is perfectly created or executed, the situation and relation of the parties, the object of the trust, and the property involved, should be considered. Gaylord v. Lafayette, 115 Ind. 423; Braubrook v. Boston Five Cent Sav. Bank, 104 Mass. 231; 6 Am. Rep. 222; Hackney v. Vrooman, 62 Barb. (N. Y.) 650; O'Brien, Petitioner, 11 R. I. 419; Stone v. Bishop, 4 Cliff. (U. S.) 593; Taylor v. Henry, 48 Md. 550; 30 Am. Rep. 486. And in such a case, as in nearly all cases where a writing is ambiguous and indefinite, the practical construction given by the parties themselves is entitled to great weight. See Reissner v. Oxley, 80 Ind. 580; Chicago v. Sheldon, 9 Wall. (U. S.) 50.

Lord St. Leonards suggests the following test for determining whether a trust is executed or merely executory: "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out, from general expressions, what his intention is, or has he so defined that intention that you have nothing to do but to take that which is given to you, and to convert them into legal estates?" Egerton v. Brownlow, 4 H. L. Cas. 210.

If the settlor contemplates performing some additional act in order to complete the trust, it is merely executory, and, if purely voluntary, will not ordinarily be enforced by the courts, and this rule was applied where the donor, intending to create a trust by deed, caused the instrument to be prepared, designated a trustee who accepted the trust, placed the fund in his hands, and then destroyed the instrument without having ever executed or delivered it. Lloyd v. Brooks, 34 Md. 27; Swan v. Frick, 34 Md. 139.

So, it has been held that a deposit in a savings bank in trust for another,

**IV. WHO MAY CREATE A TRUST—1. General Rule.**—Every person who can hold and dispose of any legal or equitable estate or interest in property, may create a trust in respect of such estate or interest.<sup>1</sup> Any person, *sui juris*, who can legally dispose of his property can create a trust, and a trust created by a person not *sui juris* is valid to the extent of his legal capacity.<sup>2</sup>

**2. The State.**—A state may create a trust.<sup>3</sup>

**3. Corporations.**—Corporations, subject to their charters and the laws under which they exist, may alienate their property, appoint trustees, and declare trusts.<sup>4</sup>

**4. Married Women.**—Married women can, as a general rule, convey their property to trustees by joining their husbands in deeds

who is neither a party nor privy thereto, the depositor retaining the title and control over the deposit, is held by him upon an executory trust. *Bartlett v. Remington*, 59 N. H. 364.

Where a testator bequeathed real estate in trust for his son without defining or limiting the extent of his interest therein, but providing that his expenses should be restricted to the income thereof, and that the trust property should not be liable for his debts, unless incurred with the written consent of the trustee, it was held that when the son became of age, the trust was executed and he took an absolute estate in fee. *Gray v. Obear*, 54 Ga. 231. But the same court held in another case that, where property was given in trust "for the sole and separate use of my said daughters severally during life, and at the death of either of them, then her portion to descend to such children as she may leave alive at the time of her death," the trust was executory until the death of a daughter, and that her interest could be reached during her life only by equitable proceedings and not by execution of sale. *Jennings v. Coleman*, 59 Ga. 718. *Compare Johnston v. Red*, 59 Ga. 621.

Where the sons of a testator, shortly after his death, executed a sealed instrument conveying to their sisters such an interest in land, devised to the widow with remainder to the sons, as might be necessary to make the shares of the children equal, taking into consideration all prior advancements, it was held to be a valid executed trust. *Buchanan v. Howard*, 3 Tenn. Ch. 206.

This subject was carefully considered in the case of *Cushing v. Blake*, 30 N. J. Eq. 689, and the court distinguished executed and executory trusts

as follows: "The distinction between executed and executory trusts depends upon the manner in which the trust is declared. When the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust. It is only where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of the trustee, that a court of equity regards the trust as an executory trust." The court also held that a trust is not made executory by a mere direction to the trustee to convey, where the trust is fully and accurately expressed. See also *Padfield v. Padfield*, 72 Ill. 322.

1. *Underhill on Trusts and Trustees* 91; *Flint on Trusts and Trustees*, § 6; *Gilbert v. Overton*, 2 H. & M. 110; *Kekewich v. Manning*, 1 Hare 464; *Donaldson v. Donaldson*, Kay 711.

2. 1 *Perry on Trusts*, § 28.

3. *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Coterel v. Hampson*, 2 Vern. 5; *Buchanan v. Hamilton*, 5 Ves. 722.

4. *Atty. Gen'l v. Wilson*, 1 Cr. & Ph. 1; *Evan v. Corp. of Avon*, 29 Beav. 144; *Colchester v. Lowten*, 1 Ves. & B. 244; *State v. Bank of Md.*, 6 Gill & J. (Md.) 205; 26 Am. Dec. 561; *Arthur v. Commercial, etc., Bank*, 9 Smed. & M. (Miss.) 394; 48 Am. Dec. 719; *Leggett v. New Jersey Mfg. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728, and note 740; *De Ruyter v. St. Peter's Church*, 3 N. Y. 238; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Reynolds v. Stark County*, 5 Ohio 204; *Dana v. U. S. Bank*, 5 W. & S. (Pa.) 224; *Hopkins v. Gallatin Turnpike Co.*, 4 Humph. (Tenn.) 403; *Catlin v. Eagle Bank*, 6 Conn. 233; *West v. Madison County Agr. Board*,



properly executed.<sup>1</sup> In *England*, under the Married Women's Property Act of 1882, they have the same rights over their property as spinsters, and can, therefore, create trusts in relation to it, either by act *inter vivos* or by testamentary disposition.<sup>2</sup> In the *United States*, also, recent legislation in many of the states has greatly extended the rights of married women over their separate property, and their power to create trusts is usually coextensive with their power of alienation.<sup>3</sup> Where they are given a testamentary capacity, they can generally create trusts, and appoint trustees by will.<sup>4</sup>

**5. Infants.**—Infants may create trusts which are good until avoided.<sup>5</sup> Infancy is a personal privilege,<sup>6</sup> and so long as an infant settlor lives, no one but himself can avoid the trust.<sup>7</sup> But it has been held that if he should die while still a minor, without avoiding the trust, a court of equity will investigate it, and see that no unfair advantage was taken.<sup>8</sup>

**6. Lunatics.**—Conveyances by lunatics are generally voidable and

82 Ill. 205; *Pierce v. Emery*, 32 N. H. 484; *Shaw v. Bill*, 95 U. S. 10. See CORPORATIONS, vol. 4, pp. 220, 236, 238.

1. *Durant v. Ritchie*, 4 Mason (U. S.) 45; *Young v. Graff*, 28 Ill. 20; *Johnson v. Yates*, 9 Dana (Ky.) 495; *Shipp v. Bowmar*, 5 B. Mon. (Ky.) 163; *Peacock v. Monk*, 2 Ves. Sr. 190; *Wright v. Cadogan*, 2 Eden 257.

2. *Underhill on Trusts and Trustees* 92; *Lewin on Trusts* \*23. Before said act, a married woman could create a trust of real estate settled to her separate use without her husband joining, but in all other cases of real estate trusts, the husband was required to join.

3. See MARRIED WOMEN, vol. 14, p. 589; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 22, p. 41; *Durant v. Ritchie*, 4 Mason (U. S.) 45; 1 Redf. on Wills 21-28. They must, however, comply with the formalities required by the law. *Temple v. Hawley*, 1 Sandf. Ch. (N. Y.) 153; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635; *McGan v. Marshal*, 7 Humph. (Tenn.) 121; *Tiedeman on Real Prop.*, §§ 469, 794.

4. 1 Redf. on Wills, 21-28; 2 Perry on Trusts, § 668; MARRIED WOMEN, vol. 14, p. 589.

5. *Bool v. Mix*, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; *Gillett v. Stanley*, 1 Hill (N. Y.) 121; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635; *Tucker v. Moreland*, 10 Pet. (U. S.) 71; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *McCall v. Parker*, 13 Met. (Mass.) 372; 46 Am. Dec. 735; *Fouch v. Parsons*, 3 Burr. 1794; 1 Perry on Trusts, § 33.

6. *Harris v. Ross*, 112 Ind. 314, and

the authorities cited in notes 2 and 3 in the article on INFANTS, vol. 10, p. 637.

7. *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9, 19.

8. *Starr v. Wright*, 20 Ohio St. 97; *Lewin on Trusts* \*25; 4 Cruise Dig. 130.

Infants contemplating marriage may create trusts in their personal property, which will prevent it from going to their husbands. *Field v. Moore*, 7 De G. M. & G. 691; *Ainslie v. Medlycott*, 9 Ves. 19; *Stamper v. Barker*, 5 Madd. 154; *Johnson v. Smith*, 1 Ves. 315; *Wilder's Succession*, 22 La. Ann. 219. As to real estate, see *Drury v. Drury*, 2 Eden 39; *Harvey v. Ashley*, 3 Atk. 607; *Healy v. Rowan*, 5 Gratt. (Va.) 414; 52 Am. Dec. 94; *Lester v. Frazer*, 2 Hill Eq. (S. Car.) 529; *McCartee v. Teller*, 2 Paige (N. Y.) 511; *Durnford v. Lane*, 1 Bro. C. C. 106, and compare *Cannell v. Buckle*, 2 P. Wms. 243; *Milner v. Harewood*, 18 Ves. 259; *Wilson v. McCullough*, 19 Pa. St. 77; *Levering v. Heighe*, 3 Md. Ch. 365; *Temple v. Hawley*, 1 Sandf. Ch. (N. Y.) 153. Under statutes removing the disability of coverture, a conveyance or mortgage executed by an infant married woman in accordance with the statute, stands on the same footing as a deed or mortgage executed by an infant *feme sole*, that is, it is voidable, but not absolutely void. *Lozey v. Bond*, 94 Ind. 67; *Scranton v. Stewart*, 52 Ind. 68; *Law v. Long*, 41 Ind. 586; *Miles v. Lingerman*, 24 Ind. 385; *Magee v. Welsh*, 18 Cal. 155; *Dixon v. Merritt*, 21 Minn. 196; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Hoyt v.*

not absolutely void.<sup>1</sup> But they may be avoided by the representatives of the lunatic as well as by himself.<sup>2</sup> A conveyance by a lunatic in trust is good until avoided, and a court of equity will not set it aside if it is fair and reasonable and the parties cannot be restored to their original condition,<sup>3</sup> nor as against *bona fide* purchasers without notice.<sup>4</sup> But a conveyance by him after an inquisition and the appointment of a guardian or committee, is absolutely void.<sup>5</sup> And he cannot create a valid and binding trust in favor of mere volunteers who have paid no valuable consideration.<sup>6</sup>

7. **Bankrupts and Insolvents.**—In *England*, bankrupts cannot create a trust in property acquired prior to the date of the certificate of discharge, where there is no surplus,<sup>7</sup> because, by act of Parliament, all property to which they may be entitled up to that time vests in the assignee. But it was held, under the bankrupt laws of the *United States*, that only the interests of the bankrupt existing at the date of the assignment vested in his assignee, and that he might, therefore, create a valid trust in property acquired after the assignment and before the date of the certificate of discharge.<sup>8</sup> It would seem, also, that an insolvent might create a valid trust in property which is exempt from execution, and does not pass by the deed of assignment, as it is well settled that fraud cannot be predicated upon the alienation of such property, and the owner may dispose of it as he will.<sup>9</sup>

Swar, 53 Ill. 134; *Schaffer v. Lavretta*, 57 Ala. 14; *McMorris v. Webb*, 17 S. Car. 558; 43 Am. Rep. 629; *Epps v. Flowers*, 101 N. Car. 158; *Sandford v. McLean*, 3 Paige (N. Y.) 117; 23 Am. Dec. 773; *Walsh v. Young*, 110 Mass. 396; and note to *Craig v. Van Bebber*, 100 Mo. 584, in 18 Am. St. Rep. 584.

1. See *INSANITY*, vol. 11, p. 147; and note to *Allis v. Billings*, 6 Met. (Mass.) 415, in 39 Am. Dec. 749.

2. See *INSANITY*, vol. 11, p. 149. In addition to the authorities there cited, see also *Allis v. Billings*, 6 Met. (Mass.) 415; 39 Am. Dec. 744; *Snowden v. Dunlavy*, 11 Pa. St. 522; *Owing's Case*, 1 Bland Ch. (Md.) 370; 17 Am. Dec. 311; *Molton v. Camroux*, 2 Exch. 437; *Elliot v. Luce*, 7 De G. M. & G. 488.

3. *Niell v. Morley*, 9 Ves. 478; 1 Story's Eq. Jur., § 228; *Perry on Trusts*, § 35.

4. *Carr v. Holliday*, 1 Dev. & B. Eq. (N. Car.) 344; *Price v. Berrington*, 3 Mac. & G. 486; *Greenslade v. Dare*, 20 Beav. 285.

5. *Leggate v. Clark*, 111 Mass. 308; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422; 22 Am. Dec. 655; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; 20

Am. Dec. 199; *Jackson v. King*, 4 Cow. (N. Y.) 207; 15 Am. Dec. 354, and note 368.

6. *Niell v. Morley*, 9 Ves. 478; *Underhill on Trusts and Trustees* 93; *Elliot v. Luce*, 7 De G. M. & G. 475; *Clark v. Clark*, 2 Vern. 412; *Roddy v. Williams*, 3 Jones & L. 1.

A deed of trust will be set aside by a court of equity, in such a case, especially where there is fraud. *Miskey's Appeal*, 107 Pa. St. 611; and 11 Am. & Eng. Encyc. of Law 147, note 1, where the facts in the case just cited are set forth.

7. *Lewin on Trusts* \*26; *Hill on Trustees* 47.

8. *In re Grant*, 2 Story (U. S.) 312; *Ex p. Newhall*, 2 Story (U. S.) 360; *Mosby v. Steele*, 7 Ala. 299; 1 *Perry on Trusts*, § 37.

So, it is held, under the state laws governing voluntary assignments for the benefit of creditors, that property acquired subsequent to the assignment, does not pass. *McCabe's Appeal*, 22 Pa. St. 427; *Lorenz v. Orlady*, 87 Pa. St. 226; *Shipman v. Graves*, 41 Mich. 675; *Haskins v. Alcott*, 13 Ohio St. 210.

9. *Taylor v. Duesterberg*, 109 Ind. 165; *Faurote v. Carr*, 108 Ind. 123; *Burdge v. Bolin*, 106 Ind. 175; 55 Am.

**8. Aliens and Non-Residents.**—Aliens and non-residents may, unless prohibited by statute, create valid trusts in personal property,<sup>1</sup> and a trust in real estate created by an alien is good until office found.<sup>2</sup> It is at least doubtful if the legislature of a state can constitutionally prohibit a non-resident citizen of the *United States* from creating a trust in property within the state, especially if it be personal property. A statute of *Indiana*,<sup>3</sup> prohibiting the appointment of a non-resident trustee, was held invalid by the circuit court of the *United States* for the district of *Indiana*, upon the ground that it was unconstitutional as being in contravention of the constitution of the *United States*.<sup>4</sup>

**V. WHO MAY BE A TRUSTEE—1. General Rule.**—As a general rule, all persons capable of confidence, and of taking and holding either the legal estate or the beneficial interest in property, may hold it in trust for others.<sup>5</sup>

It is a well-settled rule that equity never wants a trustee, or, in other words, that a trust will not be permitted to fail for want of a trustee.<sup>6</sup> If, therefore, no trustee is appointed by the settlor,<sup>7</sup> or the person named is incompetent,<sup>8</sup> or dies, refuses to take, or resigns before the trust is carried out, a court of equity will

Rep. 724; *Dumbould v. Rowley*, 113 Ind. 353; *Blair v. Smith*, 114 Ind. 114; *Buckley v. Wheeler*, 52 Mich. 1; *Derby v. Weyrich*, 8 Neb. 174; 30 Am. Rep. 827; *Bridgers v. Howell*, 27 S. Car. 425; *Saunoner v. King*, 49 Ark. 299; *Carhart v. Harshaw*, 45 Wis. 340; 30 Am. Rep. 752; *Delashmut v. Trau*, 44 Iowa 613.

But the transfer by a debtor of all his property, without consideration, in trust for himself during his life, and after his death for the payment of his debts, is fraudulent as to existing creditors. *Young v. Heermans*, 66 N. Y. 374.

1. *Lewin on Trusts* \*27; *Hill on Trustees* 47.

2. *Lewin on Trusts* \*26; 1 *Perry on Trusts*, § 36.

3. *Indiana Rev. St.* 1881, § 2988.

4. *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 146.

5. 1 *Perry on Trusts*, § 39; *Flint on Trusts and Trustees*, § 14; *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Pickering v. Shotwell*, 10 Pa. St. 23; *Potter v. Chapin*, 6 Paige (N. Y.) 649; *Dunbar v. Soule*, 129 Mass. 284; *Adams v. Adams*, 21 Wall. (U. S.) 186; *Huntly v. Huntly*, 8 Ired. Eq. (N. Car.) 250. See *Gibson's Case*, 1 Bland (Md.) 138; 17 Am. Dec. 257.

In a recent case, a woman entitled to the income of a trust fund during her

life, petitioned for the appointment of a certain person as trustee; others entitled to a portion of the fund after her death, opposed such appointment on the ground that the proposed trustee was one of the sureties on the bond of the petitioner as executrix of the estate of her late husband, who had held the fund for his life and had left her all his property, amounting to much more than the trust fund. It was held that the proposed trustee was not, as a matter of law, incompetent. *Gaskell v. Green*, 152 Mass. 526.

6. 1 *Perry on Trusts*, § 38; *Lewin on Trusts* \*833; 2 *Story's Eq. Jur.*, § 976; *Adam's Eq.* 36, 61; *Tiedeman on Real Prop.*, § 508.

7. *Dailey v. New Haven*, 60 Conn. 322; 2 *Pom. Eq. Jur.*, § 1087; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *King v. Donnelly*, 5 Paige (N. Y.) 46; *Levy v. Levy*, 33 N. Y. 102; *Raley v. Umatilla County*, 15 Oregon 172; 3 Am. St. Rep. 142; *Varner's Appeal*, 80 Pa. St. 140; *Maus v. Maus*, 80 Pa. St. 194.

8. *Vidal v. Girard*, 2 How. (U. S.) 188; *Sheldon v. Chappell*, 47 Hun (N. Y.) 59; *Brown v. Pancoast*, 34 N. J. Eq. 327; *Skinner v. Harrison Tp.*, 116 Ind. 142; *Bailey v. Kilburn*, 10 Met. (Mass.) 176; 43 Am. Dec. 423; *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442; 39 Am. Dec. 185; *In re Petraneks Estate*, 79 Iowa 410; *Winslow v. Cummings*, 3 Cush. (Mass.) 358; *Sonley v. Clock-*

appoint a trustee to execute the trust,<sup>1</sup> provided it was properly created in the first instance. Property charged with a valid trust will be followed into the hands of the personal representatives, heirs or devisees, and a court of equity may, and generally will, compel them to execute the trust.<sup>2</sup>

**2. The United States and the Several States.**—The *United States* and the several states may be trustees,<sup>3</sup> but, in the absence of legislative action, decrees cannot be enforced against the sovereignty, and it has been denied that either the *United States* or a state can act as a trustee.<sup>4</sup>

**3. Corporations.**—Corporations may hold property and execute trusts for any purpose within the scope of their corporate existence,<sup>5</sup> and courts of equity will compel them, in all proper cases, to carry the trusts into execution, either directly or by the

maker's Co., 1 Bro. C. C. 81; Dailey v. New Haven, 60 Conn. 315; Skipwith v. Martin, 50 Ark. 141.

1. *Irvine v. Dunham*, 111 U. S. 334; *Leggett v. Hunter*, 19 N. Y. 445; *Quackenboss v. Southwick*, 41 N. Y. 117; *Matter of Stevenson*, 3 Paige (N. Y.) 420; *Green v. Blackwell*, 31 N. J. Eq. 37; *Atty. Gen'l v. Barbour*, 121 Mass. 568; *Collier v. Blake*, 14 Kan. 250; *Pearson v. Concord R. Co.*, 62 N. H. 537; 13 Am. St. Rep. 605; *Scott v. Rand*, 118 Mass. 215; *Bloomer's Appeal*, 83 Pa. St. 45; *North Carolina R. Co. v. Wilson*, 81 N. Car. 223; *Meeting St. Baptist Soc. v. Hail*, 8 R. I. 234.

2. *Seda v. Huble*, 75 Iowa 429; 9 Am. St. Rep. 495; *Johnson v. Mayne*, 4 Iowa 180; *Piatt v. Vattier*, 9 Pet. (U. S.) 405; *Withers v. Yeadon*, 1 Rich. Eq. (S. Car.) 325; *Cushney v. Henry*, 4 Paige (N. Y.) 345; *De Barante v. Gott*, 6 Barb. (N. Y.) 492; *Kerr v. Day*, 14 Pa. St. 114; 53 Am. Dec. 526; *Treat's Appeal*, 30 Conn. 113; *Bennet v. Davis*, 2 P. Wms. 316; *Moggeridge v. Thackwell*, 1 Ves. Jr. 475; 3 Bro. C. C. 528; *Atty. Gen'l v. Lady Downing*, 1 Wilm. 22. The trust "fastens itself upon the conscience of the legal owner." *Lewin on Trusts* \*833.

An executor may be a trustee by necessary implication where a will directs that he shall do certain acts, which can be done only by a trustee. *Nash v. Cutter*, 19 Pick. (Mass.) 67; *Dorr v. Wainwright*, 13 Pick. (Mass.) 328; *Wheeler v. Perry*, 18 N. H. 307; *Anck's Estate*, 11 Phila. (Pa.) 118. See also *Parsons v. Lyman*, 5 Blatchf. (U. S.) 170; *Berry v. Hamilton*, 10 B. Mon. (Ky.) 129. And compare *Perkins v. Moore*, 16 Ala. 9. For the difference

between an executor and a trustee, see *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400.

3. *Shoemaker v. Grant County*, 36 Ind. 184; *Mitford v. Reynolds*, 1 Phill. 185; *Nightingale v. Goulbourn*, 2 Phill. 594; 5 Hare 484; 1 *Perry on Trusts*, § 41. See also *Briggs v. Life Boats*, 11 Allen (Mass.) 157; *McDonogh v. Murdoch*, 15 How. (U. S.) 367.

4. *Levy v. Levy*, 33 N. Y. 122. Mr. Perry and Mr. Flint also cite the case of *Shoemaker v. Board*, 36 Ind. 184, as holding that the *United States* cannot be a trustee, but no such question was involved in that case, and no statement of the kind is made in the opinion. So far as the case can be considered in point, it is to the contrary, for it holds that a state may be a trustee.

5. *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Phillips Academy v. King*, 12 Mass. 557; *Deringer v. Deringer*, 5 Houst. (Del.) 416; 1 Am. St. Rep. 150; *Amherst Academy v. Cowsils*, 6 Pick. (Mass.) 427; 17 Am. Dec. 387; *Protestant Episcopal Soc. v. Churchmen*, 80 Va. 718; *First Congregational Soc. v. Atwater*, 23 Conn. 34; *Philadelphia v. Elliott*, 3 Rawle (Pa.) 170; *Witman v. Lex*, 17 S. & R. (Pa.) 88; 17 Am. Dec. 644; *Mason v. M. E. Church*, 27 N. J. Eq. 47; *Lincoln Sav. Bank v. Ewing*, 12 Lea (Tenn.) 598; *Ex p. Greenville Academies*, 7 Rich. Eq. (S. Car.) 471. See *CORPORATIONS*, vol. 4, p. 218.

If a corporation is appointed trustee to execute trusts arising under a will, the trusts being valid in point of law, neither the heirs of the testator, nor any other private person, can inquire into the power of the corporation to act; that can be done only by the state which

appointment of new trustees.<sup>1</sup> This rule applies to municipal corporations<sup>2</sup> as well as to private corporations. Thus towns, cities, and counties may take and hold property in trust for educational<sup>3</sup> and charitable<sup>4</sup> purposes, and trusts for many other public purposes have been upheld.<sup>5</sup>

It is not always necessary that the trust should be for a purpose specified as one of those for which the corporation was created, it being sufficient if it be for a collateral purpose germane to the general purposes for which the corporation was created, and calculated to aid and promote the same.<sup>6</sup> But corporations

granted its charter. *Wade v. American Colonization Soc.*, 7 Smed. & M. (Miss.) 663; 45 Am. Dec. 324.

A school society is a corporation capable of taking a bequest or devise in trust for educational purposes, and it cannot be objected that the trustees who are to have control of the fund, are required to be selected from certain ecclesiastical societies. *First Congregational Church v. Atwater*, 23 Conn. 34.

1. *Vidal v. Girard*, 2 How. (U. S.) 188; *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422; *Pickering v. Shotwell*, 10 Pa. St. 27; *Oxford Union, etc., Soc. v. West Congregational Soc.*, 55 N. H. 463; *Peynado v. Peynado*, 82 Ky. 5; *Richmond v. Davis*, 103 Ind. 449; *Barnum v. Baltimore*, 62 Md. 275; 6 Am. & Eng. Corp. Cas. 203; 50 Am. Rep. 219; *Atty. Gen'l v. St. Johns Hospital*, 2 De G. J. & S. 621; *Atty. Gen'l v. Foundling Hospital*, 2 Ves. Jr. 46; *Green v. Rutherford*, 1 Ves. 468; *Atty. Gen'l v. Ironmonger's Co.*, 2 Beav. 313; *Coventry v. Atty. Gen'l*, 2 Madd. Ch. 77; 2 Bro. P. C. 235.

2. *Craig v. Secrist*, 54 Ind. 419; *Lagrange County v. Rogers*, 55 Ind. 297; *Raley v. Umatilla County*, 15 Oregon 172; 3 Am. St. Rep. 142; *Chambers v. St. Louis*, 29 Mo. 543; *Philadelphia v. Fox*, 64 Pa. St. 169; *Bell County v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268; *Carder v. Fayette County*, 16 Ohio St. 353; *Vidal v. Girard*, 2 How. (U. S.) 127; *Perin v. Carey*, 24 How. (U. S.) 465; *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *McDonough Will Case*, 8 La. Ann. 171; 15 How. (U. S.) 367; 2 Dillon's Munic. Corp., § 567. In *England*, *Atty. Gen'l v. Landerfield*, 9 Mod. 286; *Dummer v. Chippenham*, 14 Ves. 252; *Atty. Gen'l v. Clarendon*, 17 Ves. 499.

"A municipal corporation may be a trustee under the will of an individual when the trust created is germane to

the purposes for which the corporation was called into being, and when the administration of the trust, and the liabilities it imposes, are not foreign to the objects for which the corporation was instituted." *Skinner v. Harrison Tp.*, 116 Ind. 142. See CHARITIES, vol. 3, p. 122; MUNICIPAL CORPORATIONS, vol. 15, pp. 996, 1060.

3. *Vidal v. Girard*, 2 How. (U. S.) 127; *McDonogh v. Murdoch*, 15 How. (U. S.) 367; *Skinner v. Harrison Tp.*, 116 Ind. 139; *Allen School Tp. v. Macy School Tp.*, 109 Ind. 559; *Sutton v. Cole*, 3 Pick. (Mass.) 232; *Piper v. Moulton*, 72 Me. 155; *Dascomb v. Marston*, 80 Me. 223; *First Congregational Soc. v. Atwater*, 23 Conn. 34; *Beardsley v. Bridgeport*, 53 Conn. 489; *Russell v. Allen*, 107 U. S. 163; *Barnum v. Baltimore*, 62 Md. 275; 6 Am. & Eng. Corp. Cas. 203 and note; 50 Am. Rep. 219; *South New market Methodist Seminary v. Peaslee*, 15 N. H. 331; *Chapin v. School Dist.*, 35 N. H. 445; *Maynard v. Woodward*, 36 Mich. 423; *Christy v. Ashtabula County*, 41 Ohio St. 711.

4. See CHARITIES, vol. 3, p. 122.

5. See *Cresson's Appeal*, 30 Pa. St. 437; *Wright v. Linn*, 9 Pa. St. 433; *Philadelphia v. Elliott*, 3 Rawle (Pa.) 170; *Sargent v. Cornish*, 54 N. H. 18; *Webb v. Neal*, 5 Allen (Mass.) 575; *Hamden v. Rice*, 24 Conn. 350; *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 292; 11 Am. Dec. 471.

But it has been held that they cannot take and hold property in trust for private purposes not within the scope of their powers. *Holifield v. Robinson*, 79 Ala. 419. And see also note to 22 Cent. L. J. 520; *Gillespie's Appeal*, 150 Pa. St. 50.

6. *Jones v. Habersham*, 107 U. S. 189; *Vidal v. Girard*, 2 How. (U. S.) 189; *Raley v. Umatilla County*, 15 Oregon 172; 3 Am. St. Rep. 142; *Wetmore v. Parker*, 7 Lans. (N. Y.) 121;

cannot act as trustees where the matter is entirely foreign to the purposes of their creation, repugnant thereto, or inconsistent therewith.<sup>1</sup> The power of any particular corporation to take property and act as trustee in any particular instance, must generally be determined from the provisions of its charter, and the laws of the state in which it acts.<sup>2</sup>

If a corporation takes property which is granted or bequeathed to it, either in trust or otherwise, its title thereto will be good as against third persons, notwithstanding its charter does not authorize it to hold such property, and only the state can question it.<sup>3</sup> Where the trust is valid, the fact that the corporation is incompetent to act as trustee, will not cause the trust to fail, for a court of equity will, whenever it is necessary in such a case, appoint another trustee to carry out the trust.<sup>4</sup>

**4. Unincorporated Voluntary Associations.**—Unincorporated voluntary associations, such as charitable and religious societies, may become trustees and hold property in trust for charitable and religious purposes.<sup>5</sup>

**5. Public Officers.**—Public officers may act as trustees for pur-

First Congregational Soc. v. Atwater, 23 Conn. 34; Barnum v. Baltimore, 62 Md. 275; 6 Am. & Corp. Cas. 203; 50 Am. Rep. 219. See also Oxford Union, etc., Soc. v. West Congregational Soc., 55 N. H. 463; Sargent v. Cornish, 54 N. H. 18; Pickering v. Shotwell, 10 Pa. St. 27; Chambers v. St. Louis, 29 Mo. 543; Green v. Rutherford, 1 Ves. 462.  
1. Jackson v. Hartwell, 8 Johns. (N. Y.) 422; Matter of Howe, 1 Paige (N. Y.) 214. And it has been held that a municipal corporation cannot, in the absence of statutory authority, take and hold lands in trust for religious purposes, Corning v. Christ Church, 33 N. Y. St. Rep. 766; nor can a city accept a trust for the establishment and maintenance of a county poor-house, Augusta v. Walton, 77 Ga. 517.

2. See Dartmouth College v. Woodward, 4 Wheat. (U. S.) 636; Head v. Providence Ins. Co., 2 Cranch (U. S.) 127; Beatty v. Knowler, 4 Pet. (U. S.) 152; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358; 8 Am. Dec. 243; New York F. Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; State v. Mobile, 5 Port. (Ala.) 279; 1 Perry on Trusts, § 44; ULTRA VIRES, vol. 27.

3. Runyan v. Coster, 14 Pet. (U. S.) 122; Perin v. Carey, 24 How. (U. S.) 465; Jones v. Habersham, 107 U. S. 174; Chapin v. School Dist., 35 N. H. 445; Troy v. Haskell, 33 N. H. 533; Sargent v. Cornish, 54 N. H. 18; Philadelphia v. Girard, 45 Pa. St. 9; Leazure

v. Hillegas, 7 S. & R. (Pa.) 321; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 758; Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Raley v. Umatilla County, 15 Oregon 172; 3 Am. St. Rep. 148; Land v. Coffman, 50 Mo. 243; De Camp v. Dobbins, 29 N. J. Eq. 36; Davis v. Old Colony R. Co., 131 Mass. 273; 41 Am. Rep. 221; Wade v. American Colonization Soc., 7 Smed. & M. (Miss.) 663; 45 Am. Dec. 324.

4. Dalley v. New Haven, 60 Conn. 315; Skinner v. Harrison Tp., 116 Ind. 142; Winslow v. Cummings, 3 Cush. (Mass.) 358; Vidal v. Girard, 2 How. (U. S.) 188; Jones v. Habersham, 107 U. S. 174; Sonley v. Clockmaker's Co., 1 Bro. C. C. 81. And see *supra*, this title, *Who May Be a Trustee—General Rule*.

5. See CHARITIES, vol. 3, p. 122.

But where property devised to a church was intended by the testator to be a perpetual fund for raising sums directed to be annually applied for the missions of the Methodist Episcopal Church, it was held that trustees were necessary to administer the property, and the church as an unincorporated society could not execute the trust. Johnson v. Mayne, 4 Iowa 180.

In a case where the bequest was made in trust for a Sunday school, which was unincorporated but was connected with an incorporated church, the *New Jersey* court appointed the

poses within the scope of their official duties.<sup>1</sup> Thus, a bequest to the Chancellor of the Exchequer for the benefit of *Great Britain*, has been held valid,<sup>2</sup> and a bank comptroller has been held to be a trustee of securities held by him for the banks.<sup>3</sup>

**6. Married Women.**—Married women, as well as those who are unmarried, may become trustees;<sup>4</sup> but because of the influence which husbands—whose interests may be antagonistic to the trust—usually have over their wives, because of their lack of business qualifications, and because of the necessary joinder of their husbands, under the laws of many of the states, in the performance of certain duties which are usually required in executing a trust, it is not advisable to appoint them.<sup>5</sup> At common law a wife could not be trustee for her husband,<sup>6</sup> but in some jurisdictions it has been held that she may be such a trustee,<sup>7</sup> and the modern tendency, as shown by recent enabling statutes, is cer-

church trustee. *Mason v. M. E. Church*, 27 N. J. Eq. 47.

1. 1 Perry on Trusts, § 47.

Where money was bequeathed to certain persons by name, "and the mayor of the city," in trust for the establishment of a free school, the money to be paid over to the city for purposes of education, if, in the opinion of two-thirds of the trustees, the trust could not be administered in accordance with the testator's plan and purpose, it was held that as long as the trustees held the fund, the city had no control over it or interest in it, and that the "mayor of the city" at the time the testator died, and not at the time the trustees were appointed, was intended by the testator to be a trustee. *Dunbar v. Soule*, 129 Mass. 284.

Where a railroad company deposited certain company bonds with its president, under an agreement with an accommodation indorser that they should be held for the purpose of paying notes indorsed by him for the benefit of the company, the president becomes a trustee independently of his official character, and is personally responsible for the execution of the trust, and it is no defense for him to allege that he was directed by the company to make a different disposition of the bonds. *Wilkinson v. Stewart*, 30 Ill. 48.

2. *Nightingale v. Goulbourn*, 2 Phill. 594; 5 Hare 484. So it was held that the Governor General of *India* might take property in trust for a city in that country. *Mitford v. Reynolds*, 1 Phill. 185. See also *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433, where it was held that the

trust was to the incumbents of the office as individuals and not in their official capacity, but that they properly described themselves as officers in suing to collect money in pursuance of the trust.

3. *State v. Rush*, 20 Wis. 212.

4. *Lake v. De Lambert*, 4 Ves. 592; *Blithe's Case*, 2 Freem. 91; *Lord Antrine v. Buckingham*, 2 Freem. 168; *Compton v. Collinson*, 2 Bro. C. C. 377; *Godolphin v. Godolphin*, 1 Ves. 23; *Hearle v. Greenbank*, 1 Ves. 304; *Moore v. Hussey*, Hob. 95; *Dundas v. Biddle*, 2 Pa. St. 160; *Springer v. Berry*, 47 Me. 330; *People v. Webster*, 10 Wend. (N. Y.) 554; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497; 10 Am. Dec. 353; *Thompson v. Murray*, 2 Hill Eq. (S. Car.) 204; 29 Am. Dec. 68; *Trust Co. v. Sedgwick*, 97 U. S. 304; *Bouldin v. Reynolds*, 58 Md. 495; *Moore v. Cottingham*, 90 Ind. 243. See *MARRIED WOMEN*, vol. 14 p. 681.

5. *Compton v. Collinson*, 2 Bro. C. C. 377; *In re Kaye*, L. R., 1 Ch. 387. See also *Graham v. Long*, 65 Pa. St. 383; *Still v. Ruby*, 35 Pa. St. 373.

But where an estate comes to a married woman charged with a trust, her coverture cannot be pleaded in bar of the trust. *Clarke v. Saxon*, 1 Hill Eq. (S. Car.) 69; *Berry v. Norris*, 1 Duv. (Ky.) 302.

6. *Dickinson v. Davis*, 43 N. H. 647; 80 Am. Dec. 202; *Mutual Ins. Co. v. Deale*, 18 Md. 46; *Woodbeck v. Havens*, 42 Barb. (N. Y.) 70.

7. *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 541; *Moore v. Cottingham*, 90 Ind. 239.

The husband may also be a trustee

tainly in that direction. The matter is largely regulated by statutory provisions in the different states. In a case recently decided by the *New York* court of appeals, it was held that a married woman was capable of being a trustee under the *New York* statute, and, having become a trustee in that state, where the trust fund remained, her title thereto was not lost, but could be enforced in *New York*, notwithstanding she had removed to *New Jersey*, where a married woman cannot be appointed a trustee.<sup>1</sup>

**7. Infants.**—Infants are even less fit than married women to become trustees, and the courts will never appoint them, but if an infant trustee is nominated by the creator of the trust, the estate will pass, and the courts will see that the trust is properly executed. If the infant cannot execute it himself, his guardian may be directed to do it for him, or some competent third person may be appointed by the court to carry out the trust.<sup>2</sup>

**8. Lunatics.**—Lunatics are incapable of accepting a conveyance, and they cannot execute trusts requiring the exercise of judgment and discretion;<sup>3</sup> but long acquiescence by all parties, especially where the *cestui que trust* accepts the deed, will be sufficient,<sup>4</sup> and equity will not permit a valid trust to fail merely because a lunatic is nominated as the trustee. The court will see that the trust is administered by his guardian, or, if necessary, will remove him and appoint a competent trustee.<sup>5</sup>

**9. Bankrupts and Insolvents.**—Bankrupts and insolvents may act as trustees.<sup>6</sup> Trust estates do not pass to the assignees of insolvent trustees,<sup>7</sup> nor does a certificate of discharge in bankruptcy operate as a discharge of fiduciary debts and obligations. The estate, being held only for the *cestui que trust*, can be incumbered only for his benefit, and not for the benefit of the trustee or others.<sup>8</sup>

for his wife. *Bennet v. Davis*, 2 P. Wms. 316; *Shirley v. Shirley*, 9 Paige (N. Y.) 363; *Picquet v. Swan*, 4 Mason (U. S.) 455; *Boykin v. Ciples*, 2 Hill Eq. (S. Car.) 200; 29 Am. Dec. 67; *Griffith v. Griffith*, 5 B. Mon. (Ky.) 113; *Jamison v. Brady*, 6 S. & R. (Pa.) 467; 9 Am. Dec. 460; *Camp v. Smith*, 98 Ind. 409; *Derry v. Derry*, 74 Ind. 560; *Porter v. Rutland Bank*, 19 Vt. 410. But see *Dean v. Lanford*, 9 Rich. Eq. (S. Car.) 423.

1. *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125.

2. The capacity of infants to act as trustees, and the supervisory powers of the courts over trusts, where infants have been named as trustees, are fully treated under the title *INFANTS*, vol. 10, pp. 616-618.

A deed made by an infant in execution of a trust, cannot be disaffirmed by him. *Nordholt v. Nordholt*, 87 Cal. 552; 22 Am. St. Rep. 268; note to

*Craig v. Van Bebber*, 18 Am. St. Rep. 642; *Starr v. Wright*, 20 Ohio St. 97; *Elliott v. Horn*, 10 Ala. 348; 44 Am. Dec. 488; *Bridges v. Bidwell*, 20 Neb. 185; *Prouty v. Edgar*, 6 Iowa 353.

3. *Loomis v. Spencer*, 2 Paige (N. Y.) 153; *Person v. Warren*, 14 Barb. (N. Y.) 488; *Swartwout v. Burr*, 1 Barb. (N. Y.) 495.

4. *Eyrick v. Hetrick*, 13 Pa. St. 494.

5. *In re Bloomer*, 2 De G. & J. 88.

6. 1 *Perry on Trusts*, § 58; *Hill on Trustees* \*51; *Rankin v. Barcroft*, 114 Ill. 441.

7. *Kip v. Bank of N. Y.*, 10 Johns. (N. Y.) 63; *Blin v. Pierce*, 20 Vt. 25; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Butler v. Merchant's Ins. Co.*, 14 Ala. 798; *Scott v. Surman*, Willes 402; *Carpenter v. Marnell*, 3 B. & P. 40. See also *Shryock v. Waggoner*, 28 Pa. St. 430.

8. *Shryock v. Waggoner*, 28 Pa. St. 431; *Ludwig v. Highley*, 5 Pa. St. 132;



10. **Aliens and Non-Residents.**—Aliens and non-residents can take and hold property conveyed to them in trust to the same extent that they can take and hold the legal title thereto, that is, in the case of real estate, until office found.<sup>1</sup> They cannot plead their alienage to defeat a trust charged upon real estate which comes into their hands.<sup>2</sup> But it is a serious objection to the appointment of a non-resident trustee, that he is not within the jurisdiction of the court.<sup>3</sup> A statute prohibiting the appointment of non-residents, and making it unlawful for a non-resident to act as trustee, would seem to invade the rights guaranteed by the Constitution of the *United States*.<sup>4</sup>

11. **Other Persons.**—A nun or a monk may be a trustee;<sup>5</sup> so may an habitual drunkard, but he is subject to removal by the court.<sup>6</sup> A guardian may be a trustee, and it is the duty of an administrator or executor into whose hands the trust property comes, to settle the accounts of the decedent relating to the trust, although he is not bound to execute it.<sup>7</sup> A *cestui que trust* or a near relative ought not to be appointed trustee, but there is no rule of law positively forbidding such appointment.<sup>8</sup> The same

Lounsbury v. Purdy, 11 Barb. (N. Y.) 490; Harris v. Harris, 29 Beav. 107; Gardner v. Rowe, 2 Sim. & S. 346; Copeman v. Gallant, 1 P. Wms. 314.

1. See ALIEN, vol. 1, pp. 458, 459, 463.

As to personal property, their rights are the same as those of citizens. Hughes v. Edwards, 9 Wheat. (U. S.) 489.

2. Dunlop v. Hepburn, 1 Wheat. (U. S.) 179; Scott v. Thorpe, 1 Edw. Ch. (N. Y.) 512; Waugh v. Riley, 8 Met. (Mass.) 290.

3. Meinhertzhaeger v. Davis, 1 Coll. 335; *In re Tempest*, L. R., 1 Ch. 485; Mesnard v. Welford, 1 Sm. & G. 426; Gibson's Case, 1 Bland (Md.) 138; 17 Am. Dec. 257.

In *Maryland*, the court of chancery may appoint as agent or trustee to make a sale under its decree, a female, or other competent person, on the recommendation of the parties in interest, but a non-resident or person under disability, or one whose interest or office is incompatible with the trust, will not be appointed. Gibson's Case, 1 Bland (Md.) 138.

4. Such a statute is *Indiana* Rev. Stat. 1881, § 2988. This statute has been held to apply to express trusts only, and not to those created by operation of law. Rinker v. Bissell, 90 Ind. 375; Meikel v. Greene, 94 Ind. 344. But the validity of this statute was questioned by the supreme court of *Indiana* in Bryant v. Richardson, 126 Ind. 153;

and it was expressly held unconstitutional in Robey v. Smith, 131 Ind. 342, as well as by the federal court in Shirk v. Lafayette, 52 Fed. Rep. 857. See also Farmers' L. & T. Co. v. Chicago, etc., R. Co., 27 Fed. Rep. 146.

5. Smith v. Young, 5 Gill (Md.) 197. 6. Webb v. Deitrich, 7 W. & S. (Pa.) 401.

7. Silvers v. Canary, 114 Ind. 129; Lucas v. Donaldson, 117 Ind. 140; Schenck v. Schenck, 16 N. J. Eq. 174; Nichols v. Campbell, 10 Gratt. (Va.) 561.

But the duties of an executor pertain to the office, and those of a trustee pertain to the person. If a discretionary power of sale is given to an executor, he will be deemed a trustee, and the power cannot be executed by a mere administrator with the will annexed. Greenland v. Waddell, 116 N. Y. 234; 15 Am. St. Rep. 400; Mott v. Ackerman, 92 N. Y. 553; Hood v. Haden, 82 Va. 588; Joralemon v. Van Reper, 44 N. J. Eq. 299; *Compare* Davis v. Hoover, 112 Ind. 423; Warnecke v. Lemba, 71 Ill. 91; 22 Am. Rep. 85.

8. Wilding v. Bolder, 21 Beav. 22; Forster v. Abraham, L. R., 17 Eq. 351; *Ex p.* Clutton, 17 Jur. 988; 1 Perry on Trusts, § 59; Story v. Palmer, 46 N. J. Eq. 1. *Compare* Craig v. Hone, 2 Edw. (N. Y.) 554.

The trust is not rendered void by the appointment of a beneficiary as trustee. Rogers v. Rogers, 18 Hun (N. Y.)

may be said of a remainderman,<sup>1</sup> a tenant for life,<sup>2</sup> and the solicitor of the trust.<sup>3</sup>

**VI. WHO MAY BE CESTUI QUE TRUST**—1. General Rule.—“Equity follows the law,” and, as a general rule, any person capable of taking and holding the legal title to property, may take the equitable title thereto as *cestui que trust* or beneficiary.<sup>4</sup>

2. The United States and the Several States.—A state or the *United States* may be a *cestui que trust*,<sup>5</sup> and so may the sovereign in *England*.<sup>6</sup>

3. Corporations and Associations.—Corporations and associations which are not incorporated may be beneficiaries of trusts in personal property,<sup>7</sup> but, in the case of real estate, their rights depend upon their charters or the statutes by which they are governed, and if they cannot take or hold the legal title to real estate, they cannot become beneficiaries.<sup>8</sup>

4. Married Women and Children.—Married women<sup>9</sup> and children<sup>10</sup> may be the beneficiaries of a trust. Even an illegitimate child *en ventre sa mere* may be a *cestui que trust*.<sup>11</sup> A trust to legitimate

409; *Cocks v. Barlow*, 5 Redf. (N. Y.) 406; *Story v. Palmer*, 46 N. J. Eq. 1.

1. *Re Paine*, 33 W. R. 564.

2. *Forster v. Abraham*, L. R., 17 Eq. 351.

3. *In re Norris*, 27 Ch. Div. 333. But see *Sternberg v. Valentine*, 6 Mo. App. 176.

4. *Tiffany & Bullard on Trusts and Trustees* 3; *Tiedeman on Real Prop.*, § 445; 1 *Lewin on Trusts* \*43; *Ashurst v. Given*, 5 W. & S. (Pa.) 330; *Frazier v. Frazier*, 2 Hill Eq. (S. Car.) 305.

In the days of slavery, a slave, being prohibited from holding property, could not be a *cestui que trust*. *Skrine v. Walker*, 3 Rich. Eq. (S. Car.) 262; *Pool v. Harrison*, 18 Ala. 514. A donee must have capacity to take, whether it is attempted to convey title to him directly, or to another in trust for him. *Trotter v. Blocker*, 6 Port. (Ala.) 269.

5. *Neilson v. Lagow*, 12 How. (U. S.) 107. See also *Lamar v. Simpson*, 1 Rich. Eq. (S. Car.) 71; 42 Am. Dec. 345; *Com. v. Pennsylvania Bank*, 3 W. & S. (Pa.) 184.

6. *Hill on Trustees* 52; *Rogers v. Rogers*, 18 Hun (N. Y.) 409; *Moke v. Norrie*, 14 Hun (N. Y.) 128; *Middleton v. Spicer*, 1 Bro. C. C. 201; *Ashton v. Langdale*, 4 Eng. L. & Eq. 80; *Mitford v. Reynolds*, 1 Phill. 185; *Brummel v. McPherson*, 5 Russ. 264.

7. *Langston v. Gordon*, 26 Gratt. (Va.) 755; *Second Congregational Soc. v. Waring*, 24 Pick. (Mass.) 304;

*Swedesborough Church v. Shivers*, 16 N. J. Eq. 453.

8. *Lewin on Trusts* 44; *Hill on Trustees* 52. See also *Coleman v. R. Co.*, 49 Cal. 518. See *CORPORATIONS*, vol. 4, pp. 217, 230-235.

A deed or trust of land for the benefit of a voluntary association, having no legal existence, was held void under the *Minnesota* statute requiring a trust to be “fully expressed and clearly defined on the face of the instrument creating” it. *German Land Assoc. v. Scholler*, 10 Minn. 331.

9. *MARRIED WOMEN*, vol. 14, p. 592; *MARRIAGE SETTLEMENTS*, vol. 14, p. 538; *Peacock v. Monk*, 2 Ves. 190; *Taylor v. Meads*, 34 L. J. Ch. 203. The old learning in regard to trusts for married women has now become obsolete in most of the states, by reason of the modern legislation enabling them to take and dispose of the legal title the same as if unmarried. See 1 *Beach Mod. Eq. Jur.*, ch. VII.

10. *Bethea v. McColl*, 5 Ala. 308, and the authorities cited in the following note.

11. *Gardner v. Heyer*, 2 Paige (N. Y.) 11; *Collins v. Hoxie*, 9 Paige (N. Y.) 81; *Owens v. Bryant*, 21 L. J. Ch. 860; *Gable v. Prendergast*, 3 Eq. 648; *Pratt v. Flamer*, 5 Har. & J. (Md.) 10. But it is held that a trust to illegitimate children to be thereafter begotten, is against good morals and will not be enforced. *Medworth v. Pope*, 27 Beav. 21; *Pratt v. Mathew*, 22 Beav. 328; *Wilkinson v. Wilkinson*, 1 Y. & Coll.

children not yet *in esse* is valid,<sup>1</sup> and a trust for the heirs of a person has been held good as a trust for his children.<sup>2</sup>

**VII. WHAT PROPERTY MAY BE THE SUBJECT OF A TRUST**—1. **Generally.**—As a general rule, all property, real or personal, legal or equitable, in possession or action, in remainder, reversion or expectancy, may be the subject of a trust, unless the policy of the law or some statutory provision prohibits the settlor from parting with the beneficial interest therein, or, in the case of real estate, unless the tenure under which it is held is inconsistent with the trust sought to be created.<sup>3</sup>

2. **Choses in Action.**—Choses in action may generally be assigned in equity,<sup>4</sup> and where such is the case they may be the subjects

C. C. 657; *Howarth v. Mills*, L. R., 2 Eq. 389.

1. *Ashurst v. Given*, 5 W. & S. (Pa.) 329; *Frazier v. Frazier*, 2 Hill Eq. (S. Car.) 305; *Carson v. Carson*, 1 Winst. Eq. (N. Car.) 24. See also *Salem Water-Ditch Co. v. Stayton Capital Flour Mills Co.*, 33 Fed. Rep. 146.

Where property is left in trust for the children of a certain person, the trustee cannot, until it is shown that there can be no more children entitled to take, be required to pass the legal estate to the children that have been born. *Dial v. Dial*, 21 Tex. 529.

2. *Flint v. Steadman*, 36 Vt. 210.

Where land held in trust for the benefit of a wife and children was sold at a judicial sale, and purchased under an agreement made by the vendee with the husband that the latter should be permitted to redeem, the trust was held to inure to the benefit of the wife and children, although the vendee was ignorant of the trust. *Haywood v. Ensley*, 8 Humph. (Tenn.) 460.

3. *Underhill on Trusts and Trustees* 63; 1 *Lewin on Trusts* \*47. See *ASSIGNMENTS*, vol. 1, pp. 827, 830.

**Equitable interest** may be the subject of a trust. *Gilbert v. Overton*, 2 Hem. & M. 110; *Knight v. Bowyer*, 23 Beav. 609; *Luco v. De Toro*, 91 Cal. 405.

**Reversionary interests** may be conveyed in trust. *Shafto v. Adams*, 4 Giff. 492; *Kekewich v. Manning*, 1 De G. M. & G. 187; *Vogle v. Hughes*, 2 Sm. & G. 18.

**Expectancies and contingent interests** may be the subjects of a trust. *Wethered v. Wethered*, 2 Sim. 183; *Douglas v. Russell*, 4 Sim. 524; *Langton v. Horton*, 1 Hare 549; *Beckley v. Newland*, 2 P. Wms. 182; *Fitzgerald v. Vestal*, 4 Sneed (Tenn.) 258; *Ham v. Van Orden*, 84 N. Y. 257; *Hinkle v. Wanzer*, 17 How. (U. S.) 368.

**Other Property.**—A receipt for medicine may be transferred in trust. *Green v. Folgham*, 1 Sim. & S. 398. So may the copyright of a book, *Sims v. Marryat*, 17 Q. B. 281; 79 E. C. L. 280; a patent right, *Russell's Patent*, 2 De G. & J. 130; a trade secret, *Morrison v. Moat*, 6 Eng. L. & Eq. 14; 9 Hare 241; growing crops, *Robinson v. Maulden*, 11 Ala. 977; *Grantham v. Hawley*, Hob. 132; *Petch v. Tutin*, 15 M. & W. 110; or a colt not yet born, *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; 26 Am. Dec. 262; future earnings and property not even *in esse* may be assigned, *Field v. New York*, 6 N. Y. 179; 57 Am. Dec. 435; *Mitchell v. Winslow*, 2 Story (U. S.) 630; *Pennock v. Coe*, 23 How. (U. S.) 117; *Wade v. Bessey*, 76 Me. 413; *Rio Grande Extension Co. v. Coby*, 7 Colo. 299; *Stewart v. Kirkland*, 19 Ala. 162; *Leslie v. Guthrie*, 1 Bing. N. Cas. 697; 27 E. C. L. 550; *Brooks v. Hatch*, 6 Leigh (Va.) 534; *Calkins v. Lockwood*, 17 Conn. 154; *In re Ship Warre*, 8 Price 269; *Holroyd v. Marshal*, 2 Giff. 382; 2 De G. F. & J. 596; *Langton v. Horton*, 1 Hare 549. And a valid trust may be created even in a naked power. *Brown v. Higgs*, 8 Ves. 570. A trust may be created in rents and profits, but where the title to the realty is conveyed and the object is security, the mere direction to appropriate the rents and profits will not relieve the realty. *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326.

The fiduciary relation between the trustee and the beneficiary is not altered by the mere change of the trust property from real estate to personalty. *Frather v. Weissiger*, 10 Bush (Ky.) 117.

4. See *ASSIGNMENTS*, vol. 1, p. 827; *CHOSSES IN ACTION*, vol. 3, p. 236.

of a valid trust.<sup>1</sup> But there are some choses in action, rights and causes of action or claims, that cannot be assigned because the statute or public policy forbids, and they cannot, therefore, be made the subject of a valid trust.<sup>2</sup>

**3. Foreign Property.**—Personal property follows the person, and, no matter where it may be in reality, if the court has jurisdiction of the parties, it can enforce the trust.<sup>3</sup> But, in the case of real estate, there is more difficulty, especially where neither the parties nor the property can be reached by the court.<sup>4</sup> It seems, however, that if the court has jurisdiction of the parties, the trust may be enforced, notwithstanding it may affect real estate not within the jurisdiction of the court.<sup>5</sup>

**VIII. CREATION OF TRUSTS—1. In General.**—Trusts may be created by the express declaration of the settlor, or they may arise by implication or operation of law. As the subject of implied trusts is fully treated elsewhere in this work,<sup>6</sup> we shall here consider only the manner in which express trusts may be created.

1. *Row v. Dawson*, 1 Ves. 322; *Ryall v. Rolle*, 1 Ves. 348; *Townsend v. Windham*, 2 Ves. 6; *Yeates v. Groves*, 1 Ves. Jr. 280; *Burn v. Carvalho*, 4 Myl., & C. 690; *Ex p. Alderson*, 1 Madd. 53; *Ex p. South*, 3 Swanst. 393; *Clemson v. Davidson*, 5 Binn. (Pa.) 392; *Morton v. Naylor*, 1 Hill (N.Y.) 583; *Hinkle v. Wanzer*, 17 How. (U. S.) 353.

A contract for the delivery of stock in a corporation may be assigned. *Morrison v. Ross*, 113 Ind. 186.

2. *Grenfell v. Dean*, 2 Beav. 554; *Davis v. Marlborough*, 1 Swanst. 74; *Tunstall v. Boothby*, 10 Sim. 540; *Stone v. Lidderdale*, 2 Anstr. 533; *Priddy v. Rose*, 3 Mer. 102; *Flarty v. Odium*, 3 T. R. 681; *Lidderdale v. Montrose*, 4 T. R. 248; *Arbuthnot v. Norton*, 5 Moore P. C. C. 219; *Cooper v. Reilly*, 2 Sim. 560; *Hill v. Paul*, 8 Cl. & F. 295; *Collyer v. Fallon*, 1 T. & Rus. 459; *McCarthy v. Gould*, 1 B. & B. 387; *Price v. Lovett*, 4 Eng. L. & Eq. 110. But compare *State Bank v. Hastings*, 15 Wis. 75. In most of the cases just cited, it is held that a pension or an official salary cannot be assigned. It is also held that a mere right to file a bill in equity or sue in tort, cannot be assigned in trust. *Prosser v. Edmonds*, 1 Y. & Coll. 481; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Dunklin v. Wilkins*, 5 Ala. 199.

3. *Hill v. Reardon*, 2 Russ. 608; *Chase v. Chase*, 2 Allen (Mass.) 101; *Mason v. Chambers*, 4 J. J. Marsh. (Ky.) 401. But compare *Jenkins v. Lester*, 131 Mass. 357; *Booth v. Clark*, 17 How. (U. S.) 327.

4. See *Spurr v. Scoville*, 3 Cush. (Mass.) 578; *Menx v. Maltby*, 2 Swanst. 277; *Fell v. Brown*, 2 Bro. C. C. 276.

5. *Massie v. Watts*, 6 Cranch (U. S.) 160. See also *Toller v. Carteret*, 2 Vern. 494; *Roberteau v. Rous*, 1 Atk. 543; *Scott v. Nesbitt*, 14 Ves. 438; *Penn v. Lord Baltimore*, 1 Ves. 444; *Cood v. Cood*, 33 Beav. 314; *Tullock v. Hartley*, 1 Y. & Coll. 114; *Norris v. Chambers*, 29 Beav. 246; *Martin v. Martin*, 2 R. & M. 507; *Cranstown v. Johnston*, 5 Ves. 278; *Bunbury v. Bunbury*, 1 Beav. 318; *Hope v. Carnegie*, L. R., 1 Ch. 320; *Arglasse v. Muschamp*, 1 Vern. 419; *Archer v. Preston*, 1 Vern. 77; *Cooley v. Scarlett*, 38 Ill. 316; *Curtis v. Smith*, 60 Barb. (N. Y.) 9; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Shattuck v. Cassidy*, 3 Edw. Ch. (N. Y.) 152; *White v. White*, 7 Gill & J. (Md.) 208; *Guild v. Guild*, 16 Ala. 121; *Vaughn v. Barclay*, 6 Whart. (Pa.) 392; *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Dickinson v. Hoomes*, 8 Gratt. (Va.) 353; *EQUITY*, vol. 6, pp. 712, 713, and the authorities cited in the note.

6. *IMPLIED TRUSTS*, vol. 10, p. 1. The writer of the article referred to, follows Pomeroy, whose classification is preferable to that of Perry and Lewin. As the definitions which we have given of express and implied trusts show, we have also followed Mr. Pomeroy, and some trusts are, therefore, included in this article, which are treated by Perry and Lewin as implied trusts. We have adopted this classifica-

"Where a person has used language from which it can be gathered that he intended to create a trust, and such intention is not negatived by the surrounding circumstances, and the settlor has done such things as are necessary in equity to bind himself not to recede from that intention, and the trust property is of such a nature as to be legally capable of being settled, and the object of the trust is lawful, and the settlor has complied with the provisions of the law as to evidence, a good and valid declaration of trust has (*prima facie*) been made. But a trust *prima facie* valid, may yet be impeachable from incapacity of the settlor, or of the *cestui que trust*, or from some mistake or fraud attendant upon its creation; or, again, it may be valid as between the parties, and yet invalid as against the settlor's creditors, or trustee in bankruptcy, or as against subsequent purchasers."<sup>1</sup> No technical terms or expressions need be used.<sup>2</sup> It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property.<sup>3</sup>

tion, both because we believe it to be the best one, and because it is necessary that this article should include all kinds of trusts, not treated elsewhere in the Encyclopedia.

**Trustee de son Tort.**—A person who, without authority, enters into possession, and assumes to manage property which belongs beneficially to another, is a trustee *de son tort*, and may be held as any other constructive trustee. *Morris v. Joseph*, 1 W. Va. 256; 91 Am. Dec. 386. See also *Coleman v. Cocke*, 6 Rand. (Va.) 618; 18 Am. Dec. 757; *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789, and note.

1. Underhill on Trusts and Trustees, 18.

2. *Dipple v. Corles*, 11 Hare 184; *Cox v. Page*, 10 Hare 163; *Anderson v. Crist*, 113 Ind. 65; *Cockrill v. Armstrong*, 31 Ark. 580; *Cumming v. Reid Memorial Church*, 64 Ga. 106; *Blake v. Dexter*, 12 Cush. (Mass.) 559; *Norman v. Burnett*, 25 Miss. 183; *Quinn v. Shields*, 62 Iowa 129; 1 Am. & Eng. Corp. Cas. 498; 49 Am. Rep. 141; *Dyer's Appeal*, 107 Pa. St. 446; "Imperfect Declaration of Trust," 22 Sol. J. & Rep. 852.

On the other hand, where there is no such intention, the use of the word "trust" or "trustee" will not create a trust. *Hurst v. McNeil*, 1 Wash. (U. S.) 70; *Richardson v. Inglesby*, 13 Rich. Eq. (S. Car.) 59; *Matter of Hawley*, 104 N. Y. 250; *Rowe v. Rand*, 111 Ind. 206; *Allen v. Craft*, 109 Ind. 476;

58 Am. Rep. 525; *Bacon v. Bacon*, 4 Dem. (N. Y.) 5.

3. *Knight v. Knight*, 3 Beav. 148; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *McLaurie v. Partlow*, 53 Ill. 340; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Tobias v. Ketchum*, 32 N. Y. 327; *Wright v. Douglass*, 7 N. Y. 564; *Fisher v. Fields*, 10 Johns. (N. Y.) 475; *Brown v. Combs*, 29 N. J. L. 36; *Ferry v. Laible*, 31 N. J. Eq. 566; *De Laurencel v. De Boom*, 48 Cal. 581; *Hellman v. McWilliams*, 70 Cal. 449; *Raybold v. Raybold*, 20 Pa. St. 308; *Loring v. Loring*, 100 Mass. 340; *Andrews v. Cape Ann Bank*, 3 Allen (Mass.) 313; *Whiting v. Whiting*, 4 Gray (Mass.) 236; *McElroy v. McElroy*, 113 Mass. 509; *Taft v. Taft*, 130 Mass. 461; *Homer v. Homer*, 107 Mass. 82; *Bates v. Hurd*, 65 Me. 180; *Ready v. Kearsley*, 14 Mich. 226; *Lyle v. Burke*, 40 Mich. 499; *Conway v. Kingsworthy*, 21 Ark. 9; *Cockrill v. Armstrong*, 31 Ark. 580; *Russell v. Switzer*, 63 Ga. 711; *Wallace v. Wainwright*, 87 Pa. St. 263; *Gadsden v. Whaley*, 14 S. Car. 210; *Morrison v. Kinstra*, 55 Miss. 71; *Norman v. Burnett*, 25 Miss. 183; *Pownal v. Taylor*, 10 Leigh (Va.) 183; 34 Am. Dec. 725; *Harris v. Barnett*, 3 Gratt. (Va.) 339; *Whitcomb v. Cardell*, 45 Vt. 24; *Barron v. Barron*, 24 Vt. 375; *Kitchen v. Bradford*, 13 Wall. (U. S.) 413; *Smith v. Ford*, 48 Wis. 115; *Ellsworth v. Mace*, 33 Ind. 73; *Gaylord v. Lafayette*, 115 Ind. 423.

But the beneficiaries, objects, and

subject-matter of the trust must be so identified or indicated that the intention of the settlor can be determined and carried out. *Weeks v. Cornwell*, 64 How. Pr. (N. Y. Supreme Ct.) 276; *First Presbyterian Soc. v. Bowen*, 21 Hun (N. Y.) 389; *Matter of Johnson's Will* (Surr. Ct.), 5 N. Y. Supp. 922; *Heermans v. Schmaltz*, 10 Biss. (U. S.) 323; *Kramer v. McCaughey*, 11 Mo. App. 426; *District of Columbia v. Washington Market Co.*, 3 McArthur (D. C.) 559; *Stonestreet v. Doyle*, 75 Va. 356; 40 Am. Rep. 731; *Carskadon v. Torreyson*, 17 W. Va. 43; *Harland v. Trigg*, 1 Bro. C. C. 142; *Flint v. Hughes*, 6 Beav. 342; *Gregory v. Smith*, 9 Hare 708; *Pope v. Pope*, 10 Sim. 1. See also *infra*, this title, *Precatory Trusts*; "Imperfect Declaration of Trust," 22 Sol. J. & Rep. 852.

No greater certainty or formality is requisite in designating the trustee to take charge of the fund, than in the creation of the fund itself; in fact, it is not necessary, in order to sustain a trust in equity, that a trustee should have been designated in the instrument creating the trust fund, or by any simultaneous or subsequent instrument. *Porter v. Rutland Bank*, 19 Vt. 410.

The conveyance of lands in trust to rent and sell, and pay the proceeds to the grantor during his life, and after his death to those named in a supplementary writing, creates a valid trust under the *Wisconsin* statute providing that express trusts may be created "for the benefit and interest of any person or persons, when such trust is fully expressed and clearly defined on the face of the instrument creating it," and it is immaterial that a portion of the beneficiaries are designated by class instead of individually. *Heermans v. Schmaltz*, 10 Biss. (U. S.) 323.

Questions in regard to certainty in the beneficiaries and objects of the trust, arise most often in cases of trusts for charities, but as the subject of charities has been already treated in this *Encyclopedia* (vol. 3, p. 122), it is sufficient to here call attention to the recent case of *Tilden v. Green*, 130 N. Y. 29, where the matter is elaborately considered, and to an article on "The Failure of the Tilden Trust," in 5 Harv. Law Rev. 389, where the authorities are reviewed and the conclusion is reached that the Tilden trust would have been held good in *England* and in a majority of the states.

**Cases in Which Declarations of Trust Were Held Sufficient — Generally.** — A member of a firm transferred to A., a firm creditor, as collateral security for a debt, two acceptances secured by a deed of trust, under an agreement by A. that if he should purchase the property on foreclosure of the trust deed, he would, on payment of his debt, re-convey the property, and it was held that a trust was created in favor of such partner for the two acceptances which extended to the property in case of its purchase by A. *Peeler v. Lathrop*, 48 Fed. Rep. 780. See also *Smith v. Eckford* (Texas, 1891), 18 S. W. Rep. 210.

A mother made a conveyance of land, absolute on its face, to her daughter; the deed was without consideration and the mother continued to receive the rents and profits; the daughter, while claiming the conveyance to be absolute, admitted that it was made to her for her mother's protection, and in reply to a request of the latter that the property be reconveyed, wrote that she had made a will leaving the land to her mother and that she "could not touch a dollar contrary to her mother's wishes; that she had always considered the transfer of the land sacred, and that she would have the deed drawn up, and that her mother should have the land," and it was held that a trust was sufficiently established. *Newkirk v. Place*, 47 N. J. Eq. 477.

A, being the owner of a third interest in a gold mine, purchased the other two-thirds with money supplied by a firm of which B was a member, and conveyed the entire mine by warranty deed to B, as trustee, who executed a declaration of trust, reciting that he held the mine in trust to receive the rents and profits and, after the payment of the operating expenses of the mine and the costs of keeping it in repair, to apply the balance to the payment of the money advanced by his firm for the purchase of the two-thirds interest, with interest thereon, and then to reconvey to A; and it was held that B was merely a trustee and that the mine was liable for the advances, upon the profits proving insufficient to satisfy the claim. *Gisborn v. Charter Oak, etc., Ins. Co.*, 142 U. S. 326. See also *Brotherton v. Wethersby*, 73 Tex. 471; *Compo v. Jackson Iron Co.*, 49 Mich. 39.

A gave an acknowledgment to B that he had received certain property belonging to the latter which had been invested by him in other property, and

it was held that this was, by implication, a declaration of trust, and that B was entitled to a preference in payment of A's estate. *M en u d e v. Delaire*, 2 Desaus. Eq. (S. Car.) 564.

Where the payee of notes at the time of their execution declares her intention of holding them for the benefit of the maker's children, a trust is created and the title passes regardless of want of consideration or failure to deliver possession. *Williamson v. Yager*, 91 Ky. 282. See also *Egerton v. Carr*, 94 N. Car. 648; 55 Am. Rep. 630.

S. and P. agreed that S. should furnish a sum of money not exceeding \$5,000, which P. should invest in land, devoting his time and judgment to the selection thereof; that the purchases should be made within the current year, all contracts and conveyances to be made in the name of S., and that the lands purchased should be sold within five years, one-half the profits to be paid to P. in full for his services and expenses. It was held that S. took the legal title in trust to sell within the time limited, and, after deducting the outlay, interest and taxes, to pay P. one-half the remainder of the proceeds, and that to that extent he was the trustee, and P. the beneficiary; it was held, also, that the trust did not end at the expiration of five years unless P. should subsequently relinquish his claim. *Seymour v. Freer*, 8 Wall. (U. S.) 202. See also *Paige v. Sommers*, 70 Cal. 101; *Franks v. Williams*, 27 Tex. 24.

Where the owner and mortgagor of land conveyed it to the mortgagee upon the latter's promising to pay over the surplus after three years, it was held to create a trust enforceable in equity, the mortgagee having sold before the expiration of the three years, and the land having increased in value. *Freer v. Lake*, 115 Ill. 662.

Pending a suit to enforce a vendor's lien, the purchaser secured a stay of the sale with leave to sell at private sale, agreeing to apply the proceeds to the satisfaction of the claims of the vendor and other incumbrancers, and it was held that the fund became a trust fund in the hands of anyone to whom it came with notice. *Boyce v. Stanton*, 15 Lea (Tenn.) 546.

A's husband had the management of her property and invested a portion of it in certificates of stock, which had originally been made out in his name, as trustee for his wife, and her name afterwards erased, leaving one of the certifi-

cates in the name of the husband individually and the other in his name as trustee, the rules of the companies being such that the certificates could not be conveniently issued in trust; the dividends had been deposited to A's credit; after the death of her husband, the certificates were found in his safe in an envelope with other certificates belonging to her, on the outside of which was indorsed her name, in her husband's hand-writing, and a statement signed by him setting forth the contents of the envelope, including such certificates, and directing his executor to transfer them to A. It was held that the certificates were held in trust for A by her husband. *Guion v. Williams*, 7 N. Y. Supp. 786.

The holder of a tontine insurance policy made payable to himself and his estate, or his assigns, executed a writing which he attached to the policy, reciting that the policy was for his children's benefit, and that in case of his death before its maturity, the proceeds should be divided equally among them. Afterwards, in the presence of the children, he declared that the policy was for them. These acts were held to create a valid trust in favor of the children. *Phipard v. Phipard*, 55 Hun (N. Y.) 433.

In *Warburton v. Camp*, 55 N. Y. Super. Ct. 290, it was held that an agreement in parol, made in connection with a written assignment of a claim, to the effect that a certain sum out of the proceeds of the claim should be paid to a certain person, creates a trust for the benefit of such person in the assignment of the claim. See also *Roche v. George* (Ky. 1893), 20 S. W. Rep. 1039.

A bequest of personal property to A "for the support of" B, creates a trust. *Buffinton v. Maxam*, 140 Mass. 557. See also *Moore v. Stinson*, 144 Mass. 594. See *infra*, this title, *Provisions in Wills and Precatory Trusts*.

**Deeds and Written Contracts.**—A conveyance made in contemplation of marriage, by which the grantor conveys property to a third person "upon trust and confidence," and "for the sole use, profit and benefit of" the intended wife during her lifetime, with the remainder over to her child or children surviving, creates an express trust. *McCarthy v. McCarthy*, 74 Ala. 546.

Certain heirs owned a piece of real estate as tenants in common, and two of the tenants in common conveyed their interest in said real estate to the

other tenant in common by a deed absolute on its face, naming a money consideration, but contemporaneously with the transaction, and as a part of it, the grantee signed and delivered to the grantors a written agreement which required of her certain duties in respect to the payment of the ancestor's debts, the making of repairs, the ultimate disposition of the property, and the distribution of the proceeds after reimbursing herself. It was held that this constituted a perfectly executed and explicit declaration of trust which a court of equity must recognize and enforce. *Kintner v. Jones*, 122 Ind. 148.

Where a wife unites with her husband in the conveyance of her land on condition that the proceeds be applied to the payment of a debt binding her children's land, it has been held that a trust is thereby created which is enforceable in equity against the husband, even though all bonds for the proceeds are made payable to him. *Barnes v. Trafton*, 80 Va. 524.

A father who was afraid of complications which might arise from certain differences with his wife, transferred to his son a quantity of personal property, taking from the son an agreement to surrender it upon demand. This was held to create a trust enforceable in equity. *Tyler v. Tyler*, 25 Ill. App. 333.

So, it has been held in *Texas* that a deed of mortgaged lands executed by the mortgagors, husband and wife, to the mortgagee, upon an old promise by the latter to the wife to sell the land and, after discharging the debt, pay over the surplus or reconvey any portion unsold, creates a valid and enforceable trust. *Clark v. Haney*, 62 Tex. 511; 50 Am. Rep. 536. But as will be hereafter shown, in most of the states, the Statute of Frauds would prevent the admission of parol evidence to show that a deed, absolute on its face, was executed upon a parol trust. See also, as to the *Texas* rule, *Brotherton v. Wethersby*, 73 Tex. 471.

A son, having made a parol division of his property, which was personal, among his brothers and sisters, except a small part which was to go to his mother, then a widow, died intestate and without issue. The mother, though entitled to the whole, signed articles of agreement with the children, by which the balance of the estate, remaining after taking out her part, was to be invested, and the interest to be used for the benefit of an invalid son,

the principal, at his death, to go to the brothers and sisters of the intestate. She also waived administration, and agreed that letters should be granted to a son-in-law, which was done. After the account was filed, the administrator took the net estate as appropriated by the mother, invested it, and paid her the interest for several years for the use of her son, as agreed upon, when an auditor was appointed, at the instance of the mother, to distribute the fund, before whom she claimed the whole balance as mother and heir-at-law. It was held that the instrument executed by her must be regarded as an assignment and declaration of trust, with a trustee competent to carry all its trusts into complete effect without the aid of a court of equity. *Cresman's Appeal*, 42 Pa. St. 147; 82 Am. Dec. 498.

Where different persons have claims upon, and are interested in, a tract of land, and one undertakes to enter the same, the others agreeing to repay him a suitable *pro rata* sum to cover expenses and his trouble, a trust is created and the undertaking will be enforced. *Bryant v. Hendricks*, 5 Iowa 256.

Where a purchaser at a judicial sale, by giving notice of an agreement with the owner to reconvey the property on payment of a certain sum, prevented competition at the sale, he was adjudged to hold the land in trust for the owner. *Miller v. Antle*, 2 Bush (Ky.) 407; 97 Am. Dec. 495. But compare *Gilbert v. Carter*, 10 Ind. 16; 68 Am. Dec. 655.

No form of words is necessary to give effect to a deed conveying personal property in trust for the use of another, and the words, "for the full and sure conveyance of said slave-negroes above named, to be for them and their use, I do hereby deliver the said negroes, and all the property herein mentioned, into the possession of my wife A, and my sons, B and C," have been held good conveyances of the legal estate to the grantor, and to give the trustees a right to recover against a stranger disturbing the possession. *Youmans v. Buckner*, *Riley* (S. Car.) 204.

A deed to lands giving the grantee power to sell and pay certain debts of the grantor, but reserving no right of redemption, is not a mortgage, but a deed of trust. *Cooper v. Whitney*, 3 Hill (N. Y.) 95.

Where A and B satisfied certain



judgments outstanding against the owner of mortgaged property, which the owner subsequently conveyed to B to sell, subject to the mortgage, and apply the proceeds, after the repayment of the sum advanced by B, to reimburse A, such conveyance, together with a judgment confessed by A, as part of the same transaction, conditioned to secure B from any wrongs arising from liens on the same property, was held to create the relation of trustee and beneficiary between A and B. *Diefendorf v. Spraker*, 10 N. Y. 246.

A stipulation in a deed, absolute on its face, that a part of the property conveyed should be sold and the proceeds accounted for by the grantee, is demonstrative evidence that there was a trust reposed in the grantee, and that the conveyance was only a security for the payment of a debt due the grantee. *Simpson v. Mitchell*, 8 Yerg. (Tenn.) 417.

A deed to an administrator, reciting that the grantor had sold or agreed to sell to, and receive the consideration from, the intestate, appears upon its face to be in trust for the heirs. *Blythe v. Easterling*, 20 Tex. 565.

Where a deed conveys land in trust, it is not necessary to its validity that the *cestui que trust* should execute or express an assent to it; until the contrary appears, his assent will be presumed. *Wiswall v. Ross*, 4 Port. (Ala.) 321.

In a recent case in *California* it was held by a divided bench that where the owner of an equitable interest in an undivided tract of unpatented land, employed an attorney to procure a patent thereto for the person through whom such owner derived his interest, and agreed to give the attorney a certain portion of the land if he succeeded, the contract created an express trust, and, when completed, rendered the owner a trustee of the attorney to the extent of such interest. *Luco v. De Toro*, 91 Cal. 405.

A trust may be created by indorsement on a deed absolute on its face made before delivery, the indorsement stating that the grantor's daughter "doth hold a lifetime possession in said deed." *Blackburn v. Blackburn*, 109 N. Car. 488.

Where a devisee entered into an agreement with the executor by which he released his interest in the estate and directed the executor to pay, or have expended or invested yearly, for the devisee's children, the amount held

for him under the will, it was held to create a trust for the children which, in the absence of a reservation of the power of revocation, could not be revoked. *Beekman v. Hendrickson* (N. Y.), 21 Atl. Rep. 567.

By a deed of conveyance which was placed on record, a father, in consideration of love and affection, transferred to his infant daughter certain described promissory notes due him from other persons, to have and to hold for her use and benefit, reserving in himself "the right to manage the above amounts as agent for my said infant daughter, with the privilege to collect the money on said notes." It was held that there was a delivery of the notes, and that the deed created an executed trust which could not be revoked. *Walker v. Crews*, 73 Ala. 412.

By a contract in writing, the defendant acknowledged the receipt from the plaintiff of five thousand dollars, which he agreed to return in case a certain resolution therein set forth was not passed by the common council of the city of New York, which resolution authorized the street commissioner to enter into a contract for lighting the streets, etc. It did not appear that the defendant was a member of the common council or a city official, and no evidence was given upon the part of the plaintiff outside of the instrument itself. It was held that this contract, by its terms, created a valid trust, and was not upon its face within the condemnation of the law as against public policy. *Milbank v. Jones*, 127 N. Y. 370.

In *Adams v. Adams*, 21 Wall. (U. S.) 185, the defendant signed, sealed and put on record a deed to a trustee in trust for his wife, and afterwards kept the deed in his possession, and openly and repeatedly declared to his wife and her brothers and sisters, that it was a complete provision for her, and that it perfectly protected her. The court held that there was a sufficient delivery of the deed and that a trust would be deemed created.

Where the purchaser of lands directs the seller, when drawing up the conveyance, to insert trusts for the benefit of another, intending it as a gift, which is done, he is bound by them. *Reilly v. Whipple*, 2 S. Car. 277.

So, where the name of the trustee is omitted, but the beneficiary is authorized by the grantor to insert the name of a suitable person as trustee, the deed may be reformed and the name of a

proper person inserted. *Burnside v. Wayman*, 49 Mo. 356. And where the trustee accepts a trust by signing the deed before it is acknowledged by the grantor, this will supply the omission of the trustee's name in the body of the deed. *Boyce v. Sikes*, 97 Mo. 362.

**Signature of Trust.**—A trust deed, purporting to be signed by the trustee, is not vitiated by his failure to sign, where the signature forms no element of the consideration for the signature of the other parties, and it is expressly provided in the deed that it shall be binding regardless of the trustee. *Smith v. Davis*, 90 Cal. 25. See also as to the execution of deed, *Ewing v. Buckner*, 76 Iowa 467.

**Separate Instruments.**—Where land is conveyed by a deed absolute in form, but intended simply as a conveyance in trust, the grantee may make a valid declaration of the trust in a separate instrument, *McLaurie v. Partlow*, 53 Ill. 340; and while it is usual for the declaration of trust to be made in the same instrument which vests the legal estate in the trustee, it is not necessary that such should be the case, for it may be made in another instrument contemporaneous therewith. *Inchiquire v. French*, 1 Cox 1; *Wood v. Cox*, 2 M. H. & C. 684; *Blake v. Collins*, 69 Me. 156. See also *Stubbs v. Sargon*, 2 Keen 255; *Smith v. Altersoll*, 1 Russ. 266; *Van Cott v. Prentice*, 35 Hun (N. Y.) 322; *Hanning v. Mueller*, 82 Wis. 235.

But it has been held that the grantee is not affected by a declaration of trust as to the property conveyed, made by the grantor in a separate paper, without his knowledge and not referred to in the deed. *Rogers v. Rogers*, 53 Wis. 36; 40 Am. Rep. 756.

Other cases in which trusts were held to have been created are: *Sprague v. Thurber*, 17 R. I. 451; *Laclede, etc., Mfg. Co. v. Williams*, 14 Colo. 37; *Mull v. Bowles*, 129 Ind. 343; *Alexander v. Scotland Mortgage Co.*, 47 Fed. Rep. 131; *King v. Remington*, 36 Minn. 15; *Butler v. Hyland*, 87 Cal. 575; *Tyler v. Mayre*, 95 Cal. 160; *Van Cott v. Prentice*, 104 N. Y. 45; *Chadwick v. Chadwick*, 59 Mich. 87; *Frost v. Frost*, 63 Me. 399; *Cresman's Appeal*, 42 Pa. St. 147; 82 Am. Dec. 498; *Walden v. Karr*, 88 Ill. 49; *Rielly v. Whipple*, 2 S. Car. 277; *Smith v. Smith*, 1 McCord Eq. (S. Car.) 134; *Lake v. Freer*, 11 Ill. App. 576; *Adams v. Adams*, 64 N. H. 224; *Brison v. Brison*, 90 Cal. 323; *Beach v. Cum-*

*mins* (Ky. 1892), 18 S. W. Rep. 360; *Woodruff v. Jabine* (Ark. 1891), 15 S. W. Rep. 830; *Drosten v. Mueller*, 103 Mo. 624; *Hance v. Frome*, 39 N. J. Eq. 324; *Culbertson v. Witbeck Co.*, 127 U. S. 326; *Fagan v. Thompson*, 38 Fed. Rep. 467; *Stephens v. Stephens*, 89 Ky. 185; *Beadle v. Beadle*, 40 Fed. Rep. 315; *Pinson v. McGehee*, 44 Miss. 229; *Lyle v. Burke*, 40 Mich. 499; *Shields v. McAuley*, 37 Fed. Rep. 302; *McClellan v. McClellan*, 65 Me. 500.

**Declarations of Trust Held Insufficient.—Conveyances, Mortgages.**—Where a grantor conveyed to his son-in-law, in consideration of "the natural love and affection" which he entertained for his daughter and her husband, "and for the purpose of advancing the latter in life," it was held that no trust was created in favor of the daughter, there being nothing to indicate an intention to separate the legal estate from the beneficial interest. *Thompson v. Thompson*, 18 Ohio St. 73; *Mosely v. Mosely*, 87 N. Car. 69.

The plaintiff's decedent, in order to avoid his creditors, conveyed land to his brother, the defendant, who, at the time, signed and acknowledged a deed of the land to the decedent, which was not delivered, and the nature of which was not shown; the defendant testified that he afterwards paid for the land, and the deed was destroyed by consent, and it was held not to constitute a written declaration of trust. *Haas-hagen v. Haas-hagen*, 80 Cal. 514.

A conveyed his property to his nephew, taking a mortgage on the realty payable at his death to his executors, and an agreement for the support of himself and sister. Subsequently, wishing to provide for his grand-nephews, he took a bond and mortgage from his nephew, providing for the payment of interest to himself for life, and the principal, at his death, to his grand-nephews. No consideration passed between him and his grand-nephews for the bond and mortgage which he retained. The mortgage was afterwards satisfied; and it was held that the mortgage was in the nature of a will, and that A had power to change it in his lifetime, and that no trust was created in favor of the grand-nephews. *Kelsey v. Cooley*, 11 N. Y. Supp. 745.

A stipulation that the grantee of land was not to alien without the consent of his wife, and that if not sold it shall descend to the heirs of their bodies, does not create a trust for the use

of the wife. *Huff v. Thomas*, 1 T. B. Mon. (Ky.) 158.

**Agreements and Promises.**—Where land is held by A on a resulting trust for B, an agreement by the former to hold it in trust for the latter's wife, does not create a trust enforceable by her, B having failed to join in the execution of the agreement. *Fussell v. Hennessey*, 14 R. I. 550.

A trust for the benefit of creditors is not created by a promise by a creditor, to whom an insolvent debtor conveys property, to pay the debt of another creditor. *Saunderson v. Broadwell*, 82 Cal. 132.

An agreement between the holders of mortgage bonds that certain parties therein appointed trustees, may purchase the mortgaged property at the sale under the mortgage, and sell, lease, occupy and manage the same, being at all times accountable for the proper performance of their trust, does not create a trust authorized by the statutes of *New York*, but the title to the property, upon its purchase by such persons, vests in the beneficiaries as tenants in common. *Cassagne v. Ostrander*, 3 N. Y. Supp. 844.

Where the plaintiff conveyed real estate to T., in consideration of T.'s agreement to furnish support to the plaintiff during life, and afterwards, by agreement between the plaintiff and T. and the defendant, T. conveyed the land to the defendant, who assumed the obligation to support the plaintiff, it was held that no trust was created as between the plaintiff and T., or the plaintiff and the defendant, by these transactions. *Riddle v. Beattie*, 77 Iowa 168.

In *Nickerson v. Nickerson*, 127 U. S. 668, a wife brought a suit to establish a trust in real estate which had been purchased with the proceeds of land which it was charged her husband had promised before their marriage should be settled on her. The husband obtained a fraudulent divorce from the plaintiff and married the defendant, and thereupon conveyed the land in controversy to the defendant. The evidence consisted of mere verbal and indefinite promises, and the court denied her prayer. See also *Emerson v. Galloupe*, 158 Mass. 146.

**Letters.**—It was held in *Campbell v. Campbell*, 70 Wis. 311, that the use of an ambiguous expression in a letter, which was not inconsistent with the writer's claim of absolute ownership in

real estate, was not to be regarded as a declaration of trust.

A wrote two personal letters to B, wherein he admitted the existence of a trust, but did not name the beneficiaries, nor state the proportions which they were to take, nor define the exact nature of the trust. This was held insufficient to create a trust under the *Pennsylvania* Act of April 22d, 1856, requiring that all trusts "be manifested by writing"; and it was further held that parol evidence could not be introduced in aid of it. *Dyer's Appeal*, 107 Pa. St. 446.

So, where a stepson brought suit to recover, after his stepfather's death, the whole of the decedent's estate on the ground of an alleged trust, it was held that the trust relied on was not established by letters and parol declarations of the stepfather, which indicated a settled intention that the stepson should succeed to the estate, but only by virtue of the supposed rule of inheritance. *Russell v. Switzer*, 63 Ga. 711.

And where one wrote to his father and sisters that his life had been insured for their benefit, but made no transfer or delivery of the policy to them, it was held that this constituted merely an executory agreement to create a trust in the future, and that it could not be enforced in equity. *Webb's Estate*, 49 Cal. 542.

So, where a mother, two years after the purchase by her of her son's interest in land sold under execution, wrote to the son promising to satisfy certain judgments against him and fix the land so that he should have it, and expressing her intention of charging him with all the advances made him and deducting it from his portion of the estate, it was held insufficient to prove an express trust in the land for his benefit. *Wolf's Appeal*, 123 Pa. St. 438. See also *Lane v. Lane*, 80 Me. 570, in which a letter from a wife to her husband, saying that she had intended he should have certain land back which he had conveyed to her through another, but that she had changed her mind, was held insufficient to prove an express trust.

**Wills.**—Where a testator in his will directed his executors to divide the residuary estate among his children, share and share alike, each to have the use and benefit of one of such equal shares for life, the principal afterwards to go to the children's children, it was held not to create a trust, and that a direction to the trustees to sell the realty, and deposit or invest the proceeds "un-

The declaration of trust may be contained in letters or other writings,<sup>1</sup> even, it has been held, where they are not contempo-

til a final settlement," had reference only to a final settlement of the accounts as executors. *Williams v. Freeman*, 98 N. Y. 577. See also *Rock River, etc., Co. v. Fisk*, 47 Mich. 212.

Where a mother devises land in compliance with an oral agreement under which it was conveyed to her, but without any declaration of trust, and afterwards, by the execution of a second will, revokes the first, there is no such declaration as will create a trust. *Champlin v. Champlin*, 136 Ill. 309.

Where property is devised to executors in trust for such persons and objects as the testatrix may in writing direct, she expressing an intention to execute a codicil, and two days after the will was executed, the testatrix signed a paper not attested as required in the case of a will, it was held not to be good as a declaration of trust in favor of the persons named in it, to whom the executors were directed to turn over the property held by them. *Chase v. Stockett*, 72 Md. 235.

A testator devised his estate to two executors "upon the uses and trusts following, viz.: At the time of my death, should my daughters, or either of them, be unmarried, I give and bequeath, to such of them as may be unmarried, the sum of \$5,000." The will contained other bequests, and also the clause, "I give to my said trustees, executor, and executrix, full power and authority to sell any or all of my real estate at public or private sale, and invest the proceeds thereof, or to let or sell the same, as they may deem best," and it was held that, under 2 *New York Rev. Stat.*, p. 2438, § 56, providing that a devise of land to executors or trustees to be sold, where the trustees are not also empowered to receive rents and profits, shall vest no estate in the trustees, the provisions of the will did not create a valid express trust. *Steinhardt v. Cunningham*, 130 N. Y. 292. See also *infra*, this title, *Precautionary Trusts*.

**Miscellaneous Cases.**—A written acknowledgment that money received was to be invested for the benefit of the daughter of the person who paid the money, and the interest to be paid to her for the support of herself and children when the payor should decide that she needed it, was held not to constitute

a sufficient declaration of trust to prevent him from collecting and using the money himself. *Matter of Crise's Estate (Surr. Ct.)*, 7 N. Y. Supp. 202. And it has also been held that a trust is not created by a written acknowledgment by one person that another is entitled to certain land, where no consideration is shown. *Thompson v. Branch, Meigs (Tenn.)* 390; 33 Am. Dec. 153. See also *Hasshagen v. Hasshagen*, 80 Cal. 514.

In a recent case, land was conveyed for an expressed consideration of ten thousand dollars, and represented by the grantee's note, payable on demand with interest; at the same time the grantee leased the land of the grantor for ten years at an annual rental equal to the amount of the interest, the rental to be set off against the interest. They also entered into a written contract, setting out these facts, and provided that on the death of either of the contracting parties, while the contract continued to be in force, "all the papers this day executed and delivered, shall be canceled, surrendered and held for nought, and that the administrator or executor of the deceased party shall make a delivery to the party surviving of such deeds or other instruments in writing, as may be effectual for the purpose of restoring the parties and their personal representatives to the same condition, and with the same rights and obligations that existed before the execution of the said deed, note, or lease." The parties both outlived the term of the lease, and no showing was made as to what became of the note. It was held that the writing did not declare a trust. *Salisbury v. Clark*, 61 Vt. 453. See generally *Wight v. Sampter*, 127 Ill. 167; *Harris v. Bratton*, 34 S. Car. 259; *Modrell v. Riddle*, 82 Mo. 31; *Hawks v. Sailors*, 87 Ga. 234; *Gibson v. Decius*, 82 Ill. 304; *Jacoby v. Crowe*, 36 Minn. 93; *Harvey v. Pennypacker*, 4 Del. Ch. 445.

1. *Gaylord v. Lafayette*, 115 Ind. 423; *Kintner v. Jones*, 122 Ind. 148; *Packard v. Putnam*, 57 N. H. 43; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693; *Hollinshead v. Allen*, 17 Pa. St. 275; *Raybold v. Raybold*, 20 Pa.

aneous with the conveyance of the property.<sup>1</sup> So it may be made in an answer in equity,<sup>2</sup> in an affidavit,<sup>3</sup> in a bond,<sup>4</sup> in a recital in a deed,<sup>5</sup> in a receipt,<sup>6</sup> or even in a pamphlet.<sup>7</sup> It may also be made by the owner of property, stating that he holds it in trust for certain persons, in a declaration of trust.<sup>8</sup> And it is not

St. 308; *Newkirk v. Place*, 47 N. J. Eq. 477; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Lake v. Freer*, 11 Ill. App. 576; *Forster v. Hale*, 3 Ves. 606; *Montague v. Hayes*, 10 Gray (Mass.) 609; *Phelps v. Seely*, 22 Gratt. (Va.) 573; *Loring v. Palmer*, 118 U. S. 321; *Bentley v. Mackay*, 15 Beav. 12. But compare *Russell v. Switzer*, 63 Ga. 711; *De Laurencel v. De Boom*, 48 Cal. 581; *Moore v. Pickett*, 62 Ill. 158.

Thus, where a grantee of land who had paid a valuable consideration therefor, wrote letters to different persons stating that he held the land "for A," that he had "bought it for A," "that he was going to turn it over to A," and that he bought it "for the purpose of securing half the property for A," it was held to be a sufficient declaration of trust. *McCandless v. Warner*, 26 W. Va. 754.

An uncle agreed with his nephew that if he would refrain from drinking liquor, using tobacco, etc., until he should become twenty-one years of age, he would pay him five thousand dollars. The nephew performed his part of the agreement, coming of age in 1875. Soon afterward, he wrote to his uncle, advising him that he had fulfilled his part of the agreement and stating that the sum specified was due him, and asked for payment. The uncle replied, admitting the agreement, and the nephew's performance of his obligations under it, and stating that he had the money in the bank set apart, which he proposed to hold for the nephew until the latter was able to take care of it. It was thereupon agreed between them that the money should remain in the uncle's hands on interest. Suit was brought upon the agreement, and the court held that the consideration was sufficient, that the agreement was enforceable, and that the relation of the parties was that of trustee and *cestui que trust*, and not of debtor and creditor. *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693.

1. *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Newkirk v. Place*, 47 N. J. Eq. 477; *McArthur v. Gordon*, 126 N. Y.

597; *De Laurencel v. De Boom*, 48 Cal. 581. But see *Addlington v. Cann*, 3 Atk. 151; *Crabb v. Crabb*, 1 Myl. & K. 511; *Walgrave v. Tebbs*, 2 Jur. N. S. 85; *Lomax v. Ripley*, 24 L. J. Ch. 256; *Johnson v. Ball*, 5 De G. & S. 85; *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; *Hill on Trustees* \*64.

2. *Cottington v. Fletcher*, 2 Atk. 155; *Hampton v. Spencer*, 2 Vern. 288; *Wilson v. Dent*, 3 Sim. 385; *Pratt v. Ayer*, 3 Chand. (Wis.) 265; *McLaurie v. Partlow*, 53 Ill. 340.

3. *Pinney v. Fellows*, 15 Vt. 525; *Barkworth v. Young*, 4 Drew 1.

4. *Moorecroft v. Dowding*, 2 P. Wms. 314; *Gomez v. Tradesmen's Bank*, 4 Sandf. (N. Y.) 102; *Hannig v. Mueller*, 82 Wis. 235.

5. *Wright v. Douglass*, 7 N. Y. 564; *Blythe v. Easterling*, 20 Tex. 565; *Simpson v. Mitchell*, 8 Yerg. (Tenn.) 417.

6. *Robert's Appeal*, 92 Pa. St. 407; *Kitchen v. Bradford*, 13 Wall. (U. S.) 413. See also *Morris v. Webb*, 45 N. Y. Super. Ct. 305; *Milbank v. Jones*, 127 N. Y. 370.

A purchased certain land for cash, and B agreed to buy one-fourth of the land, also for cash; A gave B a receipt in full, which was duly witnessed and set forth that one-fourth of the purchase-money had been furnished by B, but instead of cash, A took from B a due bill payable at once, and it was held that the receipt was a sufficient declaration of trust. *Robert's Appeal*, 92 Pa. St. 407.

So where A signed the following writing, "received of B \$800 in gold, valued at \$1,000 in currency, in trust for C, a minor, my brother B's only living child, to be kept and used for his benefit to the best of my ability until he becomes of age or marries," it was held to evidence a trust created by B and accepted by A as trustee, by which the sum of money specified, with its gains under the management of the trustee, was vested absolutely in the beneficiary. *Boykin v. Pace*, 64 Ala. 68.

7. *Barrell v. Joy*, 16 Mass. 221.

8. *Doe v. Harris*, 16 M. & W. 517; *Union Mut. L. Ins. Co. v. Campbell*, 95

necessary that the beneficiary should expressly assent to a deed of trust, in an ordinary case, as his assent will be presumed, in the absence of proof of repudiation;<sup>1</sup> but the consent of the beneficiary will not be presumed where the deed imposes burdensome conditions upon him.<sup>2</sup> A trust created without the knowledge of the beneficiary may afterwards be affirmed and enforced by him,<sup>3</sup> but he cannot accept it in part and reject it in part.<sup>4</sup>

**2. Powers Given to Trustees.**—Powers given to the trustee may be of such a nature that a trust will be inferred, although not declared in express terms.<sup>5</sup>

Ill. 267; 35 Am. Rep. 166; Bates v. Hurd, 65 Me. 180; Urann v. Coates, 109 Mass. 581; Tanner v. Skinner, 11 Bush (Ky.) 120; Snyder v. McComb, 39 Fed. Rep. 292.

Thus, where by a written instrument executed in form to be recorded, the grantee of land declares that he holds it "in trust for the Indians whose names are hereunto attached, they having paid towards the purchase of such lands the sums set opposite their names respectively," to which is attached a list of names and amounts paid, it is a sufficient declaration of trust in favor of such persons. Obermiller v. Wylie, 36 Fed. Rep. 641.

So, where the grantee of a farm, after the death of the grantor, executed and recorded an instrument reciting "that because of certain real estate conveyed to me by the grantor, I do hereby consider myself holden and firmly bound to appropriate for the comfortable support of L., a son of the grantor, of sound mind, "during his life, all the rents, after deducting necessary expenses," of certain real estate, etc., it was held that the instrument constituted a declaration of trust, it being immaterial that the declaration was not contemporaneous with the deed. McArthur v. Gordon, 129 N. Y. 597.

1. Cloud v. Calhoun, 10 Rich. Eq. (S. Car.) 358; Saunders v. Harris, 1 Head (Tenn.) 185; Furman v. Fisher, 4 Coldw. (Tenn.) 626; 94 Am. Dec. 210; Penny v. Davis, 3 B. Mon. (Ky.) 313; Eyrick v. Hetrick, 13 Pa. St. 493; Wise v. Wise, 2 Jones & L. 412.

2. Kemp v. Porter, 7 Ala. 138.

3. Pleasants v. Glasscock, 1 Smed. & M. Ch. (Miss.) 17; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119; 7 Am. Dec. 478; Shepherd v. McEvers, 4 Johns. Ch. (N. Y.) 136; 8 Am. Dec. 561; Berly v. Taylor, 5 Hill (N. Y.) 577; Field v. Arrowsmith, 3 Humph. (Tenn.) 442; 39 Am. Dec. 185.

4. Swanson v. Tarkington, 7 Heisk. (Tenn.) 612; Williams v. Gideon, 7 Heisk. (Tenn.) 617; Judice v. Provost, 18 La. Ann. 601.

5. Tobias v. Ketchum, 32 N. Y. 319; Ward v. Ward, 105 N. Y. 68; Garvey v. McDevitt, 72 N. Y. 556; Brewster v. Striker, 2 N. Y. 19; Leggett v. Perkins, 2 N. Y. 297; Wagstaff v. Lowerre, 23 Barb. (N. Y.) 209; Barker v. Greenwood, 4 M. & W. 421; White v. Parker, 1 Bing. N. Cas. 573; 27 E. C. L. 493; Birmingham v. Kinvan, 2 Sch. & Lef. 444; Wright v. Pearson, 1 Eden 125; Mott v. Buxton, 7 Ves. 201; Reynell v. Reynell, 10 Beav. 21; Collier v. McBean, 34 Beav. 426; Sylvester v. Wilson, 2 T. R. 444; Ferry v. Laible, 31 N. J. Eq. 566; Randolph v. Randolph, 40 N. J. Eq. 73; Carson v. Carson, 6 Allen (Mass.) 397; Blake v. Dexter, 12 Cush. (Mass.) 559. Compare Huff v. Earl, 3 Ind. 306.

In the leading case of Tobias v. Ketchum, 32 N. Y. 319, a testator gave to his widow, the furniture and one-third of the income of his land during her life, and to his children, the rest of his property to be equally divided among them within six months after the widow's death. He appointed executors with full power and authority to carry out all the provisions of the will, to sell real estate if necessary to make a fair division, to divide the proceeds, and to rent, lease, repair, and insure the real estate, etc. The court said: "The first question then is, are the executors under this will made trustees of an express trust? The word trust or trustee is not used in the will, but that is only a circumstance to be noted in considering the question. It is by no means necessary that the donee should be expressly directed to hold the property to certain uses, or in trust, or as a trustee. . . . It is one of the fixed rules of equitable construction that there is no magic in particular

**3. Provisions for Maintenance.**—Provisions for maintenance of children or family in a will or deed, wherein property is given to the parent, may be sufficient to create a trust, without any declaration thereof in express terms. But, as a learned text-writer says: "No definite rule can be laid down; each case must stand upon its own circumstances. If the language is sufficient for the intention to be clearly inferred, the trust will be enforced; otherwise the donee will take an absolute estate, and the provisions concerning maintenance will be regarded as mere motives for the gift and recommendations addressed to his discretion."<sup>1</sup>

words; and any expressions that show unequivocally the intention of the parties to create a trust will have that effect." The court held, in conclusion, that "the authority to lease, rent, repair, insure, pay taxes, assessments, and interest, and pay net income to devisees, carried the legal title to the executors in this case, and created a trust in them valid under the statute." See also *Smith v. Scholtz*, 68 N. Y. 41; *Knox v. Jones*, 47 N. Y. 396; *Vernon v. Vernon*, 53 N. Y. 359; *Van Nostrand v. Moore*, 52 N. Y. 18; *Toronto General Trust Co. v. Chicago, etc., R. Co.*, 123 N. Y. 44; *Morse v. Morse*, 85 N. Y. 53. This branch of the subject is treated more in detail in the article on POWERS, vol. 18, p. 877.

1. 2 Pom. Eq. Jur., § 1012, citing *Woods v. Woods*, 1 Myl. & C. 401; *Raikes v. Ward*, 1 Hare 445; *Carr v. Living*, 28 Beav. 644; *Bird v. Maybury*, 33 Beav. 351; *Byne v. Blackburn*, 26 Beav. 41; *Longmore v. Elcum*, 2 Y. & C. Ch. 369; *Berry v. Bryant*, 2 Dr. & Sm. 1; *Whiting v. Whiting*, 4 Gray (Mass.) 240; *Andrews v. Bank of Cape Ann*, 3 Allen (Mass.) 313; *Smith v. Wildman*, 39 Conn. 387; *Paisley's Appeal*, 70 Pa. St. 158; *Whelan v. Reilly*, 3 W. Va. 597; *Bryan v. Howland*, 98 Ill. 625.

There is considerable conflict among the authorities. In *England*, generally, and in some of the states, it is held that when a bequest is so made that the legatee is to use the income both for himself and for the maintenance of his children, a trust is created in their favor. See English cases above cited, and *Staniland v. Staniland*, 34 Beav. 536; *Blakeney v. Blakeney*, 6 Sim. 52; *Armstrong v. Armstrong*, L. R., 7 Eq. 518; *Anderson v. Crist*, 113 Ind. 65; *Beshore v. Lytle*, 114 Ind. 8; *Robertson v. Robertson*, 120 Ind. 333; *Smith v. Bowen*, 35 N. Y. 83; *Lyon v. Lyon*, 65 N. Y. 339; *Goodrich's Estate*, 38 Wis. 492;

*Young v. Young*, 68 N. Car. 309; *Major v. Herndon*, 78 Ky. 123. But in other cases, bequests to parents to enable them to support their children, or with power to dispose of the property and devote the proceeds to the maintenance of their children, have been held insufficient to create a trust in favor of the latter. *Brown v. Casamajor*, 4 Ves. 498; *Benson v. Whittam*, 5 Sim. 22; *Jones v. Greatwood*, 16 Beav. 527; *Taft v. Taft*, 130 Mass. 461; *Biddle's Appeal*, 80 Pa. St. 258; *Bryan v. Howland*, 98 Ill. 625; *Billar v. Loundes*, 2 Dem. (N. Y.) 590.

Where property was given to a man with authority "to dispose thereof for the benefit" of himself and his children, it was held that a trust was created. *Raikes v. Ward*, 1 Hare 445; *Whiting v. Whiting*, 4 Gray (Mass.) 240. So, where it was given "for his own use and benefit, and the maintenance and education of his children," or "for the maintenance of himself and family," or the like. *Carr v. Living*, 28 Beav. 644; *Bird v. Maybury*, 33 Beav. 351; *Longmore v. Elcum*, 2 Y. & C. Ch. 369; *Andrews v. Bank of Cape Ann*, 3 Allen (Mass.) 313; *In re Robertson's Trust*, 6 W. R. 405; *Smith v. Wildman*, 37 Conn. 387; *Whelan v. Reilly*, 3 W. Va. 597; *Rittgers v. Rittgers*, 56 Iowa 218. To the same effect are *Crockett v. Crockett*, 1 Hare 451; *Bibby v. Thompson*, 32 Beav. 646; *Woods v. Woods*, 1 Myl. & C. 401; *Gilbert v. Bennett*, 10 Sim. 371; *Jubber v. Jubber*, 9 Sim. 503; *Leach v. Leach*, 13 Sim. 304; *Lucas v. Lockhart*, 10 S. & M. 468; *Jackson v. Jackson*, 2 Pa. St. 212; *Pierce v. McKeehan*, 3 W. & S. (Pa.) 280; *Hawley v. James*, 5 Paige (N. Y.) 318; *Wright v. Miller*, 8 N. Y. 10; 59 Am. Dec. 438; *Loring v. Loring*, 100 Mass. 340; *Cole v. Littlefield*, 35 Me. 439; *Babbitt v. Babbitt*, 26 N. J. Eq. 44; *Johnson v. Billups*, 23 W. Va. 685. In *Byne*

Where a trust for the maintenance of children is created, they have an interest in the fund which cannot be reached by creditor's bill or trustee process against the parent or other person charged with such maintenance;<sup>1</sup> and the person so charged with the trust is regarded in the same light as a guardian.<sup>2</sup>

Such a trust generally terminates, where no contrary intention is shown, when the children, by marriage or otherwise, cease to be members of the trustee's family and become members of another family.<sup>3</sup> It may also cease when the children become of age; but this is not always the case, as it depends upon the intention of the testator.<sup>4</sup>

*v. Blackburn*, 26 Beav. 41, it was held that, where the property was given to a stranger, as trustee, instead of the parent, no trust was created in favor of the children; but the contrary was held in *Gilbert v. Bennett*, 10 Sim. 371; *Longmore v. Elcum*, 2 Y. & C. Ch. 363; *Carr v. Living*, 28 Beav. 644; *Donovan v. Van De Mark*, 78 N.Y. 244.

On the other hand, the words used in the following cases were held to simply state the motive of the gift, and not to create a trust: "To enable" the parent "to maintain his children," or "that he may support himself and children." *Benson v. Whittam*, 5 Sim. 22; *Brown v. Casamajor*, 4 Ves. 498; *Thorp v. Owen*, 2 Hare 607; *Burt v. Herron*, 66 Pa. St. 400; *Burke v. Valentine*, 52 Barb. (N. Y.) 412; *Rhett v. Mason*, 18 Gratt. (Va.) 541. So, where a testator gave his wife personal property "absolutely, having full confidence that she would leave the surplus to be divided justly among his children." *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718; *Paisley's Appeal*, 70 Pa. St. 158; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213; *Fox v. Fox*, 27 Beav. 301. And where the trustees are given full discretion to determine the amount of money and the manner in which it shall be applied, the beneficiaries cannot, ordinarily, insist upon a greater amount than the trustees think proper. *In re Sanderson's Trust*, 3 Kay & J. 497; *Beever v. Partridge*, 11 Sim. 229; *Cowper v. Mantell*, 22 Beav. 231; *Reedland v. Crozier*, 2 De G. & J. 143; *McCormick v. Grogan*, L. R., 4 H. L. Cas. 82.

Where a will expressly made the executor trustee for one of the testator's children, and gave him power to sell and invest the property bequeathed to the other children, and pay interest annually to them during their respec-

tive lives, but did not call him a trustee, he was held, nevertheless, to be trustee for all the children. *Sheet's Estate*, 52 Pa. St. 257.

So, where a testator devised to his son, "during his natural life, the use and benefit of" certain negroes, "said negroes not to be removed from the estate or disposed of by him or any other person whatsoever, but to remain exclusively for the annual support of my said son and family," a trust was held to be thereby created in favor of the son's wife and children, and that the negroes could not be levied upon under an execution at law against the son. *Wylie v. White*, 10 Rich. (S. Car.) 294. And the supreme court of *Vermont* reached the same conclusion in a like case, where the testator bequeathed a sum of money to his son "for the support of himself and family and for no other purpose," and the executor paid the money to the son's attorney. *White v. White*, 30 Vt. 338.

1. *Clute v. Bool*, 8 Paige (N. Y.) 83; *Bramhall v. Ferris*, 14 N. Y. 44; 67 Am. Dec. 113; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Wells v. McCall*, 64 Pa. St. 207; *White v. White*, 30 Vt. 342; *Doswell v. Anderson*, 1 Patt. & H. (Va.) 185.

2. *Jodrell v. Jodrell*, 14 Beav. 411. See also *Woods v. Woods*, 1 Myl. & C. 409; *Webb v. Wools*, 2 Sim. N. S. 272; *Cooper v. Thornton*, 3 Bro. C. C. 186; *Raikes v. Ward*, 1 Hare 449; *Robinson v. Tickell*, 8 Ves. 449; *Leach v. Leach*, 13 Sim. 304; *Carr v. Living*, 28 Beav. 644; *Hadow v. Hadow*, 9 Sim. 438; *Smith v. Smith*, 11 Allen (Mass.) 423; *Chase v. Chase*, 2 Allen (Mass.) 101; *Bowditch v. Andrew*, 8 Allen (Mass.) 339, as to his rights and duties.

3. *McDowell v. Black*, Riley Eq. (S. Car.) 152; *Baker v. Red*, 4 Dana (Ky.) 158; *Connolly v. Farrell*, 8 Beav. 350.

4. *Carr v. Living*, 33 Beav. 464;



4. **Provisions in Wills.**—Provisions in wills may be such that a trust is necessary in order to carry out and enforce them. In such a case an intention on the part of the testator to create a trust will generally be inferred.<sup>1</sup>

5. **Precatory Trusts.**—Mere precatory words may be sufficient to create a trust, when used by a testator in such connection that an intention to create a trust can be clearly inferred from the entire

Gardner v. Barker, 18 Jur. 508; Bowditch v. Andrew, 8 Allen (Mass.) 339; Sargent v. Bourne, 6 Met. (Mass.) 32.

1. Blatch v. Wilder, 1 Atk. 420; Pitt v. Pelham, 2 Freem. 134; Cook v. Fountain, 3 Swanst. 585; Walker v. Whiting, 23 Pick. (Mass.) 313; Fay v. Taft, 12 Cush. (Mass.) 448; Baker v. Red, 4 Dana (Ky.) 158; Watson v. Mayrant, 1 Rich. Eq. (S. Car.) 449; Withers v. Yeadon, 1 Rich. Eq. (S. Car.) 324; Hoxie v. Hoxie, 7 Paige (N. Y.) 187; Ward v. Ward, 105 N. Y. 68; Robert v. Corning, 89 N. Y. 225. See **WILLS.**

A testatrix made her husband, who was insolvent, her executor, and gave him the use, during his life, of what was left of her estate after paying certain bequests, the remainder on his death to go to others; the principal was to be kept invested, and not encroached upon except in cases of emergency. It was held that a valid trust for the benefit of the husband was created which his creditors could not reach. *Cummings v. Corey*, 58 Mich. 494.

A direction to continue the testator's business may create a trust. *Ferry v. Laible*, 31 N. J. Eq. 566. And, as a general rule, wherever the duties of the executor are active and cannot be performed unless he retains possession of the property, with its management and control, he will be deemed a trustee. *Ward v. Ward*, 105 N. Y. 68; *Earle v. Earle*, 48 N. Y. Super. Ct. 18. But merely calling an executor a trustee, in a will, does not make him such. *Matter of Hawley*, 104 N. Y. 250. See, to same effect, *Rowe v. Rand*, 111 Ind. 206; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425. Where the person called a trustee has no power of control or disposition, there is no trust—the estate vests immediately in the beneficiary. *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425.

A trust is created in an executor by a will providing that he shall convert the real estate into personalty, and hold the real property for the payment of annuities,

etc., until the grandchildren, who are made residuary devisees, become of age. *Forsyth v. Rathbone*, 34 Barb. (N. Y.) 288.

A trust to receive the profits of real estate, within the purview of the *New York* statute regulating trusts to receive the profits of real estate, is created by devise and direction to the executor to operate mills belonging to the testator, propelled by water power also belonging to him. *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290.

But where the testator directs his executors, at the expiration of four years from the time of his death, to invest and hold \$3,000 for the benefit of R., until she reach the age of 21, and to re-invest for her benefit the interest, after providing for her support, the whole to be paid to her when she attained the prescribed age, it was held to create no trust in the hands of the executors, distinct and separate from their duties as executors. *Lansing v. Lansing*, 45 Barb. (N. Y.) 182.

So, in another case, where the testator devised real estate, subject to certain changes, to his three grandchildren who were minors, and expressed it to be his will that they were not to take it until they arrived at the age of 21, and gave directions that his son should manage and control the estate and receive and apply the avails thereof to their support during minority, and invest any surplus that there might be for their benefit; and also directed that his son should be guardian of the grandchildren, and as such have charge of their estate, and provided for his compensation for the management thereof, and that he should not be responsible for any losses unless incurred through gross neglect; it was held that the will should be construed as only conveying a trust power of management to the son, the estate vesting in the meantime in the grandchildren under the express devise to them, and not as creating a devise in trust to the

will. It was said by Lord Langdale, in a leading case,<sup>1</sup> that "As a general rule, it has been laid down that when property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, or entreaty, or wish, shall be held to create a trust: First, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish, be also certain."<sup>2</sup> As will be seen, from the cases cited below,<sup>3</sup> the earlier

son, which would be void by statute. *Post v. Hover*, 33 N. Y. 593.

1. *Knight v. Knight*, 3 Beav. 172. See also *Handley v. Wrightson*, 60 Md. 198; *Cockrill v. Armstrong*, 31 Ark. 580; *Bohon v. Barrett*, 79 Ky. 378.

2. See *Harrison v. Harrison*, 2 Gratt. (Va.) 1; 44 Am. Dec. 365 and note, 372. As to expressions held imperative, see next note below, and cases there cited.

As to certainty of the subject-matter, see *Pope v. Pope*, 10 Sim. 1; *Flint v. Hughes*, 6 Beav. 342; *Macnab v. Whitbread*, 17 Beav. 299; *Buggins v. Yates*, 9 Mod. 122; *Wynne v. Hawkins*, 1 Bro. C. C. 179; *Finden v. Stephens*, 2 Ph. 142; *Lechmere v. Lavie*, 2 M. & K. 197; *Parnall v. Parnall*, 9 Ch. Div. 96; *Mussoorie Bank v. Raynor*, L. R., 7 App. Cas. 321; *Lines v. Darden*, 5 Fla. 51.

As to certainty in the objects or beneficiaries, see *Harland v. Trigg*, 1 Bro. C. C. 142; *Moriarty v. Martin*, 3 Ir. Ch. 31; *Briggs v. Penny*, 3 M. & G. 554; *Reid v. Atkinson*, 5 Ir. Eq. 373; *Gregory v. Smith*, 9 Hare 708; *Shaw v. Lawless*, 5 C. & F. 129; *Sale v. Moore*, 1 Sim. 534; *First Presbyterian Soc. v. Bowen*, 21 Hun (N. Y.) 389; *McIntire Poor School v. Zanesville*, etc., Canal Co., 9 Ohio 203. Compare *Tolson v. Tolson*, 10 Gill & J. (Md.) 159; *Chase v. Chase*, 2 Allen (Mass.) 101; *Loring v. Loring*, 100 Mass. 340; *Carson v. Carson*, 1 Ired. Eq. (N. Car.) 329.

Unless there is a certainty as to the parties who are to take, or what they are to take, no commendatory terms of a will, expressing a "wish," "will," "desire," or the like, are sufficient to create a trust. *Lines v. Darden*, 5 Fla. 51.

Where the objects of the trust, or the property which is to be the subject of the trust, are not certain and definite, or where a clear choice to act or not to act is given, or the prior dispositions import an absolute and uncontrollable ownership, a court of equity will not

raise a trust from expressions importing recommendations, hope, confidence or desire. *Harper v. Phelps*, 21 Conn. 257.

Where a deed of trust provided that, upon the death of A, the trustees should hold one-half the premises granted to and for the use of B, his heirs and assigns forever, and the other one-half to and for the use of C, D and E, their heirs and assigns, subject to certain charges; and in case of the death of any of the persons named before that of the grantor, then such lapsed share to go to the lawful issue then living of such deceased person, or, if there was no such issue, to the right heirs of the grantor, it was held that the trust was void for uncertainty. *Jarvis v. Babcock*, 5 Barb. (N. Y.) 139. See CHARITIES, vol. 3, p. 122.

3. The following expressions have been held sufficient to show an intention to create a trust: "Desire," *Harding v. Glyn*, 1 Atk. 469; *Pushman v. Filliter*, 3 Ves. 7; *Vernon v. Vernon*, Amb. 4; *Cruwys v. Colman*, 9 Ves. 319; *Erickson v. Willard*, 1 N. H. 217; *Bonser v. Kirmear*, 2 Giff. 195; *Major v. Herndon*, 78 Ky. 123; "wish and desire" or "wish and request," *Liddard v. Liddard*, 28 Beav. 266; *Foley v. Parry*, 5 Sim. 138; *Godfrey v. Godfrey*, 11 W. R. 554; *Clowdsley v. Pelham*, 1 Vern. 411; *Cockrill v. Armstrong*, 31 Ark. 580; *Cook v. Ellington*, 6 Jones Eq. (N. Car.) 371; *McRee v. Means*, 34 Ala. 349; *Hooper v. Bradbury*, 133 Mass. 303; "request," *Eddy v. Hartshorne*, 34 N. J. Eq. 419; "entreat," *Prevost v. Clark*, 2 Madd. 458; *Taylor v. George*, 2 Ves. & B. 378; *Meredith v. Heneage*, 1 Sim. 548; "hope," *Harland v. Trigg*, 1 Bro. C. C. 142; *Paul v. Compton*, 8 Ves. 375; "will," or "will and declare," *Gray v. Gray*, 11 Sr. Ch. 218; *Eales v. England*, Pr. Ch. 200; "in the belief," "in confidence,"

English and American cases carried the doctrine very far, and, as said by Vice Chancellor Hart, "The first case that construed words of recommendation into a command, made a will for the testator."<sup>1</sup> The tendency in recent years, both in *England* and the *United States*, has been to restrict the operation of the doctrine of precatory trusts, and the present rule is well stated in the following words:

"In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an expressed trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner."<sup>2</sup>

or the like, *Eade v. Eade*, 5 Madd. 118; *Cary v. Cary*, 2 Sch. & Lef. 189; *Wright v. Atkyns*, 17 Ves. 225; *Griffith v. Evans*, 5 Beav. 241; *Wood v. Cox*, 1 Keen 317; *Macnab v. Whitbread*, 17 Beav. 299; *Shovelton v. Shovelton*, 32 Beav. 143; *Irvine v. Sullivan*, L. R., 8 Eq. 673; *Barnes v. Grant*, 26 L. J. Ch. 92; *Bull v. Bull*, 8 Conn. 47; 20 Am. Dec. 86; *Reid v. Blackstone*, 14 Gratt. (Va.) 363; *Knox v. Knox* 59 Wis. 172; 48 Am. Rep. 487; *Dresser v. Dresser*, 46 Me. 48; "recommend," *Tibbits v. Tibbits*, 19 Ves. 656; *Malim v. Barker*, 3 Ves. 150; *Hart v. Tribe*, 18 Beav. 215; and various other expressions of like import, *Parsons v. Barker*, 18 Ves. 476; *Brown v. Higgs*, 4 Ves. 708; *Macey v. Shurmer*, 1 Atk. 389; *Hunter v. Stembridge*, 12 Ga. 192; *Lucas v. Lockhart*, 10 Smed. & M. (Miss.) 466; 48 Am. Dec. 766; *Warner v. Bates*, 98 Mass. 274; *Negroes Chase v. Plummer*, 17 Md. 165; *Harrison v. Harrison*, 2 Gratt. (Va.) 1; 44 Am. Dec. 365 and note, 373; *Cockrill v. Armstrong*, 31 Ark. 580; *Bohon v. Barrett*, 79 Ky. 378.

1. *Sale v. Moore*, 1 Sim. 540.

2. 2 Pomeroy's Eq. Jur., § 1016; *Stead v. Mellor*, 5 Ch. Div. 225; *Lambe v. Eames*, L. R., 17 Eq. 320; *In re Hutchinson*, 8 Ch. Div. 540.

In *Corby v. Corby*, 85 Mo. 371, it was held that where full discretion is clearly given to the legatee, the use of precatory words in a will, will not create a trust. See also *Wilde v. Smith*, 2 Dem. (N. Y.) 93.

In *Knox v. Knox*, 59 Wis. 172; 48 Am. Rep. 487, the court, by Taylor, J., quoted the rule stated by Jarman, as follows: "Precatory words used in a will—that is, words of recommendation,

entreaty, request, wish or expectation—addressed to the devisee or legatee, may be sufficient to create a trust in favor of the person or persons in whose favor such expressions are used." And further quoted, with approval, the following from Redfield on Wills: "In order to determine whether precatory words in a will create a binding trust, 'the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.'" Later in the opinion, the court quotes from Lord Loughborough: "When a person recommends to another who is independent of him, there is nothing imperative; but if he recommends that to be done by a person whom he has a right to order to do it, the mode is only civility." Adding: "While, on the one hand, we are inclined not to go to the extent of the older cases in *England* and in this country, in establishing trusts upon the strength of precatory words used by a testator in his will, on the other, we are not disposed to repudiate the whole doctrine of such trusts. We are disposed to apply the doctrine only in cases where it is clear that, on the whole, it was the intention of the testator to create such trust by the use of such words, and where the words used show with reasonable certainty that the testator intended to control the legatee or devisee in the use and control of the property devised or bequeathed."

As will be seen, however, from the authorities cited below,<sup>1</sup> each case must be determined according to its own peculiar features and circumstances. It is difficult, therefore, to formulate any general rule upon the subject. The intention of the testator is the main

**1. Cases in Which Trusts Were Held to Have Been Created.**—Where a testator gave all his real and personal estate to his wife, her heirs and assigns forever, "having full confidence in my said wife, and hereby request that at her death she will divide equally between my sons and daughters all the proceeds of my said property, real and personal, hereby bequeathed." *Knox v. Knox*, 59 Wis. 172; 48 Am. Rep. 487. Where a testator bequeathed all his property to his wife, with a desire that she should manage and control it for the benefit of herself and their children. *Major v. Herndon*, 78 Ky. 123. See also *Walker v. Quigg*, 6 Watts (Pa.) 87; 31 Am. Dec. 452.

In a case recently decided by the Supreme Court of the *United States*, a testator gave his wife all of his property, amounting to \$1,000,000, saying, "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." He made his wife executrix, and died the day after making his will. The sister was dependent on the mother for support, and the mother, who was old and in feeble health, had only \$15,000. It was held that the property was charged with a trust for a suitable provision, to be fixed and secured by the court. *Colton v. Colton*, 127 U. S. 300.

So, where a testatrix devised property to her husband absolutely, "in the full faith" that he would properly provide for the children of her deceased brother. *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544. *Contra*, *Matter of Havens* 6 Dem. (N. Y.) 456; *Hopkins v. Glunt*, 111 Pa. St. 287; *In re Adams*, 27 Ch. Div. 394.

So, where the testator provided that he wished his wife to pay certain sums to other persons, if she found it convenient, it was held that she could not arbitrarily refuse to do so. *Phillips v. Phillips*, 112 N. Y. 197; 8 Am. St. Rep. 737. See also *Bliven v. Seymour*, 88 N. Y. 469. *Compare* *Warner v. Bates*, 98 Mass. 277; *Lawrence v. Cooke*, 104 N. Y. 632.

So, where the decedent bequeathed to his brother one thousand dollars, and to the decedent's widow the bulk of the

property, which was worth about seventy thousand dollars, and made the widow executrix, declaring in the will "and having and reposing implicit confidence in the goodness and kindness of my dear wife, I rely upon her to make all needful provision for the future wants of my brother," it was held that the estate was chargeable with a trust in the brother's favor to the extent of one thousand dollars per annum. *Blanchard v. Chapman*, 22 Ill. App. 341. See also *Deibert's Appeal*, 78 Pa. St. 296. But *compare* *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Dec. 572; *Wood v. Seward*, 4 Redf. (N. Y.) 271.

So, where a testator, by one clause in his will, gave the residue of his estate to A and her heirs, and by a succeeding clause left his granddaughter under A's guardianship, enjoining her to make such provisions for the child at such time and in such a manner as, in her judgment, might be expedient and conducive to the welfare of the grandchild, and as her sense of christian duty and justice might dictate, it was held that the estate devised was impressed with a trust in favor of the grandchild. *Lawrence v. Cooke*, 32 Hun (N. Y.) 126.

**Cases in Which Trusts Were Held Not to Have Been Created.**—Where the testator said, in his will, "I desire that the land and other property remaining shall continue in the possession of my beloved wife L. during her life, believing she will make use of it to the best advantage for the benefit of our children, as well as her own comfort." *McCreary v. Burns*, 17 S. Car. 45. Where the will provided: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seised, or possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them, as in her judgment will be best." *Colton v. Colton*, 21 Fed. Rep. 594. Where a testator gave to his widow the whole of his property, "feeling confident that she will act justly to our children when no longer required by her." *Mussoorie Bank v. Raynor, L. R.*, 7 App. Cas. 321 (Privy Council). Where a testator

thing; but how is that to be determined. In the first place, the entire will should be considered in determining the intention, and the precatory words should not only be of such a character as to indicate that the testator intended a trust to be created, but they must also be consistent with the other provisions of the will—that is, they must not be repugnant to positive provisions by which the same property is devised or bequeathed absolutely or without limitation.<sup>1</sup> Secondly, the words should be given their natural

said: "I do give and bequeath all my property to my beloved wife, only requesting her at the close of her life to make such disposition of the same among my children and grandchildren, as shall seem to her good." *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572.

So, where a testator devised property to his brother, "to be held, used, and enjoyed by him, his heirs, administrators, executors, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that, at his death, the same, or so much thereof as he shall not have disposed of by device or sale," should descend to the testator's nieces, it was held that no trust was created, either executory or otherwise. *Howard v. Carusi*, 109 U. S. 725.

So, in a recent case in *England*, where the testator gave all his real and personal estate "unto the absolute use" of his wife, her heirs, executors, administrators, and assigns, "in full confidence" that she "would do what was right" as to the disposal thereof, between his children, either in her lifetime or by will after her decease, it was held that the widow took an absolute interest in the property, free from any trust in favor of the children. *In re Adams*, 27 Ch. Div. 394.

Where a testator, by a clause in his will, which, standing alone, gave to his wife the absolute and unrestrained ownership of the property, and, by a subsequent clause, requested that she should divide it among their daughters, at her death, share and share alike, it was held that no trust was created in favor of the daughters. *Hopkins v. Grunt*, 111 Pa. St. 287. So, where a will provided that the devisee "may leave the same to her children." *McIntyre v. McIntyre*, 123 Pa. St. 329; 10 Am. St. Rep. 529.

A testator made provision for a so-

ciety, but provided that, if it should prove ineffective, the property was to go to certain persons "absolutely and in fee;" his bequest to such persons being "in the confident belief" that they would apply the property in accordance with his "wishes; but it is intended to be unconditional and free from any legal trust or obligation qualifying their absolute title." It was held that no trust was created. *Matter of Havens*, 6 Dem. (N. Y.) 456. See also *Willets v. Willets*, 35 Hun (N. Y.) 401.

In *Rose v. Porter*, 141 Mass. 309, a testator, by his will, gave to his two youngest sons all his estate, real or personal, in fee simple. The will then proceeded as follows: "In making this disposition of my property, I assume that my oldest son will understand and appreciate my reasons for giving whatever property I may have had at my disposal to his younger brothers; and that they, on their part, will not fail to do for him and his family all that, under the circumstances, the truest fraternal regard may require them to do." It was held that the will did not create a trust for the benefit of the testator's oldest son and his family, and that the estate passed to the devisees in fee simple.

After a bequest in trust to A and B, to be by them expended in securing the passage of laws granting women the right to vote, had been decreed void as not being a charity, a daughter of the testator bequeathed the residue of her estate (being about the same amount she had received from her father's estate) to A and B "as their absolute property," and added: "I request said A and B to use such fund thus given, to further what is called the Woman's Rights Cause, but neither of them is under any legal responsibility to anyone or any court to do so." It was held that this was a valid bequest, and that no trust was created. *Bacon v. Ransom*, 139 Mass. 117.

1. See *Knott v. Cottee*, 2 Ph. 192;

and ordinary meaning, unless there is something to show that they were intended to be taken in a different sense.<sup>1</sup> In the third place, discretionary expressions which leave the application of the property devised or bequeathed to the caprice or unlimited discretion of the devisee, will not, ordinarily, be sufficient to create a trust;<sup>2</sup> but the mere fact that the method of its application, or the selection of the object out of a certain class, is left to his discretion, will not of itself be sufficient to defeat a trust clearly intended to be created.<sup>3</sup> And, finally, it may be said that, while uncertainty in the subject or object of the devise is a matter to be considered adversely to the trust, such uncertainty will not necessarily be conclusive proof that no trust was intended to be created, and if there is sufficient to enable the courts to determine and carry out the intention of the testator they will do so.

**6. Consideration.**—The rule that the form of the instrument by which a trust is sought to be created, is immaterial, and that no technical words are necessary, applies with peculiar force where there is a valuable consideration for the trust. In such a case a court of equity will enforce it, even if it is not perfectly created or executed.<sup>4</sup>

*In re Adams*, 27 Ch. Div. 394; *Green v. Marsden*, 1 Drew. 646; *Meredith v. Heneage*, 1 Sim. 543; *Bardswell v. Bardswell*, 9 Sim. 319; *Webb v. Wools*, 2 Sim. N. S. 267; *Second Reformed Presbyterian Church v. Disbrow*, 52 Pa. St. 219; *Brunson v. Hunter*, 2 Hill Eq. (S. Car.) 490; *Whipple v. Adams*, 1 Met. (Mass.) 444; *Barrett v. Marsh*, 126 Mass. 213; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397; *Harper v. Phelps*, 21 Conn. 257; *Negroes Chase v. Plummer*, 17 Md. 165; *Mills v. Newberry*, 112 Ill. 135; 54 Am. Rep. 213.

1. *Ellis v. Ellis*, 15 Ala. 296; 50 Am. Dec. 132.

2. *Brook v. Brook*, 3 Sm. & Gif. 280; *Bull v. Hardy*, 1 Ves. Jr. 270; *Paul v. Compton*, 8 Ves. 380; *Howorth v. Dewell*, 29 Beav. 18; *Meggison v. Moore*, 2 Ves. Jr. 630; *Hill v. Bishop*, 1 Atk. 618; *Lefroy v. Flood*, 4 Ir. Ch. 1; *Randall v. Randall*, 135 Ill. 398; 25 Am. St. Rep. 373; *Elliot v. Elliot*, 117 Ind. 380; *Lines v. Darden*, 5 Fla. 51; *Corby v. Corby*, 85 Mo. 371; *Colton v. Colton*, 21 Fed. Rep. 595; *Lawrence v. Cooke*, 104 N. Y. 638; *Harper v. Phelps*, 21 Conn. 257. See also *Oliffe v. Wells*, 130 Mass. 221; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445.

3. See note to *Hill on Trustees* (4th Am. ed.) 73; *Quinn v. Shields*, 1 Am. & Eng. Corp. Cas. 498; *Walker v. Quigg*, 6 Watts (Pa.) 87; 31 Am. Dec. 452; *Erickson v. Willard*, 1 N. H. 217.

"The Failure of the Tilden Trust," 5 Harv. L. Rev. 589. But see *Tilden v. Green*, 130 N. Y. 29. The authorities for and against this proposition are collected in the note to *Hesketh v. Murphy*, 35 N. J. Eq. 23; and in 21 Am. L. Reg. N. S. 660-666. It is also supported by the following cases: *Wells v. Doane*, 3 Gray (Mass.) 201; *First Universalist Soc. v. Fitch*, 8 Gray (Mass.) 421; *Garvey v. Garvey*, 150 Mass. 185; *Miller v. Teachout*, 24 Ohio St. 525; *American Tract Soc. v. Atwater*, 30 Ohio St. 77; 27 Am. Rep. 422; *De Bruler v. Ferguson*, 54 Ind. 549; *Lorings v. Marsh*, 6 Wall. (U. S.) 337; *Perin v. Carey*, 24 How. (U. S.) 465; *Pickering v. Shotwell*, 10 Pa. St. 23; *Witman v. Lex*, 17 S. & R. (Pa.) 88; 17 Am. Dec. 644.

4. *Baldwin v. Humphrey*, 44 N. Y. 609; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537; *Fellows v. Heermans*, 4 Lans. (N. Y.) 230; *Pownal v. Taylor*, 10 Leigh (Va.) 183; 34 Am. Dec. 725; *Jones v. Obenchain*, 10 Gratt. (Va.) 259; *Benscotter v. Green*, 60 Md. 327; *Haskill v. Freeman*, 1 Winst. Eq. (N. Car.) 34; *Huntley v. Huntley*, 8 Ired. Eq. (N. Car.) 250; *Garner v. Garner*, 1 Busb. Eq. (N. Car.) 1. But compare *Merrill v. Peaslee*, 146 Mass. 460. See also *Reilly v. Whipple*, 2 S. Car. 277; *Burnside v. Wayman*, 49 Mo. 356. There must, how-

Where the trust is merely voluntary, not based on any valuable consideration, it may be enforced if perfectly created;<sup>1</sup> but if the

ever, be sufficient to enable the court to determine the *cestui que trust*. *Dilaye v. Greenough*, 45 N. Y. 438; *Read v. Williams* (Supreme Ct.), 8 N. Y. Supp. 24; *In re Foley's Will* (Surr. Ct.), 10 N. Y. Supp. 12; *Holland v. Alcock*, 108 N. Y. 312; *Owens v. Owens*, 23 N. J. Eq. 60. Compare *Sleeper v. Iselin*, 62 Iowa 585; *Boardman v. Willard*, 73 Iowa 20.

**What is Sufficient Consideration.**—The personal convenience of the settlor is a good consideration for the execution of a deed of trust, both at common law and under *New York Code Civil Proc.*, § 2463; *Townsend v. Allen*, 13 N. Y. Supp. 73; 59 Hun (N. Y.) 622.

By written agreement, plaintiff and his brother each conveyed \$100,000, a portion of the trust fund in which each had an expectant interest, dependent upon the life estate of their mother therein, to the defendant company in trust, to be held on condition that, in case of the death of either brother, his survivor would be equally benefited by the conveyance. Afterwards their mother died, and according to its terms the original trust fund, upon her death, vested absolutely in the brothers. They drew up a ratification of their agreement, and, by the same instrument, expressly conveyed to the defendant company property worth \$100,000 upon the trusts set forth in the agreement. It was held that the agreement, although not expressly worded in terms of mutuality, was mutual as between the brothers, the trust conveyed by one being the consideration for that which the other conveyed. *Livingston v. New York Life Ins., etc., Co.*, 13 N. Y. Supp. 105; 59 Hun (N. Y.) 622. See also *Teasdale v. Braithwaite*, 4 Ch. Div. 87.

A having mortgage and judgment liens on B's land, agreed with the latter that, in case he purchased the property at a judicial sale about to take place, he would proceed to sell it and retain the proceeds until the amount of the judgment and costs, and all prior liens which he was to pay, had been received back by him, after which he would turn over to B the surplus and convey to him the land. It was held that the contract was founded on sufficient consideration, as A had exercised acts of ownership

over the property before the sale, and because his promise was calculated to get B to relax his efforts to have the property sold at a high price, and thus prevent competition. *Carter v. Gibson*, 29 Neb. 324.

In a recent case, where A conveyed land to B, and, as part of the same transaction, the latter executed a writing declaring that he purchased the land for C, it was held that a valid express trust was created, though C gave no consideration, and that a sale by B to a stranger would be set aside as fraudulent. *Titchenell v. Jackson*, 26 W. Va. 460.

Marriage is a valuable consideration, and will support a trust. *Lewis v. Madocks*, 8 Ves. 150; *Hale v. Lamb*, 2 Eden 271; *Simmons v. Edwards*, 16 M. & W. 838; *Wellesley v. Wellesley*, 4 Myl. & C. 561; *Lee v. Lee*, 4 Ch. Div. 175; *Gough v. Crane*, 3 Md. Ch. 119; *Clarke v. Lott*, 11 Ill. 105. See also *MARRIAGE SETTLEMENTS*, vol. 14, p. 544.

A woman who had paid a consideration for land and received a deed, made a parol promise after the delivery of the deed, that she would carry out an agreement between her husband and the grantor, to the effect that she should convey or devise the land subject to a life estate in herself and her husband, to the wife and children of the grantor. This promise was held to be without consideration, and therefore no trust was created in favor of the grantor's wife and children. *Blount v. Washington*, 108 N. Car. 230.

1. *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Tanner v. Skinner*, 11 Bush (Ky.) 120; *Massey v. Huntington*, 118 Ill. 80; *Andrews v. Hobson*, 23 Ala. 219; *Neilson v. Blight*, 1 Johns. Cas. (N. Y.) 205; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 261; 8 Am. Dec. 492; *Minturn v. Seymour*, 4 Johns. Ch. (N. Y.) 498; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Van Cott v. Prentice*, 104 N. Y. 45; *Wright v. Miller*, 8 N. Y. 10; 59 Am. Dec. 438; *Barry v. Lambert*, 98 N. Y. 300; 50 Am. Rep. 677; *Penfield v. Thayer*, 2 E. D. Smith (N. Y.) 305; *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 261; *Cox v. Sprigg*, 6 Md. 274; *Swan v. Frick*, 34 Md. 141; *Howard v. Wind-*

trust is not perfectly created, that is, if there is a mere voluntary agreement or expression of an intention to create a trust, it cannot be enforced under ordinary circumstances.<sup>1</sup>

ham County Sav. Bank, 40 Vt. 597; Gaylord v. Lafayette, 115 Ind. 423; Lane v. Ewing, 31 Mo. 75; 77 Am. Dec. 632; Graham v. Lambert, 5 Humph. (Tenn.) 595; Henson v. Kinard, 3 Strobb. Eq. (S. Car.) 371; Fogg v. Middleton, Riley Eq. (S. Car.) 193; Titchenell v. Jackson, 26 W. Va. 460; Dennison v. Goehring, 7 Pa. St. 175; 47 Am. Dec. 505; Tolar v. Tolar, 1 Dev. Eq. (N. Car.) 460; 18 Am. Dec. 508; *Ex p. Pye*, 18 Ves. 140; Thorpe v. Owens, 5 Beav. 224; Drosier v. Brereton, 15 Beav. 221; Steele v. Waller, 28 Beav. 466; Bridge v. Bridge, 16 Beav. 315; Stapleton v. Stapleton, 14 Sim. 186; Vanderberg v. Palmer, 4 Kay & J. 204; Searle v. Law, 15 Sim. 99; McFadden v. Jenkyns, 1 Hare 471; Paterson v. Murphy, 11 Hare 88; Gee v. Liddell, 35 Beav. 621; Ellison v. Ellison, 6 Ves. 656. *Compare* Borum v. King, 37 Ala. 606; Walker v. Crews, 73 Ala. 417; Lister v. Hodgson, L. R., 4 Eq. 30. If there are several trusts, some lawful and some not, the former will be upheld if they can be separated. Kennedy v. Hoy, 105 N. Y. 134; Culross v. Gibbons, 130 N. Y. 447. Whether a trust is perfectly created or not, is generally a question of fact. Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228; 6 Am. Rep. 222; Jones v. Lock, L. R., 1 Ch. 25; Gaylord v. Lafayette, 115 Ind. 430; Robinson v. Robinson, 45 Ark. 481.

1. Lloyd v. Brooks, 34 Md. 33; Gardner v. Merritt, 32 Md. 78; 3 Am. Rep. 115; Swan v. Frick, 34 Md. 141; Banks v. Mays, 3 A. K. Marsh. (Ky.) 435; Bibb v. Smith, 1 Dana (Ky.) 580; Reed v. Vannorsdale, 2 Leigh (Va.) 560; Pinckard v. Pinckard, 23 Ala. 649; Crompton v. Vasser, 19 Ala. 259; Forward v. Armstead, 12 Ala. 124; Min-turn v. Seymour, 4 Johns. Ch. (N. Y.) 498; Hayes v. Kershow, 1 Sandf. Ch. (N. Y.) 258; Acker v. Phoenix, 4 Paige (N. Y.) 305; Caldwell v. Williams, 1 Bailey Eq. (S. Car.) 175; Dawson v. Dawson, 1 Dev. Eq. (N. Car.) 93; 18 Am. Dec. 573; Laury v. McGee, 3 Head (Tenn.) 269; Dillwyn v. Llewelyn, 4 De G. F. & J. 517; Disher v. Disher, 1 P. Wms. 204; Dillon v. Coffin, 4 Myl. & C. 647; Lister v. Hodgson, L. R., 4 Eq. 30; Jones v. Lock, L. R., 1 Ch. 25; Bayley v. Boul-

cott, 4 Russ. 345; Cotteen v. Missing, 1 Madd. 176; Lanterman v. Abernathy, 47 Ill. 437; Clarke v. Lott, 11 Ill. 105; Read v. Robinson, 6 W. & S. (Pa.) 331. See also "The Formation and Validity of Voluntary Trusts," 18 Am. L. Rev. 379.

This subject is well treated by Mr. Underhill, an English author, and, as his book is not always found in American libraries, we quote his statement of the doctrine at full length: "If the settlor has transferred, or done all in his power to transfer, his entire interest in the trust property, legal or equitable, to a trustee, or has explicitly declared himself a trustee of it, or has, by his acts, afforded evidence that he considered himself to be a trustee of it—as distinguished from evidence that he contemplated the future creation of a trust, or that he erroneously considered that he had made an actual gift—it will be enforced at the suit of any person interested, even if purely voluntary. (*Ellison v. Ellison*, 6 Ves. 662; *Milroy v. Lord*, 4 De G. F. & J. 264; *Richards v. Delbridge*, L. R., 18 Eq. 11; *Ex p. Pye*, 18 Ves. 140; *Dipple v. Corles*, 11 Hare 184; *Antrobus v. Smith*, 12 Ves. 47; *In re Angilbau*, 15 Ch. Div. 228; *In re Anstis*, 31 Ch. Div. 606; *Green v. Paterson*, 32 Ch. Div. 95; *In re Richards*, 36 Ch. Div. 541; *Harding v. Harding*, 34 W. R. 775.) But if the settlor has not done any of the aforesaid acts, and has merely undertaken, or even covenanted, to create a trust, or otherwise manifested an incomplete intention to do so, or to confer a benefit, the trust will only be enforced if valuable consideration was given to induce the settlor to create it, and if some person privy to that consideration seeks to have it enforced. (*Gale v. Gale*, 6 Ch. Div. 144; *Colyear v. Mulgrave*, 2 Keen 81; *Davenport v. Bishopp*, 2 Y. & C. C. C. 451; *Tasker v. Small*, 3 Myl. & C. 69.) In the latter case it will be enforced in favor of all the beneficiaries, and not merely of persons privy to the consideration; and the settlor, or his successors in title (other than purchasers for value without notice), will be regarded as passive trustees, charged with the duty of transferring the trust property to active trustees when ap-



**7. Statute of Frauds.**—By section seven of the Statute of Frauds, which is in force in most of the states,<sup>1</sup> it is provided that all declarations of trust in real estate "shall be manifested and proved by some writing signed by the party who is enabled by law to declare such trust, or by his last will in writing." It is also provided by the statute that all grants or assignments of any trust shall likewise be in writing.<sup>2</sup> This statute is construed as referring merely to the evidence and not to the creation or declaration of the trust itself.<sup>3</sup> And the courts have held that statutes containing analogous, or even stronger, provisions should be construed in the same manner.<sup>4</sup> The effect of this rule is that trusts in

pointed. (*Davenport v. Bishopp*, 2 Y. & C. C. C. 451; *Dodkin v. Brunt*, L. R., 6 Eq. 580; *Lee v. Lee*, 4 Ch. Div. 175; *In re Michell*, 6 Ch. Div. 618; *Robson v. Flight*, 4 De G. J. & S. 608.) Beneficiaries, under a trust created by will, are in the same position as parties to the consideration under a trust based on valuable consideration. Persons privy to valuable consideration comprise: 1. The person by, or at, whose request it is given. (See *per Wilde*, C. J., *Blandy v. Deburgh*, 6 C. B. 634; 60 E. C. L. 663; *Tweddle v. Atkinson*, 1 B. & S. 393; 101 E. C. L. 392.) 2. The children of a marriage, where that marriage is itself the consideration. (*Osgood v. Strode*, 2 P. Wms. 245; *Gale v. Gale*, 6 Ch. Div. 144.) 3. The children of a widow who, on a second marriage, makes or procures a trust in their favor. (*Gale v. Gale*, 6 Ch. Div. 144; *Price v. Jenkins*, 5 Ch. Div. 619; *Newstead v. Searles*, 1 Atk. 265; *Clarke v. Wright*, 6 H. & N. 849; *Mackie v. Herbertson*, 9 App. Cas. 337.) 4. Trustees for any of the foregoing. (See *per Lindley*, L. J., *In re Anstis*, 31 Ch. Div. 606.) Underhill on Trusts and Trustees 43-45.

It has been held in *New York* by a divided court, that, under 2 Rev. St., p. 134, § 67, an undelivered, but recorded, instrument, by which the owner of land declares that it is to be charged with the maintenance of another, creates a valid trust, though there is no consideration for it. *McArthur v. Gordon*, 126 N. Y. 597.

1. 1 Stimson's Am. Statute Law, § 1710.

It is not in force in *Ohio*, *North Carolina*, *Tennessee*, *Texas*, and *Virginia*, and in those states trusts in land can be proved by parol evidence. *Harvey v. Gardner*, 41 Ohio St. 642; *Fay v. Fay*, 2 Hayw. (N. Car.) 296;

*Link v. Link*, 90 N. Car. 235; *Wright v. Cain*, 93 N. Car. 301; *Thompson v. Thompson*, 1 Yerg. (Tenn.) 100; *Haywood v. Ensley*, 8 Humph. (Tenn.) 460; *Wilburn v. Spofford*, 4 Sneed (Tenn.) 705; *Pierce v. Fort*, 60 Tex. 464; *Clark v. Haney*, 62 Tex. 511; 50 Am. Rep. 536; *Miller v. Thatcher*, 9 Tex. 482; 40 Am. Dec. 172; *Bank of U. S. v. Carrington*, 7 Leigh (Va.) 576; *Walraven v. Lock*, 2 Patt. & H. (Va.) 549. See also *Price v. Reeves*, 38 Cal. 457; *Guest v. Guest*, 74 Tex. 664; *Cordova v. Lee* (Tex. 1890), 14 S. W. Rep. 208; *Holland v. Farthing*, 2 Tex. Civ. App. 155.

2. 29 Car. II, ch. 3, §§ 7, 8, 9. See Appendix to Browne on Statute of Frauds; *Tierney v. Wood*, 19 Beav. 330; *Donohoe v. Conrahy*, 2 Jones & L. 688.

3. *Smith v. Matthews*, 3 De G. F. & J. 139; *Gardner v. Rowe*, 5 Russ. 258; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Randall v. Morgan*, 12 Ves. 74; *Moran v. Hays*, 1 Johns. Ch. (N. Y.) 339; *Second Unitarian Soc. v. Woodbury*, 14 Me. 281; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Reid v. Reid*, 12 Rich. Eq. (S. Car.) 213; *Safford v. Rantoul*, 12 Pick. (Mass.) 233; *Gibson v. Foote*, 40 Miss. 788; *Johnson v. Ronald*, 4 Munf. (Va.) 77; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Cornelius v. Smith*, 55 Mo. 528.

A trust in lands—other than a resulting trust—may be declared either before or after the conveyance to the trustee, but it must be manifested in writing. *Jackson v. Moore*, 6 Cow. (N. Y.) 706.

4. "It is the settled doctrine, in interpreting this legislation," says Mr. Pomeroy, "that a trust of land need not be created nor declared by a writing; it need only be manifested and proved by some writing duly signed or

land need not be created and declared in writing,<sup>1</sup> but they must be manifested or proved by some writing, and cannot, therefore, be established by parol evidence.<sup>2</sup> But the statute will not be

subscribed by the proper party; and, as a consequence, this written evidence may be a separate instrument either simultaneous with, or subsequent to, the deed of conveyance, and may be very informal." 2 Pom. Eq. Jur., § 1006. See also Perry on Trusts, § 81; Pinnock v. Clough, 16 Vt. 508; 42 Am. Dec. 521; Pratt v. Aver, 2 Chand. (Wis.) 265; Jenkins v. Eldredge, 3 Story (U. S.) 294; Sheet's Estate, 52 Pa. St. 257; Blodgett v. Hildreth, 103 Mass. 486; Cornelius v. Smith, 55 Mo. 528.

1. There are many cases in which it is said in general terms that a trust in land cannot be created by parol, but upon examination it will be found in most, if not all, of such cases, that no written evidence was offered to prove the trust, and what the court really meant was that it could not be established by parol evidence. Practically, this distinction would make no difference in many cases, but in others it might be of the greatest importance, because trusts may often be established under the rule above stated by written evidence, which would be insufficient as an express declaration and creation of the trust. The distinction is well established. Foster v. Hale, 3 Ves. 696; Denton v. Davies, 18 Ves. 503; Davies v. Otty, 33 Beav. 540; Lane v. Ewing, 31 Mo. 75; 77 Am. Dec. 636; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; Sime v. Howard, 4 Nev. 473; Pinney v. Fellows, 15 Vt. 525; McVay v. McVay, 43 N. J. Eq. 47.

"It is a principle well settled in equity, that a trust need not be created in writing. It is sufficient if it is proved in writing, under the hand of the party to be charged." First Unitarian Soc. v. Woodbury, 14 Me. 281; Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157; Hertle v. McDonald, 2 Md. Ch. 128; Wright v. King, Harr. (Mich.) 12; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; Riggs v. Swann, 6 Jones Eq. (N. Car.) 118; Rutledge v. Smith, 1 McCord Eq. (S. Car.) 119; Brown v. Brown, 1 Strobbh. Eq. (S. Car.) 363.

It does not follow because a trust is created by a parol contract that it may not be enforced in equity. If it is afterwards admitted, and if the statute is not relied on as a defense, a specific per-

formance will be decreed. Flag v. Mann, 2 Sumn. (U. S.) 486.

So, under the Maine statute, an express trust need not be created by a writing; if it be subsequently declared by a writing signed by the party charged with the trust, it is sufficient. McClellan v. McClellan, 65 Me. 500. And a distinct written statement of a trust in lands, its subject and nature, the parties and their relation to it and each other, subscribed by the party to be charged therewith, is sufficient under said statute, whether addressed to, or deposited with, the *cestui que trust*, or not, or whether intended, when made, to be evidence of the trust, or not. Bates v. Hurd, 65 Me. 180. That statute provides that all express trusts concerning lands must be created or declared by some writing, signed by the party or his attorney, and it is held that the phrase "some writing" means any writing, however informal, from which the existence and terms of the trust can be understood, whether intended by the signer as such, or not; and that letters, memoranda, or other writing of a party, delivered or left by him, and found among his papers, are sufficient. McClellan v. McClellan, 65 Me. 500. It was also held in the case last cited that where one of the papers was signed, it was sufficient if the others were so referred to therein as to be deemed parts of one and the same transaction. See also Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67.

2. Columbus, etc., R. Co. v. Braden, 110 Ind. 558; Mescall v. Tully, 91 Ind. 96; Thomas v. Merry, 113 Ind. 83; Pearson v. Pearson, 125 Ind. 341; Stonehill v. Swartz, 129 Ind. 310; Todd v. Munson, 53 Conn. 579; Gerry v. Stimson, 60 Me. 186; Hall v. Congdon, 55 N. H. 104; Stevenson v. Crapnell, 114 Ill. 19; Phillips v. South Park Com'rs, 119 Ill. 626; Green v. Cates, 73 Mo. 115; Brock v. Brock, 90 Ala. 86; Bibb v. Hunter, 79 Ala. 351; White v. Farley, 81 Ala. 563; Patton v. Beecher, 62 Ala. 579; Parker v. Bodley, 4 Bibb (Ky.) 102; Hovey v. Holcomb, 11 Ill. 660; Withers v. Withers, Ambl. 152; Barr v. O'Donnell, 76 Cal. 469; 9 Am. St. Rep. 242; Feeney v. Howard, 79 Cal. 525; 12 Am. St. Rep. 162; Hain v. Robinson, 72 Iowa 735; Andrews v.

Concannore, 76 Iowa 251; Moore v. Jordan, 65 Miss. 229; 7 Am. St. Rep. 641; *McVay v. McVay*, 43 N. J. Eq. 47; *Eaton v. Eaton*, 35 N. J. L. 290; *Salisbury v. Clark*, 61 Vt. 453; *Wolford v. Farnham*, 44 Minn. 159; *James v. Smith*, 63 L. T. 524.

In an action to enforce a trust in land, the plaintiff who has parted with nothing, cannot show by parol that a grantor conveying land by a deed absolute, had an oral agreement with the grantee that the latter should have a life estate in the land, and hold the remainder in trust for the plaintiff. *Stonehill v. Swartz*, 129 Ind. 310. See also *Wright v. Moody*, 116 Ind. 175; *Pearson v. Pearson*, 125 Ind. 341.

An oral agreement between a husband and wife that land conveyed to the latter by her husband should be held in trust for their children, will not be enforced under the *Massachusetts* Pub. Stat., ch. 141, § 1, providing that no trust pertaining to lands, save such as result by implication of law, shall be created, except by instruments in writing signed by the party declaring the trust. *Moran v. Somes*, 154 Mass. 200.

Where a husband purchases land, paying for it with his own money, and takes the title in his wife's name, evidence is not admissible of a parol agreement between them by which an express trust in the land of which he is beneficiary is created. *Montgomery v. Craig*, 128 Ind. 48.

A trust is not created by parol agreement to reconvey land, especially where the consideration paid is its full value at the time of the conveyance. *Harper v. Harper*, 5 Bush (Ky.) 177. See also, to the same effect, *Daily v. Kinsler*, 31 Neb. 340; *Gee v. Thrailkill*, 45 Kan. 173; *Collar v. Collar*, 86 Mich. 507; *Dover v. Rhea*, 108 N. Car. 88.

One purchasing land at a sheriff's sale in his own name and with his own money, will not, in the absence of fraud, be decreed to hold it as a trustee, merely upon allegations of a verbal agreement by him to hold it for the benefit of the execution debtor. *Minot v. Mitchell*, 30 Ind. 228; 75 Am. Dec. 685. See also *McCall's Appeal* (Pa. 1887), 11 Atl. Rep. 206.

So, where one buying land at an execution sale made a verbal agreement with the owner that he should have a right to redeem within a certain period, no consideration being paid for the promise, it was held that the contract was within the Statute of Frauds

and no trust resulted. *Salisbury v. Black*, 119 Pa. St. 200. See also *Wood v. Mulock*, 48 N. Y. Super. Ct. 70; *Nesbitt v. Cavender*, 30 S. Car. 33.

Land conveyed by a son to his mother under an oral agreement by which she is to hold it for life, and then divide it at her death between the son and his sisters, becomes the absolute property of the mother, such agreement being void under the *Illinois* Statute of Frauds. *Champlin v. Champlin*, 136 Ill. 309.

In *Gee v. Thrailkill*, 45 Kan. 173, where the owner of land conveyed it in fee simple by a warranty deed absolute upon its face, upon a consideration declared to be \$1,500, but that no actual consideration except an understanding in parol between the parties with the grantee to sell or mortgage the land to obtain funds for the grantor, and reconvey to the grantor, at his pleasure, any part of the land remaining in the grantee's hands, it was held that the parol trust with respect to such land was invalid under the *Kansas* law, and the deed of conveyance absolute and valid.

A mere verbal agreement to purchase land for another, where the purchaser uses his own name and credit, cannot be enforced, and a trust does not result. *Fowke v. Slaughter*, 3 A. K. Marsh. (Ky.) 56.

So, where a debtor, to prevent his estate from being attached by his creditors, conveyed it to his father without consideration, and immediately afterwards, at the verbal request of some of his brothers, and with his father's knowledge, but without his consent, agreed that it should be held in trust for one of the brothers, who was a creditor of his, it was held to create no trust which could be enforced against the father, or against his heirs after his death. *Bartlett v. Bartlett*, 14 Gray (Mass.) 277.

And where a testator directed that certain property should be sold by his executors before any distribution of his estate had been made, and the proceeds invested according to instructions given them, for the fulfillment of which they were to be accountable to God alone, and further declared that he had made a secret bequest to his son J., which the executors should give him to understand, according to instructions, when they deemed convenient, it was held that no trust was created in favor of J., so as to enable his

permitted to so operate as to effectuate a fraud.<sup>1</sup> And the stat-

creditors to enforce any claim against it. *Sparks v. De La Guerra*, 18 Cal. 676.

So, it has been held that a promise made by heirs at law to convey property, in accordance with their declarations to a dying brother, was not sufficient to take the case out of the Statute of Frauds, even though such promise was actually coupled with comforting assurances to him and remonstrances by which his desire to make a will might have been influenced, no evidence of fraud being adduced in the case. *Bedillian v. Seaton*, 3 Wall. Jr. (U. S.) 279. Compare *McLellan v. McLean*, 2 Head (Tenn.) 684.

Where a trust deed is once delivered, its effect cannot be impaired by evidence of oral reservations and conditions. *Wallace v. Berdell*, 97 N. Y. 13. And where a deed is placed in the hands of a grantee upon a verbal agreement that in certain contingencies it shall be returned to the grantor and be of no effect, an expressed trust arises, and not being in writing signed by the party declaring it, is void, under the *Illinois Rev. Stat.*, ch. 59, § 9. *Stevenson v. Crapnell*, 114 Ill. 19.

On the other hand, where the owner of land and one intending to purchase it at a judicial sale, agrees that the title, when acquired by such purchase, shall be held in trust for the payment of the judgment and mortgaged liens thereon, and the remainder be reconveyed to the debtor, and in pursuance of such contract the purchaser acquires the title, it will be sufficient to create a trust under a statute providing that no trust in land shall be created except by the operation of law, or deed in writing subscribed by the party creating it. *Carter v. Gibson*, 29 Neb. 324.

So, where a vendee is put in possession and pays a portion of the purchase-money, but, being unable to pay the balance, procures the money from another, to whom the land is conveyed by the vendor on a verbal agreement that it shall be conveyed to the vendee, upon the payment of the sum advanced, the agreement can be enforced notwithstanding the Statute of Frauds. *Spies v. Price*, 91 Ala. 166.

And it has been held that, where an attorney, employed to enforce a judgment against certain property, creates an outstanding title under a parol agreement to hold it for his client, the trust will be enforced, and he must account

for all the profits made, after deducting the amount he was to pay for the title and reasonable attorney's fees. *Hughes v. Willson*, 128 Ind. 491.

Where an attempt is made to enforce a trust in lands, although it must be manifested by writing duly signed, it is competent, after the trust has been terminated by the trustee conveying the property to the beneficiaries, to prove the trust by parol evidence as against creditors of the trustee alleging that such conveyance was fraudulent as to them. *Silvers v. Potter*, 48 N. J. Eq. 539.

So, where land held under a parol declaration of trust has been sold in execution of the trust, and the declaration is repeated after the sale, the Statute of Frauds has no application. *Hess' Appeal*, 112 Pa. St. 168.

An interesting case was recently decided in the supreme court of *Connecticut*. The plaintiff accumulated several thousand dollars by working out, and in 1882 wrote to her brother, who was in *Ireland*, in regard to purchasing a home there in which they should live together with their insane sister. A lot was purchased and a house built upon it, the entire expenses being borne by the plaintiff, the defendant, her brother, contributing nothing except to supervise the building of the house. The property was conveyed to them jointly. Afterward, differences having arisen between them, her brother threatened to sell or mortgage his interest, and in an action to declare the brother's holding to be in trust for the plaintiff, it was held that it was error for the court to refuse to admit testimony offered by the plaintiff, to show that it was expressly agreed between them that the title taken was to be in trust for her. *Ward v. Ward*, 59 Conn. 158. See also, for other instances of the admission of parol evidence, *Hudson v. White*, 17 R. I. 519; *Bitely v. Bitely*, 85 Mich. 227; *Ragsdale v. Ragsdale*, 68 Miss. 92; 28 Am. St. Rep. 256.

But even where parol evidence is admissible to establish a trust, it must be clear and satisfactory. *Trout v. Trout*, 44 Iowa 471; *Barkley v. Lane*, 6 Bush (Ky.) 587; *Rogers v. Rogers*, 87 Mo. 257; *Lingenfelter v. Richey*, 62 Pa. St. 128; *Collier v. Collier*, 30 Ind. 32; *Mercer v. Stark*, 1 Smed. & M. Ch. (Miss.) 479.

1. *McCormick v. Grogan*, L. R., 4 H.

ute has no application to resulting or constructive trusts arising by operation of law.<sup>1</sup> So, even where it might otherwise defeat the trust it may be waived by the failure to plead it.<sup>2</sup>

The written evidence required by the statute may come from the grantor or from the trustee, but not from the *cestui que trust*.<sup>3</sup> "The grantor may declare the trust in the will or the deed by which the land is conveyed or devised, or in an instrument separate and distinct from the conveyance; or he may declare himself a trustee and that he holds the land in trust, without conveying the legal title."<sup>4</sup> When the trust is not created by the grantor or testator in the instrument by which he conveys or devises the land, it does not necessarily follow that no trust can be established, for it may be evidenced by a writing executed by the person to whom the legal title is conveyed.<sup>5</sup> Thus, letters,<sup>6</sup> receipts,<sup>7</sup> and

L. 82, *per* Lord Westbury; Strickland v. Aldridge, 9 Ves. 219; Haight v. Kaye, L. R., 7 Ch. 469; Booth v. Turle, L. R., 16 Eq. 182; Robbins v. Robbins, 89 N. Y. 256; Bork v. Martin, 132 N. Y. 280; Barrell v. Hanrick, 42 Ala. 60; Gilpatrick v. Glidden, 81 Me. 137; Catalani v. Catalani, 124 Ind. 54. See also Moore v. Crawford, 130 U. S. 122. See FRAUDS, STATUTE OF, vol. 8, pp. 737, 738.

1. Kelly v. Mills, 41 Miss. 267; Cloud v. Ivie, 28 Mo. 578; Farrington v. Barr, 36 N. H. 86; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91; 6 Am. Dec. 355; Malin v. Malin, 1 Wend. (N. Y.) 625; Slaymaker v. St. John, 5 Watts. (Pa.) 27; Gruhn v. Richardson, 128 Ill. 178.

The Statute of Frauds has no application to trusts created by operation of law alone, which may be established by parol. Caple v. McCollum, 27 Ala. 461; Cook v. Kennerly, 12 Ala. 42; McGuire v. Ramsey, 9 Ark. 518; Dean v. Dear, 6 Conn. 285; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Hanff v. Howard, 3 Jones Eq. (N. Car.) 440; James v. Fulcrod, 5 Tex. 512; 55 Am. Dec. 743; Leakey v. Gunter, 25 Tex. 400. See IMPLIED TRUSTS, vol. 10, p. 1.

2. Carpenter v. Davis, 72 Ill. 14; Moore v. Crawford, 130 U. S. 122.

3. 2 Pom. Eq. Jur., § 1007.

4. 2 Pom. Eq. Jur., § 1007.

5. See cases cited above in which declarations of trust have been held sufficient, and authorities cited in the following notes.

6. Thus, where one acquires title to land in trust for another, and writes him a letter showing clearly that he holds the land in trust, it will be sufficient to manifest the trust as required by the statute. Moore v. Pickett, 62 Ill.

158. In this case it was also held that, where the letter fails to describe the land, it might be shown by the surrounding facts and circumstances that the land in dispute was referred to. Compare Taft v. Dimond, 16 R. I. 584.

So, where the plaintiffs in a suit in ejectment claimed as heirs of their father, who purchased the land at a foreclosure sale, taking the title in his own name, and the defendant alleged that the purchase was made for her benefit and with her funds, and introduced evidence of declarations by the plaintiffs' father to that effect, a letter in the defendant's possession, written by the father of the plaintiffs just before the sale, giving permission for his name to be used in making the purchase, was held admissible in connection with the declarations on the question whether or not the defendant had furnished the purchase-money. Behm v. Molly, 133 Pa. St. 614.

See also De Laurencel v. De Boom, 48 Cal. 581; Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267; 35 Am. Rep. 166; Gaylord v. Lafayette, 115 Ind. 423; Hamer v. Sidway, 124 N. Y. 538; 21 Am. St. Rep. 693; Newkirk v. Place, 47 N. J. Eq. 477.

The trustee may incidentally recognize or declare it in the course of a correspondence, without any instrument expressly made for the purpose of acknowledging the trust. Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67; Johnson v. Deloney, 35 Tex. 42. Compare Phelps v. Seely, 22 Gratt. (Va.) 573.

7. Robert's Appeal, 92 Pa. St. 407; Boykin v. Pace, 64 Ala. 68; Bates v. Hurd, 65 Me. 180; Rogers Locomotive, etc., Works v. Kelly, 19 Hun (N. Y.) 399.

memoranda,<sup>1</sup> signed by the trustee, may be sufficient to establish the trust;<sup>2</sup> but the objects and nature of the trust must be shown by such documents with sufficient certainty, and so must their connection with the trust property appear.<sup>3</sup> It seems that it is not necessary, however, where the terms of the trust are gathered from several papers, that all of them should be signed, provided they are part of the same transaction and are referred to and identified by the paper that is signed in such a manner as to become part thereof.<sup>4</sup>

1. *Fisher v. Fields*, 10 Johns. (N. Y.) 495; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67.

Thus, in a recent case, A, being indebted to B, conveyed his land to him by an absolute deed, and B, at the same time, promised orally to convey or pay to A any surplus that might remain of the estate or its proceeds, after the discharge of the debt. B afterward told A that he had made a memorandum to the same effect, but never delivered it to him. Upon B's death, there was found among his valuable papers, a writing signed by him and addressed to no person, by which he "agreed to bind" himself to pay the above mentioned surplus to A. Below this writing was the following, also signed by him: "This memorandum is made for the use of my executor or administrator only; A has no equal or equitable claim against me or my estate, but upon payment of my debt, any balance shall inure to A's benefit." It was held that there was a declaration of the trust in writing within the meaning of the *Massachusetts* statute. *Urann v. Coates*, 109 Mass. 581. But it was held by the same court that a mere memorandum upon a ledger was not a sufficient "writing" to create or declare a trust concerning land, within the meaning of the statute. *Homer v. Homer*, 107 Mass. 82.

So, in *Rhode Island*, it was held in a recent case that a memorandum made by the alleged trustee upon slips of paper, but not signed by him, was insufficient under the Statute of Frauds. *Taft v. Dimond*, 16 R. I. 584.

And, in *California*, it has been held that a verified answer in chancery by the trustee was sufficient to satisfy the *California* statute, which provides that no trust in relation to land shall be valid, unless created or declared by a written instrument signed by the trustee. *Garnsey v. Gothard*, 90 Cal. 603.

2. *Packard v. Putnam*, 57 N. H. 43.

In a *South Carolina* case, a trust in land was established upon the deposition in writing of a witness who was the original trustee under an absolute conveyance to him, the statements in the bill and answer, and parol evidence. *Reid v. Reid*, 12 Rich. Eq. (S. Car.) 213.

So, where real estate was purchased by A and B and conveyed to A, who furnished the purchase-money; and A wrote to an attorney the following letter: "The agreement between B and myself is simply this: We have purchased an estate" (describing it), "which has by mutual consent been conveyed to me, I having paid and secured the purchase-money. Whatever disposition is made of the property, the profit and loss are to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect," it was held that the letter of A, having been acted on by the parties, was evidence of a trust or a partnership, and sufficient to satisfy the Statute of Frauds. *Montague v. Hayes*, 10 Gray (Mass.) 609. See also *Kintner v. Jones*, 122 Ind. 148; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521.

3. *Foster v. Hale*, 3 Ves. 708; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297; *Arms v. Ashley*, 4 Pick. (Mass.) 71; *Freeport v. Bartol*, 3 Me. 340; *Rutledge v. Smith*, 1 McCord Eq. (S. Car.) 119; *Hill on Trustees*, \*61. See also *Whelan v. Whelan*, 3 Cow. (N. Y.) 537; *Jackson v. Moore*, 6 Cow. (N. Y.) 706; *Reid v. Fitch*, 11 Barb. (N. Y.) 399; *Cook v. Barr*, 44 N. Y. 156; *Taylor v. Keep*, 2 Ill. App. 368; *Jones v. Wilson*, 60 Ala. 332; *Taft v. Dimond*, 16 R. I. 589; *Blodgett v. Hildreth*, 103 Mass. 484.

4. *Denton v. Davis*, 18 Ves. 503; *Brown on Statute of Frauds*, §§ 105, 350; 1 *Perry on Trusts*, § 83. See FRAUDS, STATUTE OF, vol. 8, p. 712,

In the absence of fraud or mistake, parol evidence is not admissible to establish an express trust by contradicting a written instrument absolute on its face,<sup>1</sup> but it has been held that the trustee may execute a parol trust if he chooses to do so, and that the courts will protect him in so doing.<sup>2</sup> And if a trust is once effectually created by parol and fully executed, it cannot be revoked.<sup>3</sup>

There is a sharp conflict among the authorities as to what constitutes such fraud as will justify the admission of parol evidence to establish a trust in favor of the grantor. The earlier English cases were very liberal in admitting such evidence;<sup>4</sup> but the current of modern authority is to the effect that parol evidence is not admissible to show an agreement to hold property in trust where it is conveyed by a deed absolute on its face, unless the instrument was obtained by fraud or was made absolute by mistake. In other words, while the refusal to execute or acknowledge such trust may constitute fraud in a certain sense, it is not such fraud as will render parol evidence admissible to establish the trust.<sup>5</sup>

and authorities in note, where the subject is more fully considered. See also *Barber v. Thompson*, 49 Vt. 213; *Hannig v. Mueller*, 82 Wis. 235.

The signature of the party declaring the trust need not be by an actual subscription of his name; it is sufficient if the writing is authenticated by the party as his writing, for the purpose of declaring the trust. *Smith v. Howell*, 11 N. J. Eq. 349. In the case cited, the insertion, by the party, of his initials several times in the instrument by way of signature, the terms and intent of the instrument being perfectly clear, were held a sufficient signature.

1. *Kelly v. Karsner*, 72 Ala. 110; *Patton v. Beecher*, 62 Ala. 579; *Green v. Cates*, 73 Mo. 122; *Lawson v. Lawson*, 117 Ill. 98; *Cain v. Cox*, 23 W. Va. 594; *Pavey v. American Ins. Co.*, 56 Wis. 221; *Heiss v. Vosbury*, 59 Wis. 532; *Hansen v. Berthelson*, 19 Neb. 433; *Philbrook v. Delano*, 29 Me. 410; *Dean v. Dear*, 6 Conn. 285; *Clagett v. Hall*, 9 Gill & J. (Md.) 80; *Simms v. Smith*, 11 Ga. 108; *Gainus v. Cannon*, 42 Ark. 503; *Leman v. Whitley*, 4 Russ. 423; *Childers v. Childers*, 3 K. & J. 310; *Lewis v. Lewis*, L. R., 2 Ch. 77; *Morrall v. Waterson*, 7 Kan. 199; *Traf-ton v. Hawes*, 102 Mass. 541; 3 Am. Rep. 494; *Beers v. Beers*, 22 Mich. 42; *Beach v. Cooke*, 28 N. Y. 508; 86 Am. Dec. 260; *Mescall v. Tully*, 91 Ind. 96; *Dunn v. Dunn*, 82 Ind. 42; *Pennington v. Flock*, 93 Ind. 378; *Brown v. Combs*, 29 N. J. L. 36; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162.

2. *Karr v. Washburn*, 56 Wis. 303. And where he sells land in the execution of a parol trust invalid under the Statute of Frauds, he may be held liable for the proceeds as a trustee of personal property. *Bork v. Martin*, 132 N. Y. 280.

3. *Kilpin v. Kilpin*, 1 Myl. & K. 531; *Addlington v. Cann*, 3 Atk. 151; *Crabb v. Crabb*, 1 Myl. & K. 511; *Eaton v. Eaton*, 35 N. J. L. 290; *Greenfield's Estate*, 14 Pa. St. 489; *Kirkpatrick v. McDonald*, 11 Pa. St. 387; *Brown v. Brown*, 12 Md. 87; *Robbins v. Robbins*, 89 N. Y. 258; *Sayre v. Weil*, 94 Ala. 466. So, where there is part performance, *Wheeler v. Reynolds*, 66 N. Y. 227; *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696; *Moore v. Crawford*, 130 U. S. 122; *Church v. Sterling*, 16 Conn. 388. See also *Stringer v. Montgomery*, 111 Ind. 489; *Barber v. Milner*, 43 Mich. 248; *Frieze v. Glenn*, 2 Md. Ch. 361. See FRAUDS, STATUTE OF, vol. 8, pp. 738-745.

4. *Hutchins v. Lee*, 1 Atk. 447; *Walker v. Walker*, 2 Atk. 98; *Reech v. Kennegal*, 1 Ves. 125; *Montacute v. Maxwell*, 1 P. Wms. 620; *Shelborne v. Juchenquin*, 1 Bro. C. C. 350; *Jenkins v. Eldredge*, 3 Story (U. S.) 290.

5. *Rasdall v. Rasdall*, 9 Wis. 379; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Fouty v. Fouty*, 34 Ind. 433; *Levy v. Brush*, 45 N. Y. 597; *Wheeler v. Reynolds*, 66 N. Y. 227; *Bonham v. Craig*, 80 N. Car. 224; *Johnston v. La Motte*, 6 Rich. Eq. (S. Car.) 347; *Patton v. Beecher*, 62 Ala.

Any other rule would make the Statute of Frauds practically ineffective. But where there is fraud in obtaining the conveyance, or in the means used to secure its execution in the particular form in which it is drawn, or where, by accident or mistake, it fails to express the real intention of the parties, parol evidence may be admitted for the purpose of affording relief to the injured party.<sup>1</sup>

**8. Statute of Wills.**—The Statute of Wills, as well as the Statute of Frauds, may have an important influence where a trust is claimed to have been created by will. It is provided in most of the states, as it is in *England*, that wills of either real or personal property must be in writing, signed by the testator and attested by a certain number of witnesses.<sup>2</sup> No trust in either real or

579; *Mosely v. Mosely*, 86 Ala. 289; note to *Jackson v. Cleveland*, 90 Am. Dec. 266; *Dean v. Dear*, 6 Conn. 285; *Perry v. McHenry*, 13 Ill. 236; *Lantry v. Lantry*, 51 Ill. 458; 2 Am. Rep. 310; *Hoge v. Hoge*, 1 Watts (Pa.) 213; 26 Am. Dec. 52. See FRAUDS, STATUTE OF, vol. 8, p. 737.

In a recent case, under the terms of a deed of trust, the trustee was required to convey the property to whomsoever the beneficiary might name, and if not disposed of at the time of her death to convey it to her heirs. After the settlor's death, and while the beneficiary still lived, their son conveyed all of his interest in his father's estate in trust for his wife, making no mention of the property in question, although it was afterwards alleged that he intended to include it in his conveyance. The evidence of this intention consisted of mere vague statements without proof that the property was mentioned between the parties to the deed. The son's wife collected no rents from the property, although she occupied a part of it and made some improvements. It was held that the evidence was not sufficient to establish a mistake in the deed, especially in view of the fact that the son had no vested remainder or other interest in the property which he could at that time convey. *Ewing v. Buckner*, 76 Iowa 467.

But in another recent case, in a proceeding brought to sell a decedent's real estate and pay his debts, a witness who had been on intimate terms with decedent, testified to conversations held with him just before his death, in which he admitted that he had no interest in the real estate, and requested the witness to prepare a deed to convey it to the defendant, but that no such deed was prepared, partly because of the neglect of the witness, and partly on ac-

count of his suggesting that the defendants were about to sell, and the deed could as well be made to their purchaser direct. It was held that the evidence sustained a finding that the decedent held the lands in trust for the defendants. *Newell v. Montgomery*, 129 Ill. 58.

1. *Kennedy v. Kennedy*, 2 Ala. 571; *Johnston v. La Motte*, 6 Rich. Eq. (S. Car.) 347; *Skrine v. Simmons*, 11 Ga. 401; *Robbins v. Robbins*, 89 N. Y. 251; *Wheeler v. Reynolds*, 66 N. Y. 227; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Cox v. Cox*, 5 Rich. Eq. (S. Car.) 365; *Trapnall v. Brown*, 19 Ark. 49; *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658; *Newton v. Taylor*, 32 Ohio St. 399; *Gilpatrick v. Glidden*, 81 Me. 137; *Young v. Peachy*, 2 Atk. 254; *Thomson v. White*, 1 Dall. (Pa.) 424; 1 Am. Dec. 252, and note; *Hoge v. Hoge*, 1 Watts (Pa.) 163; 26 Am. Dec. 52. See FRAUDS, STATUTE OF, vol. 8, pp. 737, 738.

The same rule applies to wills, and it has been held that a promise made to the testator by a legatee or devisee, to provide for another out of the property given to him, by reason of which he gets what would have otherwise been given to such other person, can be established by parol evidence. *Jorden v. Money*, 5 H. L. 185; *McCormick v. Grogan*, L. R., 4 H. L. 97; *Strickland v. Aldridge*, 9 Ves. 516; *Chamberlain v. Chamberlain*, 2 Freem. 34; *Thynn v. Thynn*, 1 Vern. 296; *Mestaer v. Gillespie*, 11 Ves. 621; *Norris v. Frazer*, L. R., 15 Eq. 318; *Barrell v. Hanrick*, 42 Ala. 60; *Richardson v. Adams*, 10 Yerg. (Tenn.) 273; *Owing's Case*, 1 Bland (Md.) 370; 17 Am. Dec. 311.

2. 1 Jarman on Wills (Perkins' ed.) 113-144, and the notes thereto support this proposition of the text.



personal property can, therefore, be created in a will, unless it is in writing and executed in due form as required by the statute.<sup>1</sup> There is also "an additional reason in the *United States*," says Mr. Perry, "why a will or testamentary paper informally executed cannot be used as an original declaration of trust. In nearly all the states, no will can be used to prove the transfer of any interest, legal or equitable, in property of the testator, unless such will has been duly proved, allowed, and recorded in a court of probate having jurisdiction over it, and if such will is to be used to affect the title to property in any state other than the one where it is originally proved, it must be recorded in such other state."<sup>2</sup> But, while this is true, it does not prevent a testator from referring to documents or papers already in existence, and making them part of the will.<sup>3</sup>

**9. Personal Property**—*a. GENERALLY.*—Trusts in personal property may be declared and proved by parol.<sup>4</sup> The Statute of

1. *Thayer v. Wellington*, 9 Allen (Mass.) 283; 85 Am. Dec. 753; *Wells v. Hawes*, 122 Mass. 99; *Lynch v. Clements*, 24 N. J. Eq. 431; *Langdon v. Astor*, 3 Duer (N. Y.) 477; 16 N. Y. 9; *Burlington University v. Barrett*, 22 Iowa 60; 92 Am. Dec. 376; *Addington v. Cann*, 3 Atk. 141; *Briggs v. Penny*, 3 De G. & S. 547; *In re Boyes*, 26 Ch. Div. 531; *Muckleston v. Brown*, 6 Ves. 67. Compare *Nab v. Nab*, 10 Mod. 404.

A trust in lands is not created by a mere request in writing, but not in a duly executed will, to two of three heirs apparent, to give a certain person either a promissory note or a tract of land from the property of the ancestor. *Preston v. Casner*, 104 Ill. 262.

2. 1 Perry on Trusts, § 93, citing *Wilson v. Tappan*, 6 Ohio 172; *Bailey v. Bailey*, 8 Ohio 239; *Ives v. Allyn*, 12 Vt. 589; *Campbell v. Sheldon*, 13 Pick. (Mass.) 8; *Campbell v. Wallace*, 10 Gray (Mass.) 162; *Rex v. Netherseal*, 4 T. R. 258; *Metham v. Devonshire*, 1 P. Wms. 529; *Inchiquin v. French*, 1 Cox 1; *Strong v. Perkins*, 3 N. H. 517; *Kiltredge v. Folsom*, 8 N. H. 98. See also *Lucas v. Tucker*, 17 Ind. 41; *Harris v. Harris*, 61 Ind. 117; *Thiebaud v. Sebastian*, 10 Ind. 454.

3. *Habergham v. Vincent*, 2 Ves. Jr. 228; *Smart v. Prujeau*, 6 Ves. 560; *Thayer v. Wellington*, 9 Allen (Mass.) 283; 85 Am. Dec. 758, and note; *Newton v. Seaman's Friend Soc.*, 130 Mass. 91; 39 Am. Rep. 433; *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; 1 *Williams Ex'rs*, 289, 290, and notes; *Gerrish v. Gerrish*, 8 Oregon 351; 1 Am. Probate Rep. 59; 34 Am. Rep.

585; *Fickle v. Snepp*, 97 Ind. 289; 49 Am. Rep. 499; *Fosselman v. Elder*, 98 Pa. St. 159.

4. "Trusts in Personal Property," 2 Alb. L. Jour. 261, 288; *Pitney v. Bolton*, 45 N. J. Eq. 639; *Hooper v. Holmes*, 11 N. J. Eq. 122; *Kimball v. Morton*, 5 N. J. Eq. 26; 53 Am. Dec. 621; *Day v. Roth*, 18 N. Y. 448; *Gilman v. McArdle*, 99 N. Y. 451; 52 Am. Rep. 41; *Gadsden v. Whaley*, 14 S. Car. 211; *Higgenbottom v. Peyton*, 3 Rich. Eq. (S. Car.) 398; *Crissman v. Crissman*, 23 Mich. 218; *Bostwick v. Mahaffy*, 48 Mich. 342; *Chase v. Chapin*, 130 Mass. 128; *Davis v. Coburn*, 128 Mass. 377; *Cobb v. Knight*, 74 Me. 253; *Dickerson's Appeal*, 115 Pa. St. 198; *Hellman v. McWilliams*, 70 Cal. 449; *Saunders v. Harris*, 1 Head (Tenn.) 185; *Simms v. Smith*, 11 Ga. 195; *Gordon v. Green*, 10 Ga. 534; *Berry v. Norris*, 1 Duv. (Ky.) 302; *Hon v. Hon*, 70 Ind. 135; *Hunt v. Elliott*, 80 Ind. 245; 41 Am. Rep. 794; *Mohn v. Mohn*, 112 Ind. 285; *McFadden v. Jenkyns*, 1 Ph. 153; 1 Hare 458; *Thorpe v. Owens*, 5 Beav. 224; *Hawkins v. Gordon*, 2 Sm. & Gif. 451; *Jones v. Lock*, L. R., 1 Ch. 25; *Fordyce v. Willis*, 3 Bro. C. C. 587; *Middleton v. Pollock*, 4 Ch. Div. 49. And the fact that the specific property is constantly changing, makes no difference. *Leland v. Colliver*, 34 Mich. 418.

But where the trust is declared in writing, although the Statute of Frauds will not prevent its being proved by parol evidence, the rule that such evidence is not admissible to vary the terms of a writing, may render parol

Frauds has no application to such cases, even though the subject-matter is money derived from the sale of land, or secured by mortgage thereon.<sup>1</sup> So, parol trusts may be created in the stock of a corporation, although the corporation owns real estate;<sup>2</sup> and it has been held that, while a parol agreement to hold land in trust cannot, ordinarily, be enforced, it constitutes a sufficient consideration for a parol promise, made after the sale of the land, to hold the proceeds in trust, and the latter agreement can be enforced as a parol trust in personal property.<sup>3</sup>

A mere promise to make a future donation not based on any consideration, is insufficient,<sup>4</sup> and so are vague and indefinite

evidence incompetent. *Simms v. Smith*, 11 Ga. 195. But such evidence has been admitted to prove a trust. *Chace v. Chapin*, 130 Mass. 128. See also *Northrop v. Hale*, 72 Me. 275; *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159; 35 Am. Rep. 365.

1. *Benbow v. Townsend*, 1 Myl. & K. 510; *Bellasis v. Compton*, 2 Vern. 294; *Hackney v. Vrooman*, 62 Barb. (N. Y.) 650; *Childs v. Jordan*, 106 Mass. 322; *Coburn v. Anderson*, 131 Mass. 513; *Patterson v. Mills*, 69 Iowa 755.

A trust of a mortgage debt may be created by parol; for although no interest in the land will be passed by a trust thus created, yet it is good as to the debt, and will entitle the beneficiary to payment out of the proceeds of the sale of the land. *Danser v. Warwick*, 33 N. J. Eq. 133.

But leasehold interests are within the statute. *Riddle v. Emerson*, 1 Vern. 108; *Hutchins v. Lee*, 1 Atk. 447; *Gardner v. Rowe*, 5 Russ. 258; *Otis v. Sill*, 8 Barb. (N. Y.) 102.

2. *Porter v. Rutland Bank*, 19 Vt. 410; *Foster v. Hale*, 3 Ves. 696; *Ash-ton v. Langdale*, 4 De G. & S. 402; 4 Eng. L. & Eq. 80; *Hilton v. Girand*, 1 De G. & S. 183; *Wheatley v. Purr*, 1 Keen 551; *Kilpin v. Kilpin*, 1 Myl. & K. 520; *Myers v. Perigal*, 16 Sim. 533.

In a late case the following facts appeared: Shares of stock in several corporations were transferred to A to hold in trust for B, a woman, the certificates running in the name of A personally. A treated these shares as his own, sold them all, and, for the purpose of protecting the trust, subsequently purchased other shares for the same amount in the same corporation. While he held the latter shares, B asked him for the names of her stocks, and he gave her a list. Subsequently, divorce

proceedings were instituted against A and he sold some of the shares, purchasing the same number in the same corporation a few days later. These he afterwards transferred to C with the undisclosed intention of protecting the trust. On a bill in equity brought by the wife of A, against A, B, and C, to reach these shares and apply them in satisfaction of an execution in her favor for alimony which she had obtained against A, it was held that these facts would warrant a finding that the shares in the hands of C were embraced in the trust in favor of B, and that the bill could not be maintained. *Perkins v. Perkins*, 134 Mass. 441.

3. *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, 113 Ind. 83; *Collar v. Collar*, 75 Mich. 414; *Calder v. Moran*, 49 Mich. 14; *Maffitt v. Rynd*, 69 Pa. St. 380; *Wiseman v. Baylor*, 69 Tex. 63. Compare *Wolford v. Farnham*, 44 Minn. 159.

Two sisters caused it to be publicly announced that, by the sale of land belonging to the estate of their deceased father, they and their three brothers would be left homeless; that provision had been made for other heirs at law of the deceased, and that they wished to buy the land for the joint benefit of themselves and their three brothers. By such announcement, bidding at the sale was suppressed, and the sisters bought the land for much less than its value, and shortly after sold it at a large profit. It was held that a trust accrued whereby the brothers were entitled to maintain a bill in equity to compel the sisters thus purchasing to account to the brothers for a proportionate share in the profit. *McRarey v. Hough*, 32 Ga. 681. See also *Miller v. Antle*, 2 Bush (Ky.) 401; 92 Am. Dec. 495.

4. *Allen v. Withrow*, 110 U. S. 119. See also *Gerrish v. New Bedford Sav.*

expressions of an intention to create a trust.<sup>1</sup> But an intention to create a trust may, sometimes, be inferred from conduct and circumstances, without any express declaration.<sup>2</sup>

Where a parol trust in personal property is perfectly created, it is as effective as any other trust, and the trustee cannot vary its terms or declare a new trust, without the consent of the *cestui que trust*.<sup>3</sup> It is not necessary, in such a case, that the benefi-

Inst., 128 Mass. 159; 35 Am. Rep. 367; Colman v. Sarrel, 1 Ves. Jr. 50; Antrobus v. Smith, 12 Ves. 47; Dillon v. Coppin, 4 Myl. & C. 647; Banks v. Mays, 3 A. K. Marsh. (Ky.) 435.

1. Bailey v. Irwin, 72 Ala. 505; Young v. Young, 80 N. Y. 422; 36 Am. Rep. 634; Allen v. Withrow, 110 U. S. 119; Childs v. Wesleyan Cemetery Assoc., 4 Mo. App. 74; Roddy v. Roddy, 3 Neb. 96; Snelling v. Utterback, 1 Bibb (Ky.) 609; 4 Am. Dec. 661. It is said in these cases that the evidence must be "clear and satisfactory." See also Hunter v. Bilyen, 30 Ill. 246; Harrison v. Howard, 1 Ired. Eq. (N. Car.) 407; Bailey v. Bailey, 8 Humph. (Tenn.) 230; Lyman v. United Ins. Co., 2 Johns. Ch. (N. Y.) 630; Harris v. Bratton, 34 S. Car. 259; Mannix v. Purcell, 46 Ohio St. 102; 15 Am. St. Rep. 562; Taylor v. Henry, 48 Md. 550.

A mere verbal direction to an agent to sell goods for a certain price, and apply the proceeds to his principal's debts, does not create a trust. Comley v. Dazian, 114 N. Y. 161. Nor does an assignment of personal property to a creditor as security, and a subsequent assignment of the surplus that may arise, to other creditors, make the first assignee a trustee for the others. Boessneck v. Cohn (Supreme Ct.), 7 N. Y. Supp. 620.

And it has been held that an alleged trust in personal property, which the assignor was not bound to make, and resting only on an understanding which was quite indefinite as to the beneficiaries, and in what proportions they were to take, will not, as against a creditor of the assignor, sustain the payment of a part of the fund to an alleged beneficiary. Kramer v. McCaughy, 11 Mo. App. 426.

2. Day v. Roth, 18 N. Y. 448; Gadsden v. Whaley, 14 S. Car. 210; Kimball v. Morton, 5 N. J. Eq. 26; 53 Am. Dec. 621; Ray v. Simmons, 11 R. I. 266; 23 Am. Rep. 447, and note; Snell's Equity, 80. See also Walden v. Karr, 88 Ill. 49; Clapp v. Emery, 98 Ill. 523;

Tyler v. Tyler, 25 Ill. App. 339; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250; Martin v. Branch Bank, 31 Ala. 115; Pitney v. Bolton, 45 N. J. Eq. 639.

A voluntary transfer of property by the owner to another person, giving him complete control of it, and directing him to use it to pay the debts of the former, renders the latter liable to account as a trustee. Ahl's Appeal, 25 W. N. C. (Pa.) 113.

A conveyance of personal property absolute in form, may be shown by the subsequent declarations of the transferor, assented to, and acted upon by the transferee, to have been in trust. Chace v. Chapin, 130 Mass. 128.

In a recent *Alabama* case, where it appeared that a promissory note had been executed in aid of a railroad company, and certain bonds of the company had been deposited by the makers of the note with one of their number, under a verbal agreement that he should hold them as collateral security against their liability on the note, it was held that a valid trust was created in favor of the makers of the note. Reid v. Mobile Bank, 70 Ala. 199.

3. Hunnewell v. Lane, 11 Met. (Mass.) 163.

"A trust once effectually created by parol cannot be subsequently extinguished, revoked or altered, by the party creating it." Hill on Trustees \*60, citing Kilpin v. Kilpin, 1 M. & K. 531, 539; Addlington v. Cann, 3 Atk. 151. See also Freeman v. Freeman, 2 Pars. Eq. (Pa.) 81; Greenfield's Estate, 14 Pa. St. 489; Kirkpatrick v. McDonald, 11 Pa. St. 387; Gulick v. Gulick, 39 N. J. Eq. 401.

And, in *West Virginia*, where a trust deed conveying personal property, contains a reservation to the grantor, which is inconsistent with the object of the trust and adequate to defeat it, the reservation is void as to his creditors. Kuhn v. Mack, 4 W. Va. 186.

A widow collected the insurance on her husband's life, under a policy payable to herself, and set apart a portion

ciary should know of the declaration of trust at the time it is made, provided he afterwards accepts and ratifies it;<sup>1</sup> but "where the transaction is capable of two interpretations, and the settlement is nearly voluntary, it is plain that notice, given by the donor to the donee, of the existence of the trust would, in most cases, be decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property. It is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust."<sup>2</sup>

Where the owner of "a legal estate, capable of legal transfer and delivery," attempts to make a third person trustee of the property, the legal interest must be actually transferred or vested in such trustee, in order to create a perfect trust. "It is not enough that the settlor executed a paper purporting to pass it, if in fact the paper does not have that effect. The intention of the

thereof upon a parol trust, for an infant daughter. Afterward she purchased land in her own name with the portion so set aside, and repudiated the trust, and it was held that a valid trust had been created which could be enforced, and that the land should be deemed charged with the trust. *Cobb v. Knight*, 74 Me. 253.

1. *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Neilson v. Blight*, 1 Johns. Cas. (N. Y.) 205; *Millsbaugh v. Putnam*, 16 Abb. Pr. (N. Y.) 380; *Blasdel v. Locke*, 52 N. H. 238; *Howard v. Windham County Sav. Bank*, 40 Vt. 507; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 48 Am. Rep. 784; *Barker v. Frye*, 75 Me. 29; *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159; 35 Am. Rep. 369; *Standing v. Bowring*, 31 Ch. Div. 282. See also *Otis v. Beckwith*, 49 Ill. 121; *Tate v. Leithead*, Kay 658; *Roberts v. Lloyd*, 2 Beav. 376; *Menx v. Bell*, 1 Hare 73; *Burn v. Carvalho*, 4 Myl. & C. 690; *Gilbert v. Overton*, 2 Hem. & M. 110; *Sloper v. Cottrell*, 6 El. & B. 504; *Lambe v. Orton*, 1 D. & S. 125; *Kewich v. Manning*, 1 De G. M. & G. 176; *Miller v. Billingsly*, 41 Ind. 492.

The owner of bonds deposited them in a bank for safe keeping, with directions to hold them for himself for life, and thereafter for his wife for life, and after her death for his heirs. After the death of the husband, by agreement between the widow and one of the heirs, the heir recognized the trust. It was held that the trust was binding upon both of them. *Comer v. Comer*, 24 Ill. App. 526.

If a person, by a written instrument, or by parol, directs his debtor to hold the money due in trust for a third person, and such direction is communicated to the debtor, an effectual trust in favor of the donee is created, especially where the debtor has acted on the direction and consented to the arrangement. *Eaton v. Cook*, 25 N. J. Eq. 55.

But it has been held that where one deposited money with another for investment, the latter to pay interest until it is invested, the relation established is that of debtor and creditor and not of trustee and *cestui que trust*. *Pittsburgh Nat. Bank v. McMurray*, 98 Pa. St. 538.

A gave a sum of money to B, and years after, gave an additional sum with the understanding at the time the latter gift was made that both were to be held in trust for the donor's grandchildren. Subsequently, B made an assignment of all his property for the benefit of his creditors. It was held that a valid trust existed in both sums. *Reiff v. Horst*, 52 Md. 255.

2. *Cole, J.*, in *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159; 35 Am. Rep. 365, 369. See also, as to the importance of notice in proving the trust, where it is not otherwise sufficiently proved, *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447, 450; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Clark v. Clark*, 108 Mass. 522; *Cummings v. Bramhall*, 120 Mass. 552; *Powers v. Provident Sav. Inst.*, 124 Mass. 377; *Marcy v. Amazeen*, 61 N. H. 131; 60

settlor to divest himself of the legal title must be consummated and executed, or the court will not enforce the trust."<sup>1</sup> Thus, if the owner of stock or shares in a corporation attempts to create a trust therein, and they can be transferred only upon the books of the company, a mere voluntary deed to the trustee will be insufficient, unless they are actually transferred as required by law.<sup>2</sup> If the subject of the trust is a legal interest, incapable of being transferred or assigned at law, it is sufficient, according to the weight of authority, if the settlor does all that he can to perfect the transaction and create the trust,<sup>3</sup> although there are some authorities which hold that a voluntary trust will not be enforced where the legal title remains in the settlor.<sup>4</sup> Where the subject of the trust is a mere equitable interest, the *cestui que trust* may create a valid trust by assigning his interest to a new trustee,<sup>5</sup> or, by a new declaration of trust, he can direct the old trustee to hold such interest upon new trusts.<sup>6</sup>

*b. BANK DEPOSITS.*—It often becomes a question of no little difficulty to determine the intention of one who deposits money

Am. Rep. 320; *Bridge v. Bridge*, 16 Beav. 315; *Rycroft v. Christy*, 3 Beav. 238; *Beatson v. Beatson*, 12 Sim. 281; *Meek v. Kettlewell*, 1 Hare 476; *Godsal v. Webb*, 2 Keen 99; *Cecil v. Butcher*, 2 Jac. & W. 573; *McFadden v. Jenkyns*, 1 Ph. 153.

1. 1 Perry on Trusts, § 100.

2. *Garrard v. Lauderdale*, 2 R. & M. 451; *Ellison v. Ellison*, 6 Ves. 662; *Antrobus v. Smith*, 12 Ves. 47; *Denning v. Ware*, 22 Beav. 184; *Kiddill v. Farnell*, 3 Sm. & Gif. 428; *Colman v. Sarell*, 3 Bro. C. C. 12; 1 Ves. Jr. 50; *Dillon v. Coppin*, 4 Myl. & C. 647; 4 Jur. 427; *Edwards v. Jones*, 1 Myl. & C. 226; *Bridge v. Bridge*, 16 Beav. 315; *Latham v. Vernon*, 29 Beav. 604; *Holloway v. Headington*, 8 Sim. 324. See *Stone v. Hackett*, 12 Gray (Mass.) 227.

But a deed reciting, "The following notes I leave in trust with E. C., to be divided among A, B and C, at my death," has been held sufficient to create a present trust. *Egerton v. Carr*, 94 N. Car. 648; 55 Am. Dec. 630. See also *Ireland v. Geraghty*, 11 Biss. (U. S.) 465; *Forney v. Remy*, 77 Iowa 549.

So, a receipt by W., acknowledging that a note had been indorsed and delivered to him, "to hold the same and the proceeds thereof, to secure, indemnify, and save harmless M. for being surety for the payee," was held to show a trust relation, which, however, was limited by the terms of the receipt and a resolution which had been passed by the payee's directors. *Morris v. Webb*, 45 N. Y. Super. Ct. 305. See

also *Rogers Locomotive, etc., Works v. Kelly*, 19 Hun (N. Y.) 399.

And where mere delivery, or indorsement and delivery will convey the legal title, a valid trust may thus be created as between the parties. *Stone v. Hackett*, 12 Gray (Mass.) 227; *Wyble v. McPheters*, 52 Ind. 393; *Dresser v. Dresser*, 46 Me. 48; *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231; *Vreeland v. Van Horn*, 17 N. J. Eq. 137; *Weston v. Barker*, 12 Johns. (N. Y.) 276; 7 Am. Dec. 319; *Padfield v. Padfield*, 68 Ill. 210; *Minchin v. Merrill*, 2 Edw. Ch. (N. Y.) 332.

3. *Kekewich v. Manning*, 1 De G. M. & G. 187; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Roberts v. Lloyd*, 2 Beav. 376; *Pearson v. Amicable Office*, 27 Beav. 229; *Airey v. Hall*, 3 Sm. & Gif. 315; *Blakely v. Brady*, 2 D. & W. 311; *Lewin on Trusts* § 58. If part of the property is capable of legal transfer, and part is not, the former must be actually transferred. *Woodford v. Charnley*, 28 Beav. 96.

4. *Edwards v. Jones*, 1 Myl. & C. 226; *Ward v. Audland*, 8 Beav. 201; *Meek v. Kettlewell*, 1 Hare 464; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285.

5. 1 Perry on Trusts, § 102; *Gilbert v. Overton*, 2 Hem. & M. 110; *Kekewich v. Manning*, 1 De G. M. & G. 188; *Voyle v. Hughes*, 2 Sm. & Gif. 18; *Lambe v. Orton*, 1 D. & S. 125; *Woodford v. Charnley*, 28 Beav. 99; *In re Way's Trust*, 2 De G. J. & S. 365.

6. *Rycroft v. Christy*, 3 Beav. 238;

in the name of another, and even where he declares that he intends to give it to the latter or hold it in trust, it is sometimes equally difficult to determine whether the gift or trust is executed or not. Transactions not of such a nature as to constitute perfect gifts have been held to constitute trusts,<sup>1</sup> but an imperfect gift is not necessarily good as a trust.<sup>2</sup> That branch of the subject relating to gifts has been fully treated elsewhere,<sup>3</sup> and in connection therewith the subject of trusts in bank deposits also received some consideration; but, as the matter is an important one, and, as the authorities are conflicting, it seems desirable to consider the subject further in this connection.

A mere deposit of money in the name of another, without any declaration of trust or notice to the latter, is not sufficient to create a trust.<sup>4</sup> But a deposit in bank, accompanied by a

McFadden v. Jenkyns, 1 Hare 458; 1 Ph. 153.

1. See Ray v. Simmons, 11 R. I. 266; 23 Am. Rep. 447; 15 Am. L. Reg. N. S. 701, and note; Richardson v. Richardson, L. R., 3 Eq. 686; Blasdell v. Locke, 52 N. H. 238; Minor v. Rogers, 40 Conn. 512; 16 Am. Rep. 69; Gerrish v. New Bedford Sav. Inst., 128 Mass. 159; 35 Am. Rep. 365; Morgan v. Malleeson, L. R., 10 Eq. 475; Badderley v. Badderley, 9 Ch. Div. 113. But these English cases have been severely criticised.

Where an instrument has been executed, which transfers personal property to one in trust, to pay the income and profits to the grantor for her life, and directs that money coming into the grantee's hands by virtue of the trust shall be invested in real estate under the grantee's direction, and that after the grantor's death the property shall be distributed by the grantee among the children of the grantor, such an instrument constitutes neither a gift *inter vivos* nor a testamentary disposition, and operates *in presenti* as a deed of trust. Forney v. Remey, 77 Iowa 549.

2. Pope v. Burlington Sav. Bank, 56 Vt. 284; 48 Am. Rep. 784; Young v. Young, 80 N. Y. 422; 36 Am. Rep. 640; Gerry v. Howe, 130 Mass. 350; Heartley v. Nicholson, 44 L. J. Ch. App. N. S. 279; Richards v. Delbridge, L. R., 18 Eq. 11; Moore v. Moore, 43 L. J. Ch. 623; Milroy v. Lord, 4 De G. F. & J. 264; Jones v. Lock, L. R., 1 Ch. 25.

As said by Sir George Jessel in Richards v. Delbridge, L. R., 18 Eq. 11, "The making a man trustee involves an intention to become a trustee, whereas words of gift show an intention to give over property to another, and not to retain it in the donor's

hands for any purpose, fiduciary or otherwise."

"I think it very important, indeed," says Hall, V. C., in Moore v. Moore, 43 L. J. Ch. 623, "to keep a clear and definite distinction between these cases of imperfect gifts, and cases of declarations of trust; and that we should not extend beyond what the authorities have already established, the doctrine of declarations of trust, so as to supplement what would otherwise be mere imperfect gifts." See also Ellis v. Secor, 31 Mich. 185; 18 Am. Rep. 178; Stone v. Bishop, 4 Cliff. (U. S.) 593; Sheedy v. Roach, 124 Mass. 472; 26 Am. Rep. 680; Warriner v. Rogers, L. R., 16 Eq. 340; *In re* Breton's Estate, 19 Ch. Div. 416; Pethybridge v. Burrows, 53 L. T. 5; Kinnebrew v. Kinnebrew, 35 Ala. 628; Badgley v. Voltrain, 68 Ill. 25; 18 Am. Rep. 541; Banks v. Mays, 3 A. K. Marsh. (Ky.) 435; Helfenstein's Estate, 77 Pa. St. 328; 18 Am. Rep. 449.

3. GIFTS, vol. 8, pp. 1323-1330.

4. Beaver v. Beaver, 117 N. Y. 421; 30 Cent. L. Jour. 108, and note; Mabie v. Bailey, 95 N. Y. 206; Marcy v. Amazeen, 61 N. H. 131; 60 Am. Rep. 320; and a pass book which designates the depositor as trustee for another, is not conclusive evidence of a trust. Parkman v. Suffolk Sav. Bank, 151 Mass. 218. Compare Martin v. Funk, 75 N. Y. 134; 31 Am. Rep. 446. And see Robinson v. Ring, 72 Me. 140; 39 Am. Rep. 308; Case v. Dennison, 9 R. I. 88; 11 Am. Rep. 222; Grymes v. Hone, 49 N. Y. 17; 10 Am. Rep. 313; Boone v. Citizens' Sav. Bank, 84 N. Y. 83; 38 Am. Rep. 498; Weber v. Weber, 58 How. Pr. (N. Y. Supreme Ct.) 255; Kerrigan v. Rantigan, 43

declaration on the part of the depositor that it is in trust for another, and the opening of an account or the receipt of a pass book in the name of the depositor as trustee for such person, are sufficient to constitute a valid declaration of trust.<sup>1</sup> And the retention of the pass book by the depositor, or the reservation of the right to control the fund as trustee, is not inconsistent with the theory of a trust, and will not defeat it, especially where the beneficiary has notice of the trust.<sup>2</sup> If the pass book is delivered to the beneficiary and the interest paid to him, there would seem to be even stronger reasons for holding the deposit his.<sup>3</sup> Evidence *aliunde* is

Conn. 17; *Alger v. North End Sav. Bank*, 146 Mass. 418; 4 Am. St. Rep. 331; *Sherman v. New Bedford Five Cents Sav. Bank*, 138 Mass. 381; *Stone v. Bishop*, 4 Cliff. (U. S.) 593.

So, where an insurance company deposited money with a banking firm, as a condition upon which the firm allowed the company to use its name in advertising its business in Europe, and the company advertised that credit would be maintained at the full amount, the language of a resolution of the company, and of a letter of the banking firm, showing an intention that the deposit should be for the protection of European policy holders, was held not to create a trust in favor of such policy holders, the company retaining control over the deposit. *Pierson v. Drexel*, 11 Abb. N. C. (N. Y.) 150. See also *Suntle v. Spear*, 34 N. J. Eq. 336.

1. *Macy v. Williams*, 55 Hun (N. Y.) 489. See also *In re Gaffney's Estate*, 146 Pa. St. 49; *Matter of George's Estate*, 23 Abb. N. Cas. (N. Y.) 43; *Davis v. Ney*, 125 Mass. 590; 28 Am. Dec. 272.

Thus, where a man made deposits in a bank in the names of his children, and his own name as trustee, and told them that the deposits were for them and should be theirs at his death, but did not deliver the books to them, it was held that the deposits were held by the father as trustee, and that the children were entitled thereto without a reduction from their distributive shares of his estate, and it was also held that, though the deposit for the benefit of one child was withdrawn and reinvested in another bank in the depositor's own name, the child was entitled thereto. *Atkinson's Petition*, 16 R. I. 413.

So, where a husband deposited money in a savings bank in his own name, as trustee for his wife's granddaughter, and informed her and others

of such fact, it was held that, although he afterwards withdrew the money, a trust was created by the deposit. *Mable v. Bailey*, 95 N. Y. 206; *Willis v. Smith*, 91 N. Y. 297; *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446.

So, where money is deposited in the hands of a third person in trust for the depositor's minor son, with an agreement that a trustee shall retain it for a specified time at a specified rate of interest, and in the meantime prepare a deed of trust, a complete trust is created and no title is left in the depositor to dispose of the money for his own benefit. *Sherwood v. Andrews*, 2 Allen (Mass.) 79.

So, a delivery of a bank book to a trustee, with the intention of creating a trust, but without any assignment, is sufficient. *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231.

2. *Barker v. Frye*, 75 Me. 29; *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Weaver v. Emigrant, etc., Sav. Bank*, 17 Abb. N. Cas. (N. Y.) 82; 31 Am. Rep. 446; *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115; *In re Smith's Estate*, 144 Pa. St. 428; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447. See also *Walker v. Crews*, 73 Ala. 412; *Davis v. Ney*, 125 Mass. 590; 28 Am. Dec. 272; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Blanchard v. Sheldon*, 43 Vt. 512; *Carson v. Phelps*, 40 Md. 73; *Exton v. Scott*, 6 Sim. 31; *Fletcher v. Fletcher*, 4 Hare 67; *Wheatley v. Purr*, 1 Keen 551; *Souverybye v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Smith v. Ossipee Valley Sav. Bank*, 64 N. H. 228; *Kerrigan v. Rantigan*, 43 Conn. 17; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69.

3. In a recent case a sum of money was deposited in a bank in the depositor's own name as trustee for M., as shown by the pass book and books of

generally held to be admissible for the purpose of showing the intention of the depositor.<sup>1</sup>

The question is one of fact, and if it appears from written or oral declarations, from the nature of the transaction, the relation of the parties, and the purpose of the deposit, that the fiduciary relation is completely established, the trust will be enforced, although it is a mere voluntary settlement.<sup>2</sup>

the company; the pass book was in the possession of M., at the time of the depositor's death. It was held sufficient, in the absence of rebutting evidence, to create a trust in favor of M. *In re Gaffney's Estate*, 144 Pa. St. 49. See also *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231.

1. *Northrop v. Hale*, 72 Me. 275; *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159; 35 Am. Rep. 365; *Davis v. Ney*, 125 Mass. 590; 28 Am. Dec. 272. See also *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; *Weber v. Weber*, 9 Daly (N. Y.) 211.

2. *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159; 35 Am. Rep. 365; *Sherwood v. Andrews*, 2 Allen (Mass.) 79; *Urann v. Coates*, 109 Mass. 581; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 48 Am. Rep. 781; *Webb's Estate*, 49 Cal. 541; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Sayre v. Weil*, 94 Ala. 466; *Wyble v. McPheters*, 52 Ind. 393; *Ex p. Pye*, 18 Ves. 140; *Milroy v. Lord*, 4 De G. F. & J. 264; *Penfold v. Mould*, L. R., 4 Eq. 562; *Wheatley v. Purr*, 1 Keen 551; *McFadden v. Jenkyns*, 1 Hare 458; *Heartley v. Nicholson*, L. R., 19 Eq. 233; *Thorpe v. Owens*, 5 Beav. 224. All the cases agree upon this general rule, but, as will be seen from an examination of the authorities above cited, they differ as to its application to particular facts.

The decedent had delivered his bank book before his death to the plaintiff, assigning the money verbally to him in trust for the decedent's children, reserving the right to draw upon the trustee for such sums as he should need, and this trust the plaintiff accepted. No assignment in writing was ever made to the plaintiff, but the decedent executed to the bank a power of attorney to collect the money and pay it over to the plaintiff, and this was done. It was held to be a valid trust. *Hellman v. McWilliams*, 70 Cal. 449.

If the owner of property conveys it to another in trust, or if the owner of chattels clearly declares, whether in parol or in writing, that he holds it *in presenti* in trust for another, the trust is created. *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447.

Prior to her death, the testatrix, without the knowledge of her sons, opened an account at a savings bank in their names. She added to, and drew from, the funds at various times, sending most of the money drawn to one of her sons. Afterward on the refusal of the bank to honor her checks, the books were changed, without erasing the sons' names, so as to make the funds payable to her order, the testatrix saying that, at her death, she wished the money to go directly to her sons. Shortly before her death, she gave checks to her sister, who was named executrix of her will, on which the funds were drawn and given to the testatrix, who afterward redelivered them to her sister, who deposited them in their joint names, payable to the order of either. The executrix, after the testatrix's death, drew the funds in her individual name. The will gave all the money in the bank to one son, payable to him at the discretion of the executrix. The latter testified that the testatrix said, on giving her the checks, that the money was for her, and that the surviving son must not know it, as he was improvident. It was held that a complete and irrevocable trust had been created for the sons, with the testatrix as trustee. *Matter of George's Estate* (Supr. Ct.), 3 N. Y. Supp. 246; 23 Abb. N. C. (N. Y.) 43.

So, where certain bonds were found in the box of a testator in the vaults of a trust company, in an envelope indorsed "held for K.," and signed with the decedent's initials, K. being a nephew who had lived with and been raised by him; and an entry in the decedent's private account book in his own handwriting recited, "\$1,300 of these bonds I bought for, and are the property of,



**IX. CONSTRUCTION OF TRUSTS—1. Generally.**—It has been said, with reference to wills, that no arbitrary rule can be laid down for

my 'nephew and godson, K., and belong to him," and on another page interest on the bonds was credited to K., it was held that there was sufficient to create a trust in favor of K., and that it was immaterial whether or not the testator in his lifetime actually declared to another his intention to create a trust. *In re Smith's Estate*, 144 Pa. St. 428. But see *Markey v. Markey* (Com. Pl.), 13 N. Y. Supp. 925; *Jones v. Wilson*, 60 Ala. 332.

Where money is deposited in a savings bank by one person for the use of another, so as to constitute a trust on the death of both the depositor and beneficiary, the money may be collected by the executor of the beneficiary. *Fowler v. Bowery Savings Bank*, 47 Hun (N. Y.) 399.

A deposited money in a savings bank in the name of "A, for his daughter B." It was held that this made him trustee for his daughter, even though he retained the bank book and died, leaving a will which could operate on nothing if not on this fund. *Weaver v. Emigrant, etc., Industrial Sav. Bank*, 17 Abb. N. Cas. (N. Y.) 82.

So, where a father owned bonds and deposited them with his son, taking a receipt therefor which recited that they were to be held by the son in trust for a third person, but that they were "for, and during, his life to be subject to the order" of the father. The father stated at the time, that it was his purpose to enable the son to swear, in a certain contingency, that he had none of his property in his hands. The proceeds of these bonds were paid to the father during his life. It was held that a valid trust was created, and that, on the father's death, the *cestui que trust* became entitled to such bonds as remained undisposed of at that time. *Von Hesse v. MacKaye*, 62 Hun (N. Y.) 458. See also *Sayre v. Weil*, 94 Ala. 466.

Mr. Crosswell, in a valuable article in the *American Law Review*, after a careful consideration of the leading authorities, decided at the time he wrote (1884), sums up the result of his investigation upon this subject in the following propositions: "*First*. If one deposits money in his own name 'as trustee' for another, or 'in trust' for another, the transaction is open to fur-

ther evidence. If, on the whole evidence, it appears that a trust was intended by the depositor, it will be so held. If it appears to have been a device intended to gain some advantage for the depositor, no trust will be established. An important piece of evidence tending to establish the trust, is a notification to the supposed beneficiary that such a deposit has been made. This is not essential, however, as other evidence may establish equally clearly the donative disposition of the depositor. On the other hand, the non-delivery of the bank book to the beneficiary is not important, as the trustee, retaining the control legally of the fund, would naturally retain the bank book. The drawing of interest by the donor, for his own use, or withdrawing part of the principal, is evidence that he did not contemplate a trust. *Second*. If one deposits money in the name of another, it is generally held that this transfers the property to the donee, if done with the proper donative disposition. Some courts hold the donor a trustee, some the bank a trustee, some that the legal title vests immediately in the donee, but the result is generally the same, and the retention of the bank book by the donor does not generally make any difference in the result. Of course, in those cases where it is shown that such deposit was made merely to gain some advantage to the donor, as further deposits in the savings bank, security from attachment, etc., there being no proper donative disposition, there is no transfer of the property. *Third*. If one transfers money already standing in his name to another, as trustee for a third, the conveyance must be such as will transfer the legal interest in the deposit to the trustee. If a written assignment is required that must be made. If not, a delivery of the bank book, accompanied by proper words of gift, will establish the trust. *Fourth*. If one transfers money already standing in his name to another as a direct gift to him, the transfer must be accompanied by delivery of the bank book, the evidence of the deposit. And in all cases there must be no evidence that the donor intended to retain control of the deposit or the legal interest in the deposit." "*The Formation and Validity of Voluntary Trusts*," 18 Am. Law Rev. 379, 406.

determining whether or not a trust has been created,<sup>1</sup> and that each case must be determined according to the language and circumstances peculiar to it.<sup>2</sup> As will be seen, however, from an examination of the adjudged cases, the courts endeavor to ascertain and carry out the intention of the testator or settlor,<sup>3</sup> and if there is sufficient to show an intention to create a present trust, the trust will be enforced, provided it is sufficiently definite, certain, and complete. In determining the intention of the testator or settlor, the entire instrument should be considered,<sup>4</sup> and the

1. Warner v. Bates, 98 Mass. 274; Hess v. Singler, 114 Mass. 56; Spooner v. Lovejoy, 108 Mass. 529; Smith v. Bell, 6 Pet. (U. S.) 75; Wright v. Atkins, T. & R. 157; Knight v. Knight, 3 Beav. 148; Knight v. Boughton, 11 C. & F. 548.

2. Negroes Chase v. Plummer, 17 Md. 165.

3. In Warner v. Bates, 98 Mass. 274, the court, by Bigelow, C. J., goes into a discussion of this question at considerable length, saying, among other things: "We see no sufficient ground for calling in question the wisdom or policy of the rule of construction, uniformly applied to wills in the courts in *England* and in most of the *United States*, that words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust, and the subject-matter on which it is to attach, or from which it is to arise and be administered. The criticisms, which have been sometimes applied to this rule by text writers and in judicial opinions, will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But dif-

ficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trusts are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestui que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee; the just and reasonable interpretation is, that a trust is created, which is obligatory and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended." In another case, the same court applied the same rule, that the intent of the settlor must govern, with a different result, it being held that no trust was created, as none was intended, notwithstanding the use of the words "in trust." Carr v. Richardson, 157 Mass. 576.

4. Parker v. Murch, 64 Me. 54; Major v. Herndon, 78 Ky. 123; Brown v. Brown, 12 Md. 87; Mullany v. Mullany, 4 N. J. Eq. 16; 31 Am. Dec. 238; Cincinnati, etc., R. Co. v. Indiana, etc., R. Co., 44 Ohio St. 287; Pensacola Gas Co. v. Lotze, 23 Fla. 368; Kelly v. Stinson, 8 Blackf. (Ind.) 387; Brumfield v. Drook, 101 Ind. 190. So, several instruments, part of the same transaction, should be construed to-

language used will be given its natural and ordinary meaning,<sup>1</sup> unless there is something to show that it was intended to be taken in a different sense.

So, in determining the nature of the trust estate, the terms of the trust, and the manner in which it is to be carried out, the intention of its creator is usually an important factor, and will generally control;<sup>2</sup> but this rule does not always hold good, especially in cases of executed trusts, and the rules of construction are not precisely the same in all cases. Whether a trust is perfectly executed or merely executory, is a question of fact to be determined by the purposes and objects which the settlor had in view, as manifested in the writing and as shown by the situation and relation of the parties and property.<sup>3</sup> If the language used is indefinite, ambiguous, and of doubtful construction, the practical interpretation or construction given to it by the parties is of great, if not

gether. *Hannig v. Mueller*, 82 Wis. 235; *Brumfield v. Boutall*, 24 Hun (N. Y.) 451; *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258; *Kintner v. Jones*, 122 Ind. 148.

Where, from the language of a will, it is apparent that it was the intention of the testator to vest the estate in his daughters, such intention will control, and a trust will not be presumed from the mere expression of a wish that the husbands of the daughters should not control the inheritance. *Ringe v. Kellner*, 59 Pa. St. 450.

Where the whole purpose of a deed can be accomplished under the powers therein conferred, an intent to create a trust will not be presumed in the absence of an express declaration to that effect. *Hermanns v. Robertson*, 64 N. Y. 332.

1. *Ellis v. Ellis*, 15 Ala. 296; 50 Am. Dec. 132; *State v. Joyce*, 48 Ind. 310; *Evans v. King*, 3 Jones Eq. (N. Car.) 387; *Porter v. Rutland Bank*, 19 Vt. 410.

The creation of a trust depends upon intention; and, where it is clearly expressed in a grant that the grantee is not to have the benefit, but to hold to the beneficial use of another, it will make him a trustee holding the title for the beneficial owner. *Mory v. Michael*, 18 Md. 227.

Where a testator gave property to trustees to hold one part for his widow, one part for a son, and one part for a daughter, it was held that but one, and not three separate and distinct trusts, was intended. *Bell v. Towner*, 55 Conn. 364.

2. *Inglis v. Sailor's Snug Harbor*, 3 Pet. (U. S.) 118; *Chase v. Lockerman*,

11 Gill & J. (Md.) 185; 35 Am. Dec. 277; *Wright v. Jones*, 105 Ind. 21; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390.

Thus, where a conveyance of property in trust is equally susceptible of two interpretations, the one should be adopted which will carry out the main purpose of the donor, and best give effect to the general scheme had in view by him. *Dexter v. Episcopal City Mission*, 134 Mass. 394. See also *Butler v. Moore*, 94 Ind. 359.

But a construction which would confer upon the trustee absolute and uncontrollable powers will not be favored. *Haydel v. Hurck*, 5 Mo. App. 267.

3. *Gaylord v. Lafayette*, 115 Ind. 423. See also *Kyle v. Ballenger*, 79 Ala. 516; *Haxton v. McClaren*, 132 Ind. 235; *Sturges v. Knapp*, 31 Vt. 1.

In an interesting case decided by the supreme court of *Illinois*, the facts were as follows: A father transferred notes and other securities to his son, taking from him an agreement to contribute two thousand dollars per annum to his father's support for life, and to pay certain named persons two-thirds of the proceeds of the property transferred upon the father's death for the use of a brother and sister named, which amounts the trustees were to dispose of as directed by the father's will. At the same time, and as a part of the same transaction, the father executed his will and placed it with the agreement in the hands of one of the trustees for safe keeping. Oral evidence adduced showed that the father's intention at the time was to divide the notes and securities equally among his three children. The court held that the trust

controlling influence.<sup>1</sup> Technical words are generally given their technical and accepted meaning, but if, from an examination of the entire instrument, it clearly appears that they were used in a different sense, they will be construed as actually intended by the person who used them,<sup>2</sup> unless some arbitrary rule of law, or the circumstances of the case, prevent such a construction. Thus, the words "legal representatives" have been construed as synonymous with "heirs at law," or "descendants,"<sup>3</sup> and in a recent case, where there was no evidence outside of the deed itself throwing light upon the intention of the grantor, it was held that the conveyance of land in trust for the maintenance of the grantor out of the income, with a provision that the land should, upon his death, descend to his legal representatives, created an irrevocable trust, and that after his decease the property descended to his heirs.<sup>4</sup>

**2. Executed Trusts.**—Equitable estates, where the trust is executed, are governed by the same rules as legal estates,<sup>5</sup> and the

created by the agreement between the father and son was an executed trust, and that the two-thirds to be paid to the trustees named was to be disposed of by them as directed by the will which the father made at the time, and that he had no power afterward to alter this disposition of the property by a subsequent will. *Padfield v. Padfield*, 72 Ill. 322.

1. *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Topliff v. Topliff*, 122 U. S. 121; *Gaylord v. Lafayette*, 115 Ind. 423; *Reissner v. Oxley*, 80 Ind. 580; *Lyles v. Lescher*, 108 Ind. 382; *Johnson v. Gibson*, 78 Ind. 284; *Bishop on Contracts*, § 598. See *CONTRACT*, vol. 3, pp. 867, 869, notes.

2. The context often changes the usual meaning of words. *Merchant's Nat. Bank v. Abernathy*, 32 Mo. App. 211; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157; *Phelps v. Smith*, 15 Ill. 574; *Barbour v. National Exch. Bank*, 45 Ohio St. 133; *Hammon v. Mason*, etc., *Organ Co.*, 92 U. S. 724; *Cornelius v. Smith*, 55 Mo. 528.

3. *Ewing v. Warner*, 47 Minn. 446; *Warnecke v. Lembca*, 71 Ill. 91; 22 Am. Rep. 85; *Grand Gulf R.*, etc., *Co. v. Bryan*, 8 Smed. & M. (Miss.) 234.

4. *Ewing v. Jones*, 130 Ind. 247. The same deed was given the same construction by the supreme court of *Minnesota* in the case of *Ewing v. Warner*, 47 Minn. 446, and by the *Missouri* supreme court in *Ewing v. Shannahan*, 113 Mo. 188. But in the later case of *Ewing v. Wilson*, 132 Ind. 223, parol evidence was admitted to

show that the deed construed in the cases just cited was procured by fraud, and as it was revoked by a reconveyance, the heirs took nothing.

5. *Mullany v. Mullany*, 4 N. J. Eq. 16; 31 Am. Dec. 238; *Cushing v. Blake*, 30 N. J. Eq. 689; *Harrison v. Battle*, 1 Dev. & B. Eq. (N. Car.) 213; *Noble v. Andrews*, 37 Conn. 346; *Sprague v. Sprague*, 13 R. I. 703; *Frye v. Porter*, 1 Mod. 300; *Cowper v. Cowper*, 2 P. Wms. 753; *Garth v. Baldwin*, 2 Ves. 646; *Jones v. Morgan*, 1 Bro. C. C. 206; *Roberts v. Dixwill*, 1 Atk. 610; *Spence v. Spence*, 12 C. B. N. S. 199; 104 E. C. L. 198; *Coape v. Arnold*, 2 Sm. & Gif. 311; *Choice v. Marshall*, 1 Kelly, (Ga.) 97.

In a recent case, a married woman and her husband joined in the conveyance of her real estate to the trustees to manage, and, after paying the expenses of such management, to hold for her sole use and benefit and pay her such portion of the income as they, in their discretion, might think proper during her life, on her sole receipt, and on her death to convey the entire estate to her heirs. The object of the married woman appeared to be to protect herself and not to benefit her heirs, and the settlement was held subject to the rule in *Shelley's* case, and that, therefore, the settlor took an equitable fee simple in the estate conveyed to the trustees. *Ex p. Angell*, 13 R. I. 630.

The declaration of an executed trust of land is to be subject to the same construction as if it had been the conveyance of the legal estate, and, there-

rule in Shelley's case, which often defeats the actual intention of the testator or grantor, is applied in equity to executed trusts,<sup>1</sup> as well as in ordinary cases at law, except where, as in many states, it has been abolished by statute; or, to state the rule generally, in the construction of executed trusts, technical terms are construed according to their legal and technical meaning.<sup>2</sup>

**3. Executory Trusts**—*a. MARRIAGE SETTLEMENTS.*—In construing marriage articles, the courts are aided by the presumption that it was the intention of the parties to make provision for the issue of the marriage, and not to put it in the power of either party to defeat that purpose by giving more than a life estate to each.<sup>3</sup> Thus, although the real estate is limited to the heirs of

fore, if it does not contain words of inheritance will pass only an estate for life. *Evans v. King*, 3 Jones Eq. (N. Car.) 387.

1. *Noble v. Andrews*, 37 Conn. 346; *Wright v. Pearson*, 1 Eden 119; *Austen v. Taylor*, 1 Eden 367; *Jones v. Morgan*, 1 Bro. C. C. 206; *Carradine v. Carradine*, 33 Miss. 698. But where the word "heir" is used as a mere *descriptio personæ*, and not as a term of succession, as when the ultimate limitation is "to the person who may then be the heir of A," the rule does not apply. *Greaves v. Simpson*, 10 Jur. N. S. 609.

2. *Wright v. Pearson*, 1 Eden 125; *Jervoise v. Northumberland*, 1 Jac. & W. 571; *Brydges v. Brydges*, 3 Ves. 125; *Austen v. Taylor*, 1 Eden 367; *McPherson v. Snowden*, 19 Md. 197.

They are subject to the same construction as common-law conveyances, and the trust estate is governed by the same rules. *Badgett v. Keating*, 31 Ark. 400. Thus, the words, "heirs at law," when used in conveying a trust estate, are generally given their literal technical meaning. *Merrill v. Preston*, 135 Mass. 451.

3. *Trevor v. Trevor*, 1 P. Wms. 622; *Streatfield v. Streatfield*, 1 W. & T. L. C. 33; *Blackburn v. Stables*, 2 Ves. & B. 369; *Griffith v. Buckle*, 2 Vern. 13; *Stonor v. Curwen*, 5 Sim. 268; *Davies v. Davies*, 4 Beav. 54; *Lambert v. Peyton*, 8 H. L. Cas. 1; *Lafitte v. Lawton*, 25 Ga. 305; *Ardis v. Printup*, 39 Ga. 648; *Wallace v. Wallace*, 82 Ill. 530; *Phelps v. Phelps*, 72 Ill. 545; 22 Am. Rep. 149; *Brown v. Brown*, 31 Gratt. (Va.) 502.

In the case of *Cushing v. Blake*, 30 N. J. Eq. 689, the court, by Depue, J., after a thorough investigation of the subject, stated the following proposi-

tions as expressing the law by which courts should be governed in construing marriage settlements: "There is a difference in one respect between marriage articles and a devise by will. Under the artificial rule in Shelley's case, the gift to an ancestor for life, with a limitation over to heirs or heirs of the body, creates in him an estate in fee or in tail, and the limitation over is capable of destruction by him by conveyance or devise if the estate be a fee simple, or by fine and common recovery if it be a fee tail. When these technical terms are used in an agreement for a settlement in view of marriage, the court will infer from the nature of the agreement that the parties contemplated provision for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be made in such a manner as will prevent the destruction of the limitation over to the issue. But this doctrine of the court is applicable only so long as the agreement for the settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed complete in itself and perfect so that it requires only to be obeyed and fulfilled by the trustees according to the provisions of the settlement, the trust will be construed in the same manner as similar trusts created for other purposes." See also *Blackburn v. Stables*, 2 Ves. & B. 367; *Jervoise v. Northumberland*, 1 Jac. & W. 559; *Rochford v. Fitzmaurice*, 2 Dr. & W. 18; *Sackville West v. Holmesdale*, L. R., 4 H. L. Cas. 543; *Neves v. Scott*, 9 How. (U. S.) 196; *Carroll v. Renich*, 7 Smed. & M. (Miss.) 798; *Tillinghast v. Coggeshall*, 7 R. I. 383.

In a *Massachusetts* marriage settle-

the body, or the issue of either or both of the parties,<sup>1</sup> or to the issue and their heirs,<sup>2</sup> equity, instead of construing the language strictly, according to its technical meaning, will construe it to mean that the estate is limited to one or both of the parents for life, and the children will take it after their death as purchasers.<sup>3</sup> So, if it is shown that a settlement does not express the true intention of the parties, it may be corrected and reformed in equity so as to carry out such intention.<sup>4</sup>

*b. WILLS.*—In the construction of wills, the intention of the testator is the pole-star, by which the courts should steer,<sup>5</sup> and the construction of such instruments has been more liberal with a view to carrying out such intention than in the case of deeds, but technical expressions often control even in the construction of wills.<sup>6</sup> Other instruments may, by reference, be incorporated in the will, or become part thereof, in such a manner that they

ment, made before the abolition of the rule in *Shelley's* case, whereby the settlor conveyed all of her property to a trustee for the sole and separate use and benefit of the settlor and her heirs, the trustee covenanted that he would, upon her death, transfer the property to her children, if she should leave any, but made no express covenant as to her heirs at law. It was held that the settlor took an equitable estate from the time of her marriage for life, with a contingent remainder to her children, if she should leave any, and a reversion to herself in case she should die without issue, and that this reversionary interest she could lawfully dispose of by will. *Loring v. Eliot*, 16 Gray (Mass.) 568.

A testator gave land to R. in trust for M., to be sold if M. should die childless, and the proceeds to be divided among the testator's children, but if M. should leave children, the land to be theirs. It was held that R. took a fee, that the trust was not executed, that the interest of the testator's children was a contingent remainder, and that they were entitled, not to the land, but to its proceeds. *Farr v. Gilreath*, 23 S. Car. 602.

1. *Dod v. Dod*, Amb. 274. See also *Trevor v. Trevor*, 1 P. Wms. 622; *Griffith v. Buckle*, 2 Vern. 13; *Davies v. Davies*, 4 Beav. 54.

2. *Phillips v. James*, 2 D. & S. 404.

3. See *Handick v. Wilkes*, 1 Eq. Cas. Ab. 393; *Rochford v. Fitzmaurice*, 2 Dr. & W. 18; *Barnaby v. Griffin*, 3 Ves. 206; *Warrick v. Warrick*, 3 Atk. 291; *Horne v. Barton*, 19 Ves. 398; *West v. Errissey*, 2 P. Wms. 349; *Jones v.*

*Langton*, 1 Eq. Cas. Ab. 392; 1 *Perry on Trusts*, § 361. See also *MARRIAGE SETTLEMENTS*, vol. 14, p. 538.

4. *Honour v. Honour*, 1 P. Wms. 123; *Warrick v. Warrick*, 3 Atk. 293; *Roberts v. Kingsley*, 1 Ves. 238; *Briscoe v. Briscoe*, 7 Ir. Eq. 129; *Bold v. Hutchinson*, 5 De G. M. & G. 568; *Neves v. Scott*, 9 How. (U. S.) 197; *Gause v. Hale*, 2 Ired. Eq. (N. Car.) 241; *Smith v. Maxwell*, 1 Hill Eq. (S. Car.) 101; *Allen v. Rumph*, 2 Hill Eq. (S. Car.) 1. Innocent purchasers, whose rights intervene, will, of course, be protected. *Warrick v. Warrick*, 3 Atk. 291; *West v. Errissey*, 2 P. Wms. 349.

5. 4 *Kent's Com.* \*537; *Lutz v. Lutz*, 2 Blackf. (Ind.) 72; *Baker v. Riley*, 16 Ind. 479; *Conger v. Lowe*, 124 Ind. 368; *Belsay v. Engel*, 107 Ill. 182; *Daniel v. Whartenby*, 17 Wall. (U. S.) 639; *Wollett v. Harris*, 5 Madd. 452; *Dillaye v. Greenough*, 45 N. Y. 438; *Shaw v. Spencer*, 100 Mass. 382; 1 *Am. Rep.* 115; 97 *Am. Dec.* 107; *Wright v. Jones*, 105 Ind. 21; *Porter v. Rutland Bank*, 19 Vt. 410.

Thus, the rule in *Shelley's* case does not ordinarily apply to executory trusts. *Carrigan v. Drake*, 36 S. Car. 354.

6. 4 *Kent's Com.* \*537; *Lambert v. Paine*, 3 Cranch (U. S.) 134; *Ide v. Ide*, 5 Mass. 501; *Doe v. Wright*, 8 T. R. 66; *Ridgeway v. Lanphear*, 99 Ind. 251; *Allen v. Craft*, 109 Ind. 476; 58 *Am. Rep.* 525.

Where land was devised to A in trust for the testator's daughter and her children, and all the beneficiaries died, it was held that the trustee took the fee

should be considered in determining the intention of the testator.<sup>1</sup> And, although a devise to one "for his use and benefit during his life, and then to his heirs and assigns," is within the rule in Shelley's case, an executory trust, with a discretionary power in the trustee, is not within that rule.<sup>2</sup> If it clearly appears from the entire will, where the trust is executory, that the testator did not mean to use the expressions therein contained in their strict

of the land for the use of the beneficiaries, and that the estate was subject to the same rules as a legal estate, and did not revert on the death of the beneficiaries, but passed by descent. *Gill v. Logan*, 11 B. Mon. (Ky.) 231.

Where a testator left property to trustees in trust for the equal use and benefit of his four sisters—naming them—and their heirs forever, to be managed in such way as the trustees might think to the best interest of each, it was held that the sisters took a fee simple interest in the land, and an absolute property in the personalty, but that the legal title remained in the trustees for them to manage the property as they might think for the best interest of the devisees respectively. *Bass v. Scott*, 2 Leigh (Va.) 356.

1. *Fesler v. Simpson*, 58 Ind. 83; *Fickle v. Snepp*, 97 Ind. 289; 49 Am. Rep. 499; *Cumming v. Reid Memorial Church*, 64 Ga. 105. See also *Hannig v. Mueller*, 82 Wis. 235; *Kintner v. Jones*, 122 Ind. 148.

In *Fesler v. Simpson*, 58 Ind. 83, A and his wife signed a deed of conveyance of certain real estate, and acknowledged its execution before a proper officer, conveying to his son W. and his children, to have and to hold said premises to the said W. during his natural life, and, at his death, to his children in fee simple. On the same day A executed his will, in a clause of which he gave to W. and his children "the tract of land described in the deed to him made by me and my wife," giving the date of said deed, being the same as the date of said will, "to be held as therein provided." And, by the said will, the testator gave to his two other sons each "a tract of land described in" deeds made to them in like manner; and he directed that, after his death, his executor should deliver said deeds "to my children to whom said land is conveyed, it being my intention to retain said deeds until my death." The deed to W. and his children was not delivered by the grantor, but was retained by him until his death, after which it

was delivered by A's executor to W. The court held that, without regard to the question of whether there was a sufficient delivery of the said deed, W. took, under the will, only a life estate in the land. The court held further, that at least all parts of the deed to which reference was made in the will, if not the entire deed, must be regarded as incorporated in the will. See also, as bearing upon the proposition under discussion, *Tonnele v. Hall*, 4 N. Y. 140; *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Loring v. Sumner*, 23 Pick. (Mass.) 98.

In *Cumming v. Reid Memorial Church*, 64 Ga. 105, the testator devised a tract of land to trustees and their successors in fee to sell and apply the proceeds to the erection of a church building, the style of the edifice to be left with them. By a codicil, he gave the trustees, "for the erection of a church in said will provided for," \$8,000 more, should the *residuum* of the estate amount to so much. By another codicil, he directed that, if unnecessary to pay the specific legacies in full, the \$8,000 should abate. There was no residuary clause. There was found among the testator's papers a memorandum bearing a later date than either the will or the codicils, which stated the testator's desire as to how the church should be built and used. The lot was sold by the trustees, and the proceeds invested in the erection of a church. The testator's executor paid them also the \$8,000. This latter sum the next of kin sued for in equity. It was held that the testator's intention was to be gathered from the will, the codicils, and from the memorandum, to which it was proper to refer in aid of the ambiguity in the will and codicils; and that it was his intention to give the sum named absolutely to the trustees for the erection, and also the repair and improvement of a church building, and that no valid claim to the fund subsisted in the next of kin.

2. *Siceloff v. Redman*, 26 Ind. 251; *Locke v. Barbour*, 62 Ind. 577; *Papillon*

technical sense, "the court, in decreeing such settlement as he has directed, will depart from his words to execute his intention."<sup>1</sup> But the presumption which is indulged in cases of marriage articles, and often controls their construction, even as against technical terms, namely, that the provision was intended for the issue of the marriage, has no influence upon the construction of wills.<sup>2</sup> Many cases involving the construction of wills as to the intention of the testator, the nature of the estate, and the duties of the trustee are reviewed in the notes below.<sup>3</sup>

v. Voice, 2 P. Wms. 471; Carrigan v. Drake, 36 S. Car. 354; 4 Kent's Com. 218, 220.

1 Sir William Grant, in *Blackburn v. Stables*, 2 Ves. & B. 369. See also *Bastard v. Proby*, 2 Cox 6; *Papillon v. Voice*, 2 P. Wms. 471; *Leonard v. Lord Sussex*, 2 Vern. 526; *Thompson v. Fisher*, L. R., 10 Eq. 207; *Parker v. Bolton*, 5 L. J. Ch. 58.

2 *Blackburn v. Stables*, 2 Ves. & B. 369; 1 Perry on Trusts, § 360.

3 See *infra*, this title, *Nature of the Trustee's Estate*.

A man willed real and personal property to his wife for life, which at her death was to be equally divided between his son and his daughters, E. and M.; and further provided that the part given to E. he wished placed in trust, and at her decease, if she left no children, to be paid to M.; and it was held that E. took the real estate in fee with executory devise over to M., and that a trustee should be appointed for the personality. *Hooper v. Bradbury*, 133 Mass. 303.

Where a testator gave the residue of his estate to his children, with the direction that whatever should fall to the share of one child should be deposited in the hands of the others in trust for him, and power was also given to sell the real estate, the trust was held to extend to the realty as well as the personality. *Braman v. Stiles*, 2 Pick. (Mass.) 460; 13 Am. Dec. 445.

Where a sum of money was bequeathed in trust, the income to be paid to the testator's children during their natural lives, and, upon the death of either child without heirs of his body, his share to become vested in the surviving children equally, it was held that upon the death of one of the children without issue his share vested absolutely in the remaining children free from trust. *Hutchinson's Appeal*, 34 Conn. 300.

So, it was held in a *Massachusetts*

case that after a devise in trust to S., "for the benefit of my daughter G., wife of R., to her sole and separate use, and her heirs and assigns forever," took effect, and G. died, leaving R. and two children surviving, G. took an equitable estate in fee during coverture, which descended to the children subject to R.'s tenancy by curtesy, and upon the death of one child under age and unmarried, his share was inherited by the other under the *Massachusetts* statute. *Richardson v. Stodder*, 100 Mass. 528.

Where real and personal property was given by will to a trustee, in trust for the testator's daughter and her children, the children were held to take equally with their mother on the death of the testator. *Davis v. Cain*, 1 Ired. Eq. (N. Car.) 304.

A testator devised the residue of his estate to his executors in trust, "(1) that they sell, dispose, and convey the same, at public or private sale, at such times and on such terms as they, in their, his, or her discretion, may think proper; (2) that they divide such real and personal property, or the proceeds thereof, into four equal parts or shares, one of such shares for each of my daughters." The trustees were then directed "to convey, pay, and assign" three shares, and to "hold, retain, invest, and keep invested" the other share, and collect "the rents, interest, and income," arising therefrom, and to pay taxes, assessments, insurance, and repairs until the "division or sale." It was held that an active trust was created as to the whole of the residue of his estate, and that the trustees were to determine, according to their judgment exercised in good faith, whether the several parcels thereof should be sold or divided. *Story v. Palmer*, 46 N. J. Eq. 1.

In *Hambleton v. Darrington*, 36 Md. 434, property was devised upon certain trusts to L., the testator's son H. being one of the beneficiaries, with the



proviso in the will that if H. died without children, before the occurrence of certain contingencies, the property held in trust for him should vest absolutely in L., his heirs and assigns. H. survived L., but died leaving no children, and before the occurrence of the contingencies named. It was held that L. received under the will a descendible and devisable estate in the property devised in trust for H.

Where property is devised in trust for the use and benefit of the children of M., children of W. and G. equally, as tenants in common, their heirs and representatives forever, the children of M. and W., born after the decease of the testator, are not included in the devise, but all born at that time, and G., take *per capita*. *Benson v. Wright*, 4 Md. Ch. 278.

Where, by will, the testator gave all his estate, real and personal, to his son A, for the support of him and his brother B, and provided that B should get no more than what would support him equal to A, should he not be extravagant, A was held to take the whole estate in trust as to one moiety for B. *Carson v. Carson*, 1 Ired. (N. Car.) 329.

A will devised to each of the testator's children a fee, with a limitation over upon the death of anyone without issue before reaching his majority, and to this will was added a codicil: "It is my will and desire that the share of my estate, which is intended for my daughters, shall vest in executors in trust for their sole benefit, and if they should marry, free from the control of their husbands, and on the death of either 'leaving children,' her share to be equally divided among her children." It was held that the codicil operated to change the legal estate of a married daughter to an equitable one, but had no other effect upon her interest under the will, nor upon the interest of her surviving brothers and sisters on her death, without issue, after she came of age. *Grumball v. Patton*, 70 Ala. 626.

Property was conveyed in trust for a married woman during her life, and after her death, for the support of her husband, with remainder over in trust for the wife's son and any children that the wife might thereafter have "as tenants in common equally; the issue of any deceased child to have and take the part, share or portion to which the parent of said issue would, if living, be entitled." But in case any child of the wife should die during minority, and

have left no issue surviving it, such child's share was to go to the survivor or survivors of said child absolutely. It was held that the son took an equitable estate in fee, and that, when the wife died, having had no other children, and the husband's estate was extinguished, the son, after reaching his majority, was entitled to have the trustee discharged. *Thompson v. Ballard*, 70 Md. 10.

A testator appointed his wife executrix, providing that all the real estate after the wife's death should pass to the trustees of a certain academy and their successors, "the annual product to be by them appropriated to the erection of a poorhouse in said county and for the support of its inhabitants forever." It was held that not until the death of the wife could the trustees of the academy take the trust, and that the trust thereafter devolved upon their successors in office forever. *Augusta v. Walton*, 77 Ga. 517.

So, where by a bequest to the State Insane Asylum, direction was given for the investment of money on a bond and real estate mortgage, the interest to be collected annually and expended under the direction of the superintendents of the asylum, for the purchase of books and papers for the benefit of the inmates, the court ordered the payment of the legacy to the treasurer of the institution, to be held and administered by its managers, on the trust declared in the will. *Mason v. M. E. Church*, 27 N. J. Eq. 47.

A, having leased his coal lands for a certain royalty, recited the lease in his will and directed his executors, after his death, to take charge of it, and, from the proceeds, first give his wife an ample support during her life, and then divide the remainder equally among his children, share and share alike, and it was held that the trust was active and continuing during the life of the wife only, and that the heirs could make a valid conveyance of their contingent interest to the assignee of the leasehold. *Forcey's Appeal*, 106 Pa. St. 508.

Where a testator left a factory to be used by his son without rent, the son to pay taxes, make repairs and improvements, and keep the premises insured at his own expense, it was held that the property should be insured in the name of the trustee, but that upon the burning of the premises the son was entitled to have the interest money paid to him for the purpose of rebuilding. *Wiley v. Morris*, 39 N. J. Eq. 97.

A testator devised his real estate in trust, and directed his executors to convert the same into personalty, and ultimately turn over the proceeds to a permanent trustee to invest and pay annuities. Until the executors should thus turn over the estate, they were directed to pay the annuities. It was held that the permanent trustee had no duty to perform touching the annuities until the executors had converted enough of the real estate to turn over all necessary proceeds to the trustee; until that time, the executors must pay the annuities. *Barry's Appeal*, 103 Pa. St. 130.

The will of C., after a statement that, being about to undertake a long and dangerous voyage, he deemed it his duty to make a will "for the benefit and protection" of his wife and his two children, contained this clause: "I do, therefore, make this my last will and testament, giving and bequeathing to my wife, Caroline, all of my property, real and personal, . . . and do appoint my wife, Caroline Maria, my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named." It was held that the widow took an absolute title to all of the testator's estate. *Clarke v. Leupp*, 88 N. Y. 228. See also *Dillaye v. Greenough*, 45 N. Y. 445; *Lambe v. Eames*, L. R., 10 Eq. 267; *Howarth v. Dewell*, 6 Jur. N. S. 1360; *Webb v. Wools*, 2 Sim. N. S. 267; *In re Hutchinson*, 8 Ch. Div. 540.

Where real estate is devised to a trustee, in trust, to sell and dispose of the proceeds, but with no authority to receive the rents and profits, he takes no estate in the land under the revised statutes of *New York*, but the devise is a mere power in trust. *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295.

A power given in trust, by a will, to partition the trust estate, and, if the trustee thinks best, to sell it for the purpose of the partition, does not require the continuance of the legal estate in the trustee to sustain it. *Irving v. De Kay*, 9 Paige (N. Y.) 521.

The courts will favor a construction creating a trust rather than an arbitrary power, and in case of a bequest of certain shares of stock to the testator's brother, "in trust for the use and benefit of my two brothers, A and B, to be appropriated to each of their sole uses

and benefits at his discretion," it was held that the trustee had a discretion over the appropriation but not an option to appropriate or not. *Aldrich v. Aldrich*, 12 R. I. 141.

A testator, by a codicil to his will, revoked the provision made in it for his son and gave the property to B., in trust, to keep until the son should prove himself worthy to receive it, and provided that if B. should not judge it best to deliver the property to the son, it should remain the property of B. and his heirs. It was held that B.'s discretion in the matter could not be controlled, in the absence of improper motives or a want of good faith. *Bacon v. Bacon*, 55 Vt. 243.

A testator gave his estate, real and personal, to trustees, directing the surplus income to be equally divided among his children, authorizing advancements to be made to them under certain circumstances, and providing, when the trust should end, "and the trustees convey the estate to said children, it being my will that said estate shall then be equally divided amongst my children, regard being had to the above mentioned provisions, and the prior advancements of any of said children being considered, said estate it is my will shall go to my children as above mentioned, their heirs and assigns forever." It was held that the trustees, at the termination of the trust, were not bound to make provision, but might convey to the children as tenants in common. *How v. Waldron*, 98 Mass. 281.

Decedent devised all of his property to trustees, directing them to collect rents and dispose of it so as to increase its value, and to pay to his daughter such sums of money, from time to time, as they should deem proper, and transfer to her the property when she should reach the age of thirty-five years, she being then unmarried. Instructions were also given as to the disposal of the estate in case she should marry or die without issue. It was held that upon the daughter's death, unmarried before reaching the age of thirty-five, the trustees held the legal title in fee to dispose of the property according to the bequests authorized, and that they could not be ejected by the daughter's heirs at law. *Kirkland v. Cox*, 94 Ill. 400.

In *Goddard v. Brown*, 12 R. I. 31, a testator bequeathed his interest in manufacturing property to trustees, directing them to pay the residue of his

income of the estate, including said property, for the support and education of his children "in such proportions, in such sums, at such times, and in such manner as said trustees in their discretion may think best." It was held, in the absence of a showing of urgent necessity, that, therefore, the trustees could not exercise the power of selling the manufacturing property estate bequeathed.

**Trusts in Rents, Income, etc.**—Trusts in rents, profits, or income of property, are often created by will, and it is sometimes difficult to determine their nature and extent. The following cases will show the construction given to such trusts: Where land has been devised to trustees to pay the proceeds to the *cestui que trust* during life, and at his death convey the remainder, all rents which became payable after the testator's death, where the last preceding pay day occurred during his life, were held to be included with the income, no portion belonging to the capital of the fund. *Sohier v. Eldredge*, 103 Mass. 345. See also *Sargent v. Sargent*, 103 Mass. 297.

Where the executor was directed to pay all the income derived from the estate to A, after paying the necessary expenses accruing thereon, the estate consisting principally of realty, and A, being a non-resident alien, it was held, under the *New York* statute, to create an active trust in the executor to receive the rents and profits of the land and apply them to the use of A during his life. *Marx v. McGlynn*, 4 Redf. (N. Y.) 455; 88 N. Y. 357. See also *Haltum v. Corse*, 2 Barb. Ch. (N. Y.) 506.

A devise of real estate to the executor, in trust, among other things, to pay the income thereof to the testator's widow, only entitles her to the net income, after deducting taxes, repairs, and the ordinary current expenses attending the estate. *Watts v. Howard*, 7 Met. (Mass.) 478.

Where the testator gave a fund to his executors, in trust, for each of his four children and his or her issue, and provided that the executor was to safely invest the same and pay to each of the children the interest and income of it during his or her natural life, in such manner and in such amounts as the executors should deem most prudent, and a judgment had been rendered against one of the children, it was held that the executors should

apply so much of the income of that child as would be sufficient to satisfy the judgment, a receiver having been appointed under supplemental proceeding on the execution, and it appearing, by the bill, that, of the income coming to the legatee, the executors had enough money in their hands, over and above the amount which they deemed it prudent to pay the legatee, to satisfy the judgment with costs and interest. *Hardenburgh v. Blair*, 30 N. J. Eq. 42.

A testator devised an estate to trustees, directing them to apply the residue of the rents and profits, after the payment of certain charges, to the support of his son for life in such a way that the same should never become liable to the payment of any of his debts, and so that no creditor should ever be able to take or seize it, or any part of it. It was held that the rents not received, whether due and payable, or only accruing at the son's death, did not pass to his executor or to trustees named by him in an ineffectual attempt to execute a power of disposition under his father's will. *Horwitz v. Norris*, 49 Pa. St. 213.

A testator made a devise to his two nephews, J. and T., and his two nieces, C. and D., share and share alike, providing that, "Whatever portion shall come to J. and my two nieces, shall be held in trust by my executors, for their use, and the net income from the same shall be paid to each respectively, and in case of the death of either, the heirs of such decedent shall receive the same, on arriving at the age of twenty-one years, that the parent would have taken. In the event of the death of either of my nephews or nieces without leaving lawful issue, a child or children to survive them and attain the age of twenty-one years, then the share of such nephew or niece I direct my executors to pay from the principal of said share." It was held that an active trust was created, continuing after J.'s life, and that J. took only the income for life. *Livezey's Appeal*, 106 Pa. St. 201.

Decedent, in his will, directed that a portion of his estate be put at interest in the county treasury for a period of ten years, said interest to be applied annually to the support of the poor of a certain township; and that, at the expiration of that time, the interest should stop, and the principal remain in the treasury for the use of the county

forever. This legacy was held to be void for uncertainty. The court further held that the testator's intent made the county the trustee, and that it, as such trustee, had full power to hold the property and administer the trust. *Lawrence County v. Leonard*, 83 Pa. St. 206.

In a recent *Maryland* case, there was a conveyance of property in trust for the separate use of a married woman during her life, and thereafter for her husband's support, with a remainder over upon his death. The trust in the husband's favor instructed the trustee to appropriate the net income to the husband's use and support during his natural life. This was held to be a personal trust, extinguished by a sale of the husband's interest in insolvency proceedings after the death of his wife, and that it was immaterial that the purchaser afterwards reconveyed it to him. *Thompson v. Ballard*, 70 Md. 10.

A testatrix gave to two trustees property, "to be disposed of for the benefit of the poor in the manner hereinafter provided;" and directed them to appoint a committee of three or more persons who should "determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect," and to dispose of the trust fund "in accordance with the determination of the said gentlemen certified by them to the trustees." The trustees chose the committee, who determined that certain sums should be paid to various corporations of the kind described, and that if the trust fund should exceed the aggregate of these sums, "the residue is to be subject of future disposal by us." The validity of the will being contested, some years elapsed before the trustees were able to reduce the fund to money and pay it over; the residue of the fund at the time of the determination of the committee was more than the aggregate sum apportioned; and during the interval the income accumulated at a greater rate than the legal rate of interest; and one of the committee died. It was held that the corporations designated were not entitled to take the income of any specific part of the fund, nor shares of the whole income proportioned to the sums designated to be paid to them; but to receive the amount of legal interest on such sums from the time of the report

of the committee; and that any surplus of the income, after payment of such interest, should be added to the fund for further distribution; that the vacancy on the committee could be filled by appointment by the trustees; and that no further distribution of the fund could be made until after the filling of such vacancy; that in such further distribution the committee might designate that payments be made to institutions of the kind described in the will incorporated since the creation of the trust. *Marsh v. Renton*, 99 Mass. 132.

In *Minot v. Tappin*, 127 Mass. 333, a testator devised a portion of his estate to trustees, one of whom was his son, in trust to pay the net income, or so much thereof as the trustee should think proper, to another son, semi-annually, during his life, for his use and benefit, or to expend the whole or any part thereof in the maintenance and education of his children and family, with remainder to the wife for life, and on his death and that of his wife to transfer the trust estate, or so much thereof as might then remain undisposed of, to their children; or, in default of such children, to the testator's heirs at law; and, by another clause, authorized the trustees, in their discretion, to pay only such part of the income as they should deem expedient for the son's use and benefit. The son, for whose benefit the trust was created, died childless and unmarried. The trustees did not pay to him the whole of the income, but it accumulated in their hands. It was held that his administrator was not entitled to such income.

A devise of real estate to A, in trust for B, the regular profits to be paid to the beneficiary exclusively, with the intention of the testatrix being partly declared that the devise was not in any manner to inure for the use and benefit of the creditors of the beneficiary, confers no title to the land on the beneficiary, but vests a mere life estate in the lands and profits such as the creditors cannot reach. *Easterly v. Keney*, 36 Conn. 18.

In a recent *Kentucky* case, a devise was made to "A, in trust for the sole and separate use of my daughter M., and, in the event of her marriage, free from any control, interference, or liability of her husband, but giving her the separate control and use of the same, as though she was unmarried." The court held that the principal alone was devised in

c. DEEDS.—The courts are inclined to construe deeds rather more strictly than either marriage articles or wills,<sup>1</sup> but, with this exception, the rules of construction are substantially the same as those which govern the construction of wills.<sup>2</sup> The application

trust for her separate use, and that the disability of infancy which prevented her from receiving the profits arising from the trust property, was not removed by her marriage during her minority, and that the profits accumulating during that period became no part of the principal of the trust estate, but that upon her majority it must pass to her, free from her husband's control. *Clark v. Anderson*, 10 Bush (Ky.) 99.

By her will, a testatrix gave "the improvement of my property in trust to" a certain named trustee, "the income to be paid equally to my brother and sister during their natural lives, and at their death, the principal I give to my nephews and nieces then surviving." After the death of the testatrix, the brother died, leaving the sister surviving him. The court held that the whole income of the property was payable thereafter to the sister until her death, the gift over in remainder to the nephews and nieces being deferred until that time. *Loring v. Coolidge*, 99 Mass. 191.

By her will, decedent provided that her debts should be paid out of the first money that might come to hand, and then devised real estate to a trustee to hold the land for fifteen years after her death, distributing the proceeds arising therefrom, and at the expiration of that period, dividing the land. It was held that the fact that the first three years' rentals after her death were applied to pay her debts, did not justify the trustee in holding the land for eighteen years after her death before dividing it. *Goodwin v. Goodwin*, 69 Mo. 617.

A testator bequeathed the residue of his estate to executors, in trust, to pay the net income to the testator's wife so long as she should remain his widow, to be expended by her in the support of his children, and directed that she be required to give no account of the manner in which she might apply it. The court held that this bequest created no special trust in her, but only rendered her liable to account in case of wrongdoing. *Biddle's Appeal*, 80 Pa. St. 258.

But where a testator created a trust in his property for the benefit of his wife and children, and provided that the

fund should not be impaired, unless absolutely necessary for their support, but that its income should be applied to the support and education of the children under the control of the wife, it was held that she became a special trustee for them, and that the trust for their maintenance did not necessarily terminate on the coming of age of one of the children, who continued to be a member of the family. *Pilcher v. McHenry*, 14 Lea (Tenn.) 77.

A testator made his executors trustees over all trusts created by his will, directing them to pay all incomes over to those who had been given money in trust. It was held that they were trustees over those devised lands where the words "in trust" were used, and that they might pay over all their legacies without seeing to the application of them. *Wood v. Hammond*, 16 R. I. 98. See generally, as to the validity and construction of such trusts, *Kinsey v. Lardner*, 15 S. & R. (Pa.) 192; *Mason v. Jones*, 2 Barb. (N. Y.) 229; *White v. Howard*, 52 Barb. (N. Y.) 294; *Vail v. Vail*, 4 Paige (N. Y.) 317; *Tucker v. Tucker*, 5 Barb. (N. Y.) 99; *Harrison v. Harrison*, 36 N. Y. 543; *Griffin v. Graham*, 1 Hawks (N. Car.) 96; *Bowers v. Mathews*, 4 Ired. Eq. (N. Car.) 258; *Bleight v. Manufacturers, etc., Bank*, 10 Pa. St. 131; *Coburn v. Anderson*, 131 Mass. 513; *Carr v. Branch*, 85 Va. 597; *Fay v. Fay*, 1 Cush. (Mass.) 93; *Putnam v. Story*, 132 Mass. 205; *Ware v. McCandlish*, 11 Leigh (Va.) 623; *Rhett v. Mason*, 18 Gratt. (Va.) 541; *Withers v. Yeardon*, 1 Rich. Eq. (S. Car.) 324.

1. See *McPherson v. Snowden*, 19 Md. 197, in which it was held that the use of the word "issue," in a declaration of trusts, both in reference to the disposition of the rents and profits, and the disposition of the corpus of the estate, justified the application to that term, thus used, of the rule that technical words are to be construed more strictly in a deed or grant than in a will.

2. A court is not justified in departing from the ordinary meaning of the terms used in a deed, by the mere fact that it is unusual for a man to make a trust in favor of a child of his wife by a

of these rules to particular cases is shown in the authorities, of which a synopsis is given below.<sup>1</sup>

former husband. *Evans v. King*, 3 Jones Eq. (N. Car.) 387.

If the intent of the deed is fairly ascertainable, parts inconsistent with, or repugnant thereto, may be rejected. *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554.

It has been held that a deed to a trustee expressed to be for certain uses, is, as between him and the beneficiaries, to be construed strongly against him. *Jones v. Butler*, 30 Barb. (N. Y.) 641.

A provision, in a deed of trust to secure payment of a debt, for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and a law forbidding sales under such deeds for a limited time is unconstitutional. *Taylor v. Stearns*, 18 Gratt. (Va.) 244.

A deed to a trustee for a woman and the heirs of her deceased husband, there being but one child, conveys an estate in common for the benefit of the woman and child, and a purchaser from the trustee is charged only with the notice of such an estate, and not with notice of an estate for life in the woman with remainder to the child. *Bazemore v. Davis*, 55 Ga. 504.

1. A conveyed an estate to B, his heirs and assigns forever, to his and their proper use in trust, nevertheless, for the use of A for life and of his children after his death, and in default of such children to his appointees by will, and in default of such appointees then to the use of his right heirs. A was held to have acquired an equitable estate in fee, notwithstanding the intervening power of appointment. *Brown v. Renshaw*, 57 Md. 67. So where one conveys land and personally in trust for the payment of his debts, the income, afterward, to be paid to himself, and the corpus to his heirs, in case he shall die intestate, his estate is an equitable fee simple as to the land, and an analogous estate as to the personality. *Taylor v. Lindsay*, 14 R. I. 518.

Real estate was conveyed in trust for the grantor to occupy it, and receive the rents and profits, the trustee to join him in such conveyances as he should make, if the trustee deemed it expedient, and, if requested by the wife and children of the grantor then

living, to convey to the grantor, or to such person as he should nominate, and, on the grantor's death, to convey to his heirs. It was held that the children of the grantor took vested equitable interests in the land during his life, which they could convey, subject to the contingency of their dying before their father, or of his exercising his right of appointment. *Whipple v. Fairchild*, 139 Mass. 262.

As trustee for his wife B, A was required by the court to purchase real estate with her funds, and take a conveyance of it in trust for her separate use in life, the remainder in fee to be his or her children's. Instead of doing this, he took a conveyance "to the only proper use and benefit of the said A, trustee of B, her heirs and assigns forever." It was held that the children became the equitable owners in fee of the remainder, and that the purchaser of the wife's interest at a judicial sale upon execution after the husband's death took her interest subject to the equitable rights of the children. *McMillan v. Baker*, 85 N. Car. 291.

So, where a fund is given to the trustee for the separate use of a married woman for life, with power of appointment by will, and in default of appointment to her child in fee, the use is not executed on the death of the woman if she fails to exercise the power of appointment, but the legal estate remains in the trustee, and his devisee, although a volunteer, takes it and the property is bound by the trust. *Lee v. Simpson*, 37 Fed. Rep. 12.

A man executed a deed of trust of property, real and personal, to his three sons, the deed reciting that he had purchased a certain farm, the title to which was in his daughter and her husband, and that they should receive nothing under the trust unless they conveyed it to the trustees. The will provided that the grantees should control the property as fully as if the conveyance had been made free from any trust, with full power to sell and dispose of the same, except that said farm should not be sold until after the death of the grantor, and that the grantor should have the net profits and the use and occupation of the real estate, and should pay all taxes and assessments

and keep down all incumbrances; and it was further provided by the deed that the grantor should have a life interest in the benefits arising from the trust, and that at his death the property was to be divided among his children, and it was held that the legal title to the realty was vested in the grantor by the deed, and the trustees had no power to sell it until his death, and that the legal title of the personality was vested in the trustees. *Byrne v. Gunning*, 75 Md. 30.

Where the deed provided that it was "the intent of said grantors to convey and assign to said A, to be held by him and those who succeed him, in trust for the said grantors, respectively, as to their several estate and interest, they respectively controlling the investments," one grantor's interest to be held free from the control of her husband, another's free from liability for his debts, and the interest of two in a house to be sold "with the affirmative assent of the trustee," and the interest of a third to be sold, the trustee co-operating and uniting, it was held that the trustee held the same kind of interest in all the property conveyed. *Warner v. Sprigg*, 62 Md. 14.

Where land was conveyed to A in trust for B during B's natural life, and after her death to her heirs in fee simple "to have and hold the said premises unto them and their heirs and assigns forever," it was held that the deed created a trust estate during the beneficiary's life, and that the heirs received a contingent remainder. *Zuver v. Lyons*, 40 Iowa 510.

In *McCoy v. Monte*, 90 Ind. 441, where real estate was conveyed to A and B, husband and wife, in trust for C, his children and their descendants, if he should have any, or, in the absence of such children or their descendants, then in trust for the heirs of A and B, with power to sell, and convey such lands with C's consent and recommendation, the proceeds in other land to be held for the same purpose, it was held that such conveyance, under the *Indiana* statute, did not invest C with a legal title to the land, and that, therefore, he could not convey it to another.

So, where A executed a deed reciting that he did thereby "grant, bargain, and sell" to B, his wife, and her children, under specified limitations, the premises, to hold during A's life as trustee for B and children, for their use, with power to sell, rent, or dispose

of the property for their benefit; and that the surviving parent should appoint a trustee to manage the trust after his or her death, until the youngest child should become fifteen years old, when a division was to be made, it was held by the same court that the title was in A, as trustee for B and children. *Adams v. Barlow*, 69 Ga. 302.

In a peculiar case in *Pennsylvania*, the following facts developed: In 1828, land was conveyed by A "in trust for the use and benefit of B, his wife and her heirs forever; that is, the children, if any, begotten by A; and her daughter C is to be made equal, to be for them and their heirs forever, after the decease of A, her present husband." The *habendum* clause stated that it should be held "for the use and benefit of the said wife and her daughter C, and the children begotten by A, if any, upon the body of said B." Five children were afterward born to A and B. A died in 1846. After his death, a special act of the legislature devised the estate of C and the children, and conferred it upon B, who then made a conveyance, and afterwards died. It was held that the word "children," in the deed, was a word of purchase, and not of limitation; that the life estate passed to B, with a vested remainder in C, which opened to let in the subsequently born children; that it was beyond the power of the legislature to devise the remainder, and that, until the death of B, C and the children had no right of possession. *Wolford v. Morgenthal*, 91 Pa. St. 30.

The grantor conveyed property in trust for his wife and daughters in fee, simply stipulating that the trustee should, upon their request, convey by proper deed to whomsoever they might designate. It was held that this stipulation was merely for a change of trustee, and not to be construed as a limitation of a fee after a fee, or the substitution of a fee for a fee. *Clark v. Platt*, 30 Conn. 282.

A deed of trust contained apt words of limitation and provided that, if the grantor's wife should leave no will, her share should be conveyed, after his death, to the person or persons legally entitled, and it was held that neither the grantor nor his son who died before him, had any interest in the estate which could be reached by creditors, and that the maxim *nemo est*

*haves viventis* applied. *Johnson v. Whiton*, 118 Mass. 340.

A, in consideration of love and affection, executed a conveyance of land to his wife and their children for life, and at her death to the said children, and other children then living, by him, and their heirs, and in case of her death without children, to revert to A and his heirs, with power of said A to act as trustee for the wife and children; to control the property subject to the trust; to collect the rents, issues and profits, and expend the same in the support, maintenance, and education of said wife and children, and with power to the wife to change the trusteeship on application to the chancellor, and it was held that a charge was created in the nature of a trust on the wife's life estate, for the maintenance, support, and education of the children. *Maxwell v. Hopple*, 70 Ga. 152.

Where a wife conveyed land to herself as trustee, covenanting to hold the title to the use of her daughter F, and any children F might have, free from the control or contracts of any future husband, it was held that F took equally with any children that she might thereafter have born to her. *Pearce v. Brooks*, 52 Ga. 425.

So, where A executed a deed reciting that he did thereby "grant, bargain, and sell the premises to B, his wife, and her children, under specified limitations, to hold during A's life as trustee for B and children, for their use, with power to sell, rent, or dispose of the property for their benefit, a trustee to be appointed by the surviving parent, to manage the trust after his or her death until the youngest child should become fifteen years of age, when a division was to be made," it was held by the same court that the title was in A as trustee for B and children. *Adams v. Barlow*, 69 Ga. 302.

Where it is doubtful by the terms of a conveyance to trustees with power to sell, whether the trustees take as joint tenants or tenants in common, the courts will, if possible, hold that they take as joint tenants. So, where a conveyance was made to trustees with power to sell and use the proceeds to pay the expenses and the debts of the grantor, and the deed was silent as to whether the trustees should take as joint tenants or tenants in common, they were held to take as joint tenants. *Saunders v. Schmaelzle*, 49 Cal. 59.

"A trust deed and a confidential writ-

ing delivered at the same time, to be opened and read afterwards, may be construed together." *Van Cott v. Prentice*, 35 Hun (N. Y.) 317.

So, in another case, a trust in lands conveyed by a mother to her infant son, by a deed absolute and declaration of trust exchanged, was sustained under the circumstances of the case against the heirs of the son after his death, upon the ground that the declaration of trust should be construed with the deed as part of the same transaction, and that the acts and admissions of the son after he became of age indicated that he had confirmed the trust. *Owens v. Owens*, 23 N. J. Eq. 60.

A father, who was about to marry a second time, conveyed property in trust "for the equal benefit" of his six children, with a reservation of the right to control and manage the property, and order a sale or division at any time as the children should come of age, but stipulating that the funds were to be in no case diverted from the interest of the children. It was held that the children took vested interests, with which there was nothing in the reservation inconsistent, and that a son who left home at the time the deed was executed, could recover what his father had received as his share during his minority from his father's executrix. *Baldwin v. Baldwin*, 76 Va. 345.

Where the wife's land was conveyed by the husband of the wife, in trust as to one-third part, to pay the rents and profits during the lifetime of the latter to such person as she, whether sole or covert, should from time to time appoint by revocable instrument, or in the default of appointment, to herself, notwithstanding coverture, and in case of coverture to her separate use; and it was further provided that the rents and profits were not to be anticipated, or liable for her debts or for those of her then or any future husband, it was held that the trust was an active one and should be sustained, notwithstanding the devise. *Fry's Estate*, 11 Phila. (Pa.) 305.

But in another case, a conveyance under seal by A to B of certain lands, which authorized B to sell and convey them, and until sold, to rent them, making deeds for all real estate already contracted to be sold, "on payment of the debts owing on them respectively," and to dispose of the proceeds: *First*. To meet the expenses of the trust. *Second*. To pay over the



residue to A during his life, or to appropriate it to his use under his direction. *Third*. After his death, and after his debts should be paid, to distribute the residue as thereafter to be directed in a supplementary writing; but should no such writing be executed, then distributed among the heirs of A. This was held not to create an expressed trust, such as the *New York* statute authorized, inasmuch as it did not create any trust for the benefit of creditors, nor any trust to receive the lands and profits and apply them to the use of the grantor for life. *Heermann v. Burt*, 78 N. Y. 259.

Where it is clear that a deed was expressly and exclusively intended to create a trust, the *habendum* and the covenants do not necessarily give any beneficial interest to the grantee. *McElroy v. McElroy*, 113 Mass. 509.

A conveyance granting an estate which vests at once, but reserving a life estate to the grantor, creates no trust for the benefit of the grantor in the estate granted. *Craven v. Winter*, 38 Iowa 472.

The entire instrument whereby the trust is created, must be considered in determining the nature and terms of the trust, and where the granting clause of the deed declares a trust unlimited in time, with a qualification at the close of the description of the premises, putting a limit upon the duration of the trust, this latter clause must be considered as a limitation of the general words first used. *Parker v. Murch*, 64 Me. 54.

A., for a valuable consideration, conveyed land to the selectmen of a town, and their successors in office, for the use of E., and, after his death, if any of the premises should remain, then to E.'s heirs forever, to hold for the use aforesaid, at the discretion of the grantees, E. being in possession of the premises before and after the conveyance until his death, and having devised the same to his wife in fee. It was held that the said selectmen took a legal estate in trust for E. and his heirs; that, as the legal estate was in trust, it must be commensurate with the trust, and therefore it was an estate in fee simple; and that E. had an equitable fee simple, which he might lawfully devise. *Newhall v. Wheeler*, 7 Mass. 180; *Norton v. Leonard*, 12 Pick. (Mass.) 152; *Heath v. Knapp*, 4 Pa. St. 228.

A conveyed an estate to B, in trust for B's children, then alive and named

in the deed, and such others as might be thereafter born of his then wife, to be divided among them equally, and until such division to be occupied and used for the support of the children; and he also conveyed another estate to trustees in trust for the benefit of the wife of B, and at her death to be divided among her children; it was held that the legal estate in the first estate vested, not in the father, but in his existing children named in the deed, subject to open and admit such other children as his wife might thereafter have; that the legal title to the second estate was in the wife, but that, as she had applied for a change of trustees, which had been made, and the sale ordered and made, and thus held herself out as having only an equitable title to the property, she could not disturb the title of the purchaser at the sale. *McNish v. Guerard*, 4 Strobb. Eq. (S. Car.) 66.

Where a father, by a deed of trust, settles upon his daughter certain slaves for life, and if she marries, then in trust for the joint use of herself and husband, and in case of the death of either of them, then in trust for the survivor, and, upon the death of the survivor, then to the issue that may hereafter be born of the marriage absolutely, the daughter having married twice and having issue by both marriages, the issue of each marriage takes share and share alike. *May v. May*, 7 Fla. 207; 48 Am. Dec. 431.

**Powers of Trustees.**—A power to sell and reinvest, given to the trustee, his heirs and assigns, from time to time as he shall deem it expedient, to sell or mortgage, etc., at his discretion, is a special discretionary power, and does not devolve upon a new trustee appointed by the court, and a provision that in case the income of the trust estate shall prove insufficient for the maintenance of the grantor's wife, the trustee shall sell or mortgage a part of the whole and "apply the proceeds to the purposes aforesaid," confers no title of reinvestment, except as to such surplus proceeds as might from time to time be in his hands, for obtaining interest thereon, till needed for the wife's support. *Bailey v. Burges*, 10 R. I. 422. But a deed to secure a debt, giving the trustee power to "seize, sell, and dispose of" certain real estate, unless the debt be paid at a given time, and providing the manner of sale, and that the proceeds shall be first applied to the payment of the debt, then, if there be

any balance, to the grantor, passes such a title to the trustee as will enable him to recover in ejectment to carry into effect the purposes of the trust. *Cameron v. Phillips*, 60 Ga. 434.

Certain land was conveyed by A for the use of B and others, with an absolute control of the property conveyed; and in the exercise of a "sound discretion to lease and release, incumber or convey, in mortgage or fee, or dispose of in any way the said A, in the exercise of a sound discretion, as aforesaid, may deem best for the interest of said beneficiaries, reinvesting the proceeds thereof for the best interest of the said beneficiary." It was held that this gave the trustee no power to mortgage the property to secure his own individual debt. *Merriman v. Russell*, 39 Tex. 278. See also *Beatty v. Clark*, 20 Cal. 11.

Where a deed provides that the trustees are to keep the principal safely invested according to their best judgment, and from the income thereof pay the grantor the sum of \$5,000 each year, the annuity is to be derived from the income alone. *Veazie v. Forsaith*, 76 Me. 172.

The courts will be mainly governed by the general scope and object of the trust and the nature of the duties which the trustee is required to discharge, in deciding the right of the trustee to retain the possession and management of the trust estate against the equitable tenant for life. *Williamson v. Wilkins*, 14 Ga. 416.

It does not necessarily follow, from a provision giving the trustees full power to retain the trust property in their hands, unsold and undivided, until after a specified time, that it should be divided after that time. *Zabriskie v. Wetmore*, 26 N. J. Eq. 18.

Where money is given to a village to erect a suitable building for a high school, without endowment or further direction as to its maintenance, the village may use its reasonable discretion on the subject, and put it on the basis of the public schools. Such building may be lawfully used in connection with preparatory grades, and a court of equity cannot control the construction of the local authorities in completing the scheme and raising money for its support at public expense, otherwise than may be provided for by law, when no private funds are given to the trust for that purpose. *Hathaway v. New Baltimore*, 48 Mich. 251. See also *Kilpatrick v. Graves*, 51 Miss. 432.

A made himself the trustee of real estate for the benefit of his wife and children, preserving a power of sale for their benefit according to his own discretion; afterwards, he, with his wife, mortgaged the property, which was sold under the mortgage and a surplus obtained; A being then dead, the surplus was held to belong to the trust and not to A's estate. *McAleer's Appeal*, 99 Pa. St. 138.

Where B. conveyed property to L., by conveyance reciting his approaching marriage and his intention to make a settlement on his contemplated wife, and that the conveyance was made to L. that he might convey the estate to trustees for the benefit of the wife upon such trust as he should approve, the conveyance was held to authorize L., with B.'s approval, to insert a power of sale in the trust deed. *Belmont v. O'Brien*, 12 N. Y. 394.

After a deed of trust upon land had been recorded, the grantor conveyed the property to a third person, who conveyed it to another. The first grantor then moved from the land, and the last alienee moved in. While the last alienee was thus residing on the land, it was entered upon by the trustee, under the deed of trust, sold according to the provisions of the trust, and conveyed to the purchaser. In ejectment by the purchaser from the trustee against the purchaser from the grantor, it not being found that there was any adverse possession at the time of the conveyance by the trustee, the conveyance by the trustee was held valid. *Pownall v. Taylor*, 10 Leigh (Va.) 179; 34 Am. Dec. 725.

A husband conveyed, by post-nuptial settlement, all the property which he had acquired by his marriage to trustees, to hold and keep the principal and interest during the marriage exempt from his debts, contracts, and control; to be managed and disposed of on the separate orders and receipts of his wife, or by her deeds or will, so that she might enjoy and dispose of it as it came from her parents and sister, or might thereafter in any manner accrue to her, in all respects as if she was not married; and it was held that all the interest which her husband had acquired by the marriage passed to the trustees by the deed, which created a good and valid trust under the *New York* statute; that the deed did not pass the right to dispose of the real estate involved, nor the rents and profit thereof

beyond the lifetime of the husband, as he had no power to convey, and that the fee in the realty, and the right to dispose of it, and the rents and profits after his decease, remained as if the deed had not been executed; and that the power of appointment by the deed to the wife extended to the absolute disposal by her of the principal and income, or any part thereof. *Cruger v. Cruger*, 5 Barb. (N. Y.) 225.

The owner of land in fee executed declarations or certificates of trust to several persons, by which he acknowledged that each had an equal share therein, and agreed to hold the same in trust for them, to sell and dispose thereof for their benefit, and to divide the proceeds among them, and, if directed by them, to allot and set apart the land to and among the owners. It was held that the holders of the certificates had each an interest in the power and covenants of the declarant, and that he was bound to execute them personally and could not delegate them or substitute others to execute them, and that it was part of the consideration that the owner should exercise his skill and judgment in disposing of the estate. *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336. The trustee of lands, in which he had a life estate, was authorized by the court of chancery to execute a mortgage on them for the money already advanced and debts due from him, as also for moneys to be advanced, and to apply the proceeds to the payment of his debts, and invest the surplus to yield an income for his support. It was held that he was not authorized by this to execute a mortgage for clothing to be thereafter furnished him or his children, nor upon a verbal promise or written agreement to advance him money. *Williamson v. Field*, 2 Sandf. Ch. (N. Y.) 533.

W. entered into a contract with D., by which he agreed to give the latter \$200, in consideration that D. would give him the numbers of certain tracts of public land which he (W.) wished to enter; and after D. gave him the numbers, W. sent an agent to the proper office with directions to enter the land for him. D. went to the place of entry and in conversation with the agent offered to enter the land for W., but before the agent could enter the land for W., D. entered it for himself and refused to transfer it to W. It was held that the contract between W. and D. created a relation of private trust

and confidence between them, and that D. was bound to do nothing adverse to W. in the matter, and upon the tender of \$200 and the amount paid for the land, the court decreed that D. should hold the land in trust for W. *Winn v. Dillon*, 27 Miss. 494.

A trust authorized the trustee to receive certain money and invest a portion in an accumulating fund, and at the donor's decease to pay over so much of said fund to the trustee under the will of her late husband as might be necessary to make the value of the property in the hands of said trustee equal to the present value of \$146,000; in fact, at the time the will was made the value of the property in the hands of the trustee under the will was less than that sum. It was held that the trustee under the deed should pay to the trustee under the will enough to make the value of the property in his hands equal to \$146,000. *Lowell v. Loring*, 1 Allen (Mass.) 466.

A conveyed land to B by an absolute deed, and B gave a written contract to A, promising to sell the land at a certain time and pay two notes with the proceeds, and the balance to A. It was held that B took the land in trust, and that it was his duty to make a sale at the time specified and appropriate the proceeds in a manner settled in the contract; that C, who was a surety on one of the notes, though ignorant of the trust at the time it was undertaken, was yet entitled to enforce his execution when informed of it, if it had been previously valid, and if there was a mortgage on the estate not mentioned in the contract but known to B at the time of its execution, he might pay it off and take the amount from the proceeds of the sale. *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492.

Real estate and slaves were conveyed in trust to pay a debt, with the stipulation that the slaves be first sold, and in the event they should fail to produce enough to pay the debt, then the real estate should be sold. By the request of the person in interest, sale was delayed, and before the sale was made the civil war emancipated the slaves. It was held that this emancipation did not preclude the sale of the land, as the proper construction of the trust required, not that a sale of all the slaves conveyed must take place before the land could be sold, but that in the administration of the trust, personal prop-

**X. ACCEPTANCE OR DISCLAIMER BY TRUSTEE.**—No one can be compelled to act as trustee of an express trust, if he refuses to accept the appointment.<sup>1</sup> Even where one has agreed in advance to accept the trust, he may afterwards refuse to do so.<sup>2</sup> And where a conveyance is made in trust to public officers and their successors in office, the successors are not bound unless they accept the trust.<sup>3</sup>

erty should first be used, and that such personal property as had existed at the time of the sale, must be taken as far as it would go, and after that the real estate. *Thurmond v. Woods*, 27 Gratt. (Va.) 727.

A deed of gift by a father, of certain property, including two negro women, to his daughter and her husband, and her children, born and to be born, for their support during her life, with remainder to the children, and appointing a trustee, makes the mother a joint tenant or tenant in common with her children, and the trustee is entitled to the possession, which he must take as soon as the proper execution of the deed requires. *Davis v. Hunter*, 23 Ga. 172.

A deed which conveyed land in trust for A and the heirs of her body upon a sufficient consideration, and provided that the trustee, at the request of A and her heirs, might sell the estate conveyed, and hold the proceeds of such sale in trust in like manner, was held not to exclude the power to mortgage for the benefit of the beneficiaries. *Wood v. Kice*, 103 Mo. 329.

Under the provisions of an instrument of trust, the trustee was directed when the beneficiary was twenty-two years old to invest the trust funds in a farm, and advance what implements and stock should be needed to operate it, the implements and stock to be given to the beneficiary absolutely, and the farm to stand in the name of the trustee. Authority was given to the trustee to sell the farm at any time, and invest the proceeds in real-estate securities. It was held that a court of equity had the power to authorize the trustee to make such investments at once, without first purchasing the farm. *Milligan v. Pleasant*, 74 Md. 8.

But where real estate was conveyed to a trustee in trust to receive the rents and profits and pay them to A for life; on her death to sell or partition the real estate, one-third to vest in B, and a further trust was declared as to the residue thereof; it was held that the trustee had no power to execute a lease which, as against B, would be binding after the

death of A. *In re McCaffrey's Estate*, 50 Hun (N. Y.) 371.

See also the following additional cases involving the construction of peculiar deeds of trust: *Thompson v. McDonald*, 2 Dev. & B. Eq. (N. Car.) 463; *Bowen v. Chase*, 94 U. S. 812; *Embury v. Sheldon*, 50 How. Pr. (N. Y. Supreme Ct.) 324; *Albee v. Holmes*, 114 Mass. 470; *Hobbs v. Chesley*, 55 N. H. 31; *Scott v. Rand*, 118 Mass. 215; *Harding v. St. Louis F. Ins. Co.*, 2 Tenn. Ch. 465; *Guilmartin v. Stevens*, 55 Ga. 203; *Provost v. Provost*, 7 Hun (N. Y.) 81; *Jones v. Butler*, 11 Hun (N. Y.) 413; *Oxford Union, etc., Soc. v. West Congregational Soc.*, 55 N. H. 463; *Tyson v. Latrobe*, 42 Md. 325; *Badgett v. Keating*, 31 Ark. 400; *Thomas v. Crawford*, 57 Ga. 211; *Ash's Appeal*, 80 Pa. St. 497; *North American Land Co.'s Estate*, 83 Pa. St. 493; *Du Bose v. Carlisle*, 51 Ala. 590; *Tyler v. Granger*, 48 Cal. 259.

1. *Robinson v. Pitt*, 3 P. Wms. 251; *Lowry v. Fulton*, 9 Sim. 123; *Moyle v. Moyle*, 2 R. & M. 715; *Mahony v. Hunter*, 30 Ind. 250; *Beekman v. Bonsor*, 23 N. Y. 298; 8 Am. Dec. 269; *Burritt v. Silliman*, 13 N. Y. 93; 64 Am. Dec. 530.

He may renounce such a trust, even if such renunciation would deprive the beneficiary of some benefit intended for him by the testator. *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Kennedy v. Winn*, 80 Ala. 166.

2. *Doyle v. Blake*, 2 Sch. & Lef. 239; *Evans v. John*, 4 Beav. 35; *Smith v. Knowles*, 2 Grant Cas. (Pa.) 413; *Crook v. Ingoldsby*, 2 Ir. Eq. 375.

Such refusal will not invalidate the trust, for the court will appoint another trustee. *Nicoll v. Miller*, 37 Ill. 387; *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311; *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 358; *Eltner v. Fife*, 32 Ohio St. 358; *Johnson v. Roland*, 2 Baxt. (Tenn.) 203; *Thatcher v. St. Andrew's Church*, 37 Mich. 264. See also *infra*, this title, *Succession and Appointment of New Trustee*.

3. *Delaplaine v. Lewis*, 19 Wis. 476. Under the *Rhode Island Statute of*

No title vests in the proposed trustee unless he expressly or impliedly accepts the trust, or in some manner assumes the duties and liabilities thereof.<sup>1</sup> In the absence of anything to the contrary, a trust, beneficial to the trustee, will be presumed to have been accepted, especially after a long period of time has elapsed without any disclaimer.<sup>2</sup>

The acceptance may be express,<sup>3</sup> or it may be implied from acts of the proposed trustee, such as qualifying and proceeding to carry out the provisions of the trust deed or will,<sup>4</sup> permitting an action concerning the trust property to be brought in his name,<sup>5</sup>

March 8th, 1861, ch. 367, authorizing gifts to the commissioners of burial grounds in Providence, in trust for the care of the cemetery, and directing the investment and application of the income of such fund, the commissioners have no vested right, as trustees, to funds accruing prior to the passage of the statute of April 25th, 1889, ch. 781, directing them to pay the same over to commissioners of the sinking fund of said city, to be by them administered under the trust, as the trustees are municipal officers, subject to removal by the legislature at any time. *Smith v. Westcott*, 17 R. I. 366.

1. *Townson v. Tickell*, 3 B. & Ald. 31; 5 E. C. L. 519; *Trask v. Donaghue*, 1 Aik. (Vt.) 370; *Stacey v. Elph*, 1 Myl. & K. 195; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Bethune v. Dougherty*, 21 Ga. 257; *Cooper v. McClun*, 16 Ill. 435; *King v. Donnelly*, 5 Paige (N. Y.) 46; *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295; *Judson v. Gibbons*, 5 Wend. (N. Y.) 224; *Bulkley v. Depeyster*, 26 Wend. (N. Y.) 21; *Mahony v. Hunter*, 30 Ind. 246; *Armstrong v. Morrill*, 14 Wall. (U. S.) 138. *Compare* *Christain v. Yancey*, 2 Patt. & H. (Va.) 240; *Bixler v. Taylor*, 3 B. Mon. (Ky.) 362.

2. *Read v. Robinson*, 6 W. & S. (Pa.) 331; *Eyrick v. Hetrick*, 13 Pa. St. 494; *Penny v. Davis*, 3 B. Mon. (Ky.) 313; *Furman v. Fisher*, 4 Coldw. (Tenn.) 626; 94 Am. Dec. 210; *Roberts v. Moseley*, 64 Mo. 507; *In re Needham*, 1 Jones & L. 34; *Thompson v. Leach*, Vent. 198; *Goss v. Singleton*, 2 Head (Tenn.) 67; *Wise v. Wise*, 2 Jones & L. 412. *Compare* *Matter of Robinson*, 37 N. Y. 261. See also *Barclay v. Goodloe*, 83 Ky. 493.

No formal acceptance is necessary on the part of the trustee where the legal title to a slave is conveyed to him in trust for the use of another; it will

be presumed from the possession remaining with the beneficiary. *Penny v. Davis*, 3 B. Mon. (Ky.) 313.

3. Express acceptance is generally shown by the trustee signing the deed, or writing his acceptance. *Patterson v. Johnson*, 113 Ill. 559.

**Declaration of Trust.**—The trustee may also execute what is called a declaration of trust, stating that he holds certain property in trust for certain persons, etc. The owner of property may constitute himself a trustee in this way. The declaration may be in writing, or, in the case of personal property, it may be parol. See **DECLARATIONS**, vol. 5, p. 368. See also *Doe v. Harris*, 16 M. & W. 517; *Union Mut. L. Ins. Co. v. Campbell*, 95 Ill. 267; 35 Am. Rep. 166; *Tanner v. Skinner*, 11 Bush (Ky.) 120; *Urann v. Coates*, 109 Mass. 581; *Bates v. Hurd*, 65 Me. 180; *McClellan v. McClellan*, 65 Me. 500; *supra*, this title, *Who May Create a Trust*.

4. *Earle v. Earle*, 93 N. Y. 104; *Harvey v. Gardner*, 41 Ohio St. 642; *Ridenour v. Wheritt*, 30 Ind. 485; *Flint v. Clinton Co.*, 12 N. H. 432; *Lewis v. Baird*, 3 McLean (U. S.) 56; *Crocker v. Lowenthal*, 83 Ill. 579.

Where a party is both executor and trustee under a will, it has been held that the fact that he takes out letters of administration as executor, amounts to an acceptance of the trust. *Sangston v. Hack*, 52 Md. 173. But see *Daggett v. White*, 128 Mass. 398; *Anderson v. Earle*, 9 S. Car. 460; *Green v. Green*, 4 Redf. (N. Y.) 357. Declining to act as executor is not necessarily a renunciation of the trust, where the same party is appointed both executor and trustee. *Garner v. Dowling*, 11 Heisk. (Tenn.) 48. But see *Mutual L. Ins. Co. v. Woods*, 4 N. Y. Supp. 133; 51 Hun (N. Y.) 640.

5. *Montford v. Cadogan*, 17 Ves. 485; *Taylor v. Atwood*, 47 Conn. 498.

or otherwise dealing with the trust property as trustee.<sup>1</sup> Parol evidence of his acts and declarations is admissible to prove acceptance,<sup>2</sup> and if they are ambiguous they will be construed as an acceptance of the trust with all its responsibilities.<sup>3</sup>

As already stated, one named as a trustee may decline to accept the trust. This he may do by a disclaimer. The disclaimer generally reaches back and takes effect as of the time of the creation of the trust, provided there has been no acceptance, either express or implied, and provided further that no intervening rights have been acquired to prevent.<sup>4</sup> It may be parol,<sup>5</sup> and acts inconsis-

1. *James v. Frearson*, 1 Y. & C. C. C. 370; *Bence v. Gilpin*, L. R., 3 Exch. 76; *Conyngham v. Conyngham*, 1 Ves. 522; *McBride v. McIntyre*, 91 Mich. 406; *Wadd v. Hazleton*, 62 Hun (N. Y.) 602.

Where separate assignments of a judgment are made to two different parties for the benefit of infant children, and both assignees file petitions in a pending suit claiming to be entitled to the control of said judgment, the successful assignee will be regarded as having accepted the assignment and as holding the judgment in trust for the children. *Feamster v. Feamster*, 35 W. Va. 1.

Where an executor accepts securities intended by the testator for another, an obligation is created on his part, as trustee, to carry out the wishes of the deceased and deliver the trust property to such other person. *Wadd v. Hazleton* (Supreme Ct.), 17 N. Y. Supp. 410.

So, where a trustee named in a deed acts under it by advertising the property for sale, it will amount to an acceptance of the trust, though he may not have the deed in his possession. *Crocker v. Lowenthal*, 83 Ill. 579.

The institution of a suit to recover the property conveyed, and the execution of a power of attorney to an agent to execute the trust, are unequivocal acts of acceptances of the trust, and place the party in the same condition as if he had accepted it in the beginning. *Christian v. Yancey*, 2 Patt. & H. (Va.) 240.

One receiving money to hold in trust, and acknowledging the trust by declarations and the payment of interest to the beneficiary, cannot repudiate it. *Crist v. Hovis*, 12 N. J. Eq. 84.

Though the liabilities and duties of a trustee cannot be imposed upon a man without his assent, yet where one with a knowledge of his appointment as trustee, interferes with the trust

property in such a manner and to such an extent as cannot be accounted for on any other ground than an acceptance of the trust, his interference will be sufficient proof of an acceptance, and will subject him to all the responsibilities of a trustee in the same manner as if the office had been expressly accepted. *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Chaplin v. Givens*, Rice Eq. (S. Car.) 132.

Where A conveys land to B, to be afterward reconveyed to him by B, an express trust is created which B accepts by accepting the deed. *Hearst v. Pujol*, 44 Cal. 230.

2. *Doe v. Harris*, 16 M. & W. 517; *Urch v. Walker*, 3 Myl. & C. 703; *James v. Frearson*, 1 Y. & C. C. C. 370.

3. *Lowry v. Fulton*, 9 Sim. 115; *Read v. Truelove*, Amb. 417; *Montgomery v. Johnson*, 11 Ir. Eq. 476; *Chaplin v. Givens*, Rice Eq. (S. Car.) 132; *Eyrick v. Hetrick*, 13 Pa. St. 494. This statement, of course, presupposes that the acts or declarations are such as reasonably admit of such a construction.

4. *Stacey v. Elph*, 1 Myl. & K. 195.

Before final action has been taken by the register on a resignation tendered under the *Alabama Code*, § 3727, the trustee may withdraw such resignation and execute the power of sale conferred by the trust deed. *Dillard v. Winn*, 60 Ala. 285.

5. *Nicolson v. Wordsworth*, 2 Swanst. 369; *Bray v. West*, 9 Sim. 429; *Peppercom v. Wayman*, 5 De G. & S. 230; *Thompsons v. Meek*, 7 Leigh (Va.) 419; *Roseboom v. Moshier*, 2 Den. (N. Y.) 61; *Com. v. Mateer*, 16 S. & R. (Pa.) 416; *Rex v. Wilson*, 5 M. & R. 140; *Small v. Marwood*, 4 M. & R. 190; *Begbie v. Crook*, 2 Bing. N. Cas. 70; 29 E. C. L. 259; *Adams v. Taunton*, 5 Madd. 435; *Mutual L. Ins. Co. v. Woods*, 4 N. Y. Supp. 133; 51 Hun (N. Y.) 640. But merely declining to act as executor is not necessarily a

ent with an acceptance may be sufficient.<sup>1</sup> It ought properly, however, to be in writing.<sup>2</sup> The disclaimer may also be made in a pleading in a case in court.<sup>3</sup>

If the trustee named in a will is given a legacy or benefit, independent of the office, he may disclaim the trust without losing such legacy or benefit,<sup>4</sup> but he cannot disclaim the trust and at the same time claim the benefit, if it is merely annexed to the office in the nature of a perquisite and not an independent gift to the individual.<sup>5</sup>

The effect of a disclaimer, so far as the trust is concerned, is to leave it in the same condition as if the disclaiming trustee had never been nominated.<sup>6</sup> If, therefore, other trustees remain who have not disclaimed, the property will vest in them to carry out the trust,<sup>7</sup> and if there is no trustee who has not disclaimed, the

renunciation of a trust created by the will. *Garner v. Dowling*, 11 Heisk. (Tenn.) 48.

1. *Wardwell v. McDowell*, 31 Ill. 364; *Thornton v. Winston*, 4 Leigh (Va.) 152; *Williams v. King*, 43 Conn. 572; *Ayres v. Weed*, 16 Conn. 291; *Judson v. Gibbons*, 5 Wend. (N. Y.) 224.

2. *Stacey v. Elph*, 1 Myl. & K. 199.

3. *Clemens v. Clemens*, 60 Barb. (N. Y.) 366; *Hickson v. Fitzgerald*, 1 Moll. 14; *Legg v. Mackrell*, 1 Giff. 166; *Ladbroke v. Bleaden*, 16 Jur. 630; *In re Ellison's Trust*, 2 Jur. N. S. 62; *Foster v. Dawber*, 1 D. & S. 172; *Norway v. Norway*, 2 Myl. & K. 278.

4. *Pollexfen v. Moore*, 3 Atk. 272.

5. *Calvert v. Sebbon*, 4 Beav. 222; *Lewis v. Mathews*, L. R., 8 Eq. 277; *Slaney v. Watney*, L. R., 2 Eq. 418; *Kirkland v. Narramore*, 105 Mass. 31; 7 Am. Rep. 497.

In *Kirkland v. Narramore*, 105 Mass. 31, it was held that, under a clause in the will providing "I hereby appoint Franklin Narramore as trustee, to take and keep the above legacies, the income of which he shall appropriate to their comfort so long as they live. After their decease, what remains I bequeath to the above trustee," the trustee could not take such remainder, unless he accepted the trust, either expressly or by doing some act under his appointment.

If one accepts a trust and then dies, his heir cannot disclaim it. *Humphrey v. Morse*, 2 Atk. 408; Co. Litt. 9 a; *King v. Phillips*, 16 Jur. 1080. But see *Creagh v. Blood*, 2 Jones & L. 170; *Hill on Trustees*, 224.

6. *Townson v. Tickell*, 3 B. & Ald. 31; 5 E. C. L. 219; *Hawkins v. Kemp*,

3 East 410; *Smith v. Wheeler*, 1 Vent. 128; *Leggett v. Hunter*, 19 N. Y. 445; *Clemens v. Clemens*, 60 Barb. (N. Y.) 366; *Dunning v. Ocean Nat. Bank*, 6 Lans. (N. Y.) 296; *Goss v. Singleton*, 2 Head (Tenn.) 67. See also *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Johnson v. Roland*, 2 Baxt. (Tenn.) 203; *Martin v. Paxson*, 66 Mo. 260.

A trustee who has surrendered his position cannot thereafter confer any of his original powers on his successor who is appointed subject to the control of the court touching the trust. *Kenaday v. Edwards*, 134 U. S. 117.

7. *Denne v. Judge*, 11 East 288; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 13; *Webster v. Vandeverter*, 6 Gray (Mass.) 428; *Ratcliffe v. Sangston*, 18 Md. 383; *Matter of Crossman*, 20 How. Pr. (N. Y. Supreme Ct.) 350; *Trask v. Donoghue*, 1 Aik. (Vt.) 370.

Upon the refusal of one of several trustees to accept the trust, it devolves upon the others, and the whole trust estate vests in them; but if all refuse, though the legal estate nominally vests in the trustees, the execution of the trust devolves upon the court, and new trustees may, if necessary, be appointed. *King v. Donnelly*, 5 Paige (N. Y.) 46; *Hawley v. James*, 5 Paige (N. Y.) 318; *McCooker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *Burrill v. Shiel*, 2 Barb. (N. Y.) 457; *Gamble v. Dabney*, 20 Tex. 69; *Lee v. Randolph*, 2 Hen. & M. (Va.) 12.

So where there are joint trustees, and one dies, the others take by survivorship. *Stewart v. Pettus*, 10 Mo. 755; *Mixon v. Rose*, 12 Gratt. (Va.) 425; *Gray v. Lynch*, 8 Gill (Md.) 403. See also *Jones v. Maffet*, 5 S. & R. (Pa.) 523.

estate will generally vest in the heirs or personal representatives, subject to the trust.<sup>1</sup>

**XI. RESIGNATION AND REMOVAL OF TRUSTEE.**—A trustee, having once accepted the trust, is not entitled to resign or renounce the trust as of right without good cause.<sup>2</sup> There must be some provision in the declaration of trust giving him the right to resign, or he must get the consent of all the parties or a decree from the court.<sup>3</sup>

Courts of equity have jurisdiction to remove trustees and

1. *Austin v. Marten*, 25 Beav. 523; *Goss v. Singleton*, 2 Head (Tenn.) 67.

If, by reason of the disclaimer of trustees, the property descends to the heir at law, who is also the beneficiary, the legal estate is cast upon the beneficiary, and if, upon his application to a court of competent jurisdiction, a trustee is appointed, in whom the legal estate is vested, coupled with the trusts, the legal estate is by necessary implication divested out of the beneficiary. *Goss v. Singleton*, 2 Head (Tenn.) 67. Ordinarily, however, upon the decease of a trustee who has accepted, his interest passes to his executor, and if he has instituted suit as trustee, it should survive in the name of the executor. *Mauldin v. Armistead*, 14 Ala. 702; *De Peyster v. Ferrers*, 11 Paige (N. Y.) 13. See also *Schenck v. Schenck*, 16 N. J. Eq. 174; *Nichols v. Campbell*, 10 Gratt. (Va.) 561; *Powell v. Knott*, 16 Ala. 364; *Tyler v. Mayre*, 95 Cal. 160. But see *McDougald v. Carey*, 38 Ala. 320; *Armstrong v. Park*, 9 Humph. (Tenn.) 195.

But where an executor is also appointed trustee under the will, an administrator *de bonis non* appointed on the death of such executor, is not, by virtue of such appointment, constituted trustee; and the *cestui que trust* cannot recover of such administrator interest on the trust fund, *Knight v. Loomis*, 30 Me. 204. And where a trust terminates at the death of the trustee, the trust property does not pass to his personal representative. *Cook v. Dyer*, 47 Mo. 214.

In a recent case, where an executor refused to act as testamentary trustee and filed his resignation as trustee in court, which was not acted on, the court, at the instance of the beneficiary, who could not get the income or find another trustee, treated both executors as trustees, and held them accountable to the beneficiary. *Tucker v. Grundy*, 83 Ky. 540. See *infra*, this

title, *Succession and Appointment of New Trustee*.

2. *Jones v. Stockett*, 2 Bland Ch. (Md.) 409; *Sargent v. Howe*, 21 Ill. 148; *Perkins v. McGavock*, 3 Hayw. (Tenn.) 265; *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616; *Cruger v. Halliday*, 11 Paige (N. Y.) 314; *Brennan v. Willson*, 71 N. Y. 506; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *Greenwood v. Wakeford*, 1 Beav. 576. But see *Bogle v. Bogle*, 3 Allen (Mass.) 158; *Eighmie v. Townsend* (Supreme Ct.), 15 N. Y. Supp. 464.

As to what is good cause, see *Howard v. Rhodes*, 1 Keen 581; *Hamilton v. Fry*, 2 Moll. 458; *Coventry v. Coventry*, 1 Keen 758; *Taylor v. Glanville*, 3 Madd. 176. See also *Ex p. Greenhouse*, 1 Madd. 92; *Curtis v. Chandler*, 6 Madd. 123; *Bowditch v. Bannelos*, 1 Gray (Mass.) 220; *Field v. Arrow-smith*, 3 Humph. (Tenn.) 442; 39 Am. Dec. 185; *Cole v. Wade*, 16 Ves. 27; *Curtis v. Smith*, 6 Blatchf. (U. S.) 537; *Green v. Blackwell*, 31 N. J. Eq. 37.

Interference of the *cestui que trust* may be good cause for the resignation of the trustee. *Greenwood v. Wakeford*, 1 Beav. 576.

3. *Shepherd v. M'Evers*, 4 Johns. Ch. (N. Y.) 136; 8 Am. Dec. 561; *Thatcher v. Candee*, 4 Abb. App. Dec. (N. Y.) 387; *Diefendorf v. Spraker*, 10 N. Y. 246; *Matter of Miller*, 15 Abb. Pr. (N. Y.) 277; *Switzer v. Skiles*, 8 Ill. 529; 44 Am. Dec. 723; *Toms v. Williams*, 41 Mich. 552; *Drane v. Gunter*, 19 Ala. 731; *Lowry v. Fulton*, 9 Sim. 123. The consent of the parties will not be sufficient unless they are *sui juris*. *Cruger v. Halliday*, 11 Paige (N. Y.) 314; *Matter of Jones*, 4 Sandf. Ch. (N. Y.) 615; *Courtenay v. Courtenay*, 3 Jones & L. 529; *Henderson v. Sherman*, 47 Mich. 267.

The beneficiary is not a necessary party in a suit by a trustee for the purpose of resigning his trust and appointing a successor under the powers



appoint others.<sup>1</sup> Thus, trustees who are incompetent or unfit,<sup>2</sup> who commit a breach of trust,<sup>3</sup> leave the country and reside

in the will. *Barclay v. Goodloe*, 83 Ky. 493.

In *Vermont*, under Revised Laws, § 2289, which provide that "a trustee may decline or resign his trust when the probate court sees proper to allow the same," the trusteeship does not become vacant upon the neglect of the trustee to give a bond under section 2288—, making such failure a declination of the trust, but the probate judge must first accept the declination or make an order removing him. *Foss v. Sowles*, 62 Vt. 221.

A party to a petition by a trustee to be discharged, cannot afterward raise questions that might have been decided in that proceeding. *Culross v. Gibbons*, 130 N. Y. 447.

1. *Matter of Livingston*, 34 N. Y. 555; *People v. Norton*, 9 N. Y. 176; *Bowditch v. Bannelos*, 1 Gray (Mass.) 220; *Williamson v. Suydam*, 6 Wall. (U. S.) 723; *McPherson v. Cox*, 96 U. S. 404. See *infra*, this title, *Succession and Appointment of New Trustees*. And in a proceeding for the removal of the trustee of property of a corporation in another state, the property being mortgaged to secure bonds of the corporation, the court has jurisdiction to restrain the trustee from proceeding with an action, brought in a court of such other state, to foreclose the mortgage. *Gibson v. American L. & T. Co.*, 58 Hun (N. Y.) 443.

2. *Backhaus v. Backhaus*, 70 Wis. 518; *In re Mayfield*, 17 Mo. App. 684; *Savage v. Gould*, 60 How. Pr. (N. Y. Supreme Ct.) 234.

**Bankruptcy** may be sufficient cause for removal. *Harris v. Harris*, 29 Beav. 107; *Bainbridge v. Blair*, 1 Beav. 495; *In re Bridgman*, 1 D. & S. 164; *Com'rs, etc. v. Archbold*, 11 Ir. Eq. 187; *In re Roche*, 1 Conn. & L. 306. But see *Williamson v. Nichol*, 47 Ark. 254; *Rankin v. Barcroft*, 114 Ill. 441; *Turner v. Maule*, 5 Eng. L. & Eq. 222; *Belknap v. Belknap*, 5 Allen (Mass.) 468; *Shryock v. Waggoner*, 28 Pa. St. 430, showing that it does not necessarily disqualify.

**Drunkenness** may be sufficient cause. *Bayles v. Staats*, 5 N. J. Eq. 513; *Everett v. Prythergch*, 12 Sim. 367. See also *Fisk v. Stubbs*, 30 Ala. 335.

**Lunacy** may be sufficient cause. *Piper's Appeal*, 20 Pa. St. 67; *Matter*

of *Wadsworth*, 2 Barb. Ch. (N. Y.) 381; *In re Holland*, 16 Ch. Div. 672; *In re Martyn*, 26 Ch. Div. 745; *In re Watson*, 19 Ch. Div. 384.

Where the trustees who are to manage the affairs of a church corporation are required to be members of the church, one who withdraws himself from the church and joins another denomination, which latter prohibits a connection by its members with the former, will be considered as having abandoned his office, and as having no further interest in the property of the church he has left. *Ross v. Crockett*, 14 La. Ann. 823.

3. *Atty. Gen'l v. Pearson*, 7 Sim. 309; *Thompson v. Thompson*, 2 B. Mon. (Ky.) 161; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Matter of Mechanics' Bank*, 2 Barb. (N. Y.) 446.

Neglecting to invest trust funds is a breach of trust for which a trustee may be removed, where the will creating the trust requires investment of the funds. *Cavender v. Cavender*, 114 U. S. 464; *Deen v. Cozzens*, 7 Robt. (N. Y.) 178; *Gartside v. Gartside*, 113 Mo. 348.

So, speculating with the trust fund constitutes a breach of trust. *Rankin v. Barcroft*, 114 Ill. 441. So does receiving personal gain therefrom, *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Ex p. Phelps*, 9 Mod. 357; or destroying the trust property, *Ex p. Greenhouse*, 1 Madd. 92; making improper loans, and the like, *Johnson v. Simpson*, 9 Pa. St. 416; *Buckeridge v. Glassee*, 1 Cr. & Phill. 126.

So, the refusal of a co-trustee to join in a conveyance of land, on the ground that its sale would interfere with his personal interest, is ground for his removal. *Matter of Frisbie*, 3 Dem. (N. Y.) 22. But it has been held that a testamentary trustee who has not committed a breach of trust, will not be removed merely because certain transactions, not endangering the security of the estate, were probably entered into for his own personal advantage. *Matter of Morgan*, 3 Dem. (N. Y.) 612.

A testator directed his property to be divided into equal parts at the death of his wife, one of which he gave to his son in trust for such child or children as he might have either at the time of division or thereafter, share and share alike. The trustee, with the assent of

abroad,<sup>1</sup> or refuse to act after acceptance,<sup>2</sup> may be removed. But the mere refusal to exercise a discretionary power,<sup>3</sup> or the mere disagreement between the trustee and the *cestui que trust*,<sup>4</sup> is not sufficient cause for removal; nor is the mere failure to make the best possible investment necessarily cause for removal where the trustee acts in good faith.<sup>5</sup>

his children, used the income from the property for himself, making and changing investments at discretion. On the death of one of his children, leaving an infant daughter surviving, it was held that she was entitled to have the trust fund brought into court, and, on the trustee's failure to obey such order, to have him removed. *Ehlen v. Ehlen*, 63 Md. 267.

A trust company, to which a mortgage of the property of a corporation was executed to secure payment of bonds, sued to foreclose the mortgage. Its attorney, with the authority of the trust company, consented that the lien of the mortgage should be subordinated to expenditures incurred for improvements on the property, subsequent to the mortgage, by another corporation to which it had been conveyed by the mortgagor. This was held to be ground for an action to remove the trust company as trustee. *Gibson v. American L. & T. Co.*, 58 Hun (N. Y.) 443.

So, where a person was appointed trustee of a sinking fund to pay a railroad company's debts, with power to invest the fund in such securities as the president or board of directors might recommend, without previous direction loaned a portion of the fund to a banking firm of which he was a member, and which soon after became insolvent, it was held that this was a breach of trust and could not be condoned by the board, although to secure the loan he had taken collaterals which he thought good at the time, and he should be removed and a receiver appointed. *North Carolina R.Co. v. Wilson*, 81 N.Car.223.

Where two trustees have committed a breach of trust, the court may determine the order in which they shall be answerable for the loss. *McCartin v. Traphagen*, 43 N. J. Eq. 323.

It has been held no defense to a petition for the removal of an insolvent trustee who has been guilty of misconduct, that he had settled with the *cestui que trust*, and that the fund is in the hands of a co-trustee, against whom no complaint is made. *Matter of Wiggins*, 29 Hun (N. Y.) 271.

1. *Millard v. Eyre*, 2 Ves. Jr. 94; *In re Bignold's Trust*, L. R., 17 Ch. 224; *Lill v. Neafie*, 31 Ill. 101; *Lane v. Lewis*, 4 Dem. (N. Y.) 468; *Farmers L. & T. Co. v. Hughes*, 11 Hun (N. Y.) 130; *Tilden v. Fiske*, 4 Dem. (N. Y.) 357; *Maxwell v. Finnie*, 6 Coldw. (Tenn.) 434; *Dorsey v. Thompson*, 37 Md. 25; *State v. Hunt*, 46 Mo. App. 616.  
2. *Wood v. Stane*, 8 Price 613; *Travell v. Danvers*, Finch 380; *Clark v. Wilson*, 77 Ind. 176; *Brower v. Callender*, 105 U. S. 88.

One who denies that he is a trustee, should be removed. *Irvine v. Dunham*, 111 U. S. 327.

In a suit to remove the defendant as trustee under a deed providing that on resignation of the trustee named, the court should appoint a successor, it appeared that the defendant had been appointed to succeed the original trustee, who had resigned. It was held that the fact that the defendant held the plaintiff out as trustee, and himself neglected the trust, warranted his displacement as nominal trustee, and justified a decree requiring him to convey the legal title to the plaintiff. *Lathrop v. Baubie*, 106 Mo. 470.

3. *Lee v. Young*, 2 Y. & C. C. C. 532; *Gibbes v. Smith*, 2 Rich. Eq. (S. Car.) 131.

4. *Forster v. Davies*, 4 De G. F. & J. 139; *Atty. Gen'l v. Chapman*, 3 Beav. 255; *Nickles v. Philips*, 18 Fla. 732; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Naglee's Estate*, 52 Pa. St. 154. But strong mutual hostility between the trustee and the beneficiary was held sufficient cause for removal in a recent case, where the trustee was invested by will with a wide discretion. *Wilson v. Wilson*, 145 Mass. 490; *McPherson v. Cox*, 96 U. S. 404. So disagreement among co-trustees has been held sufficient cause for removal. *Quackenboss v. Southwick*, 41 N. Y. 117; *Matter of Bernstein*, 3 Redf. (N. Y.) 20.

5. *Lathrop v. Smalley*, 23 N. J. Eq. 192; *In re Durfee*, 4 R. I. 401; *Berry v. Williamson*, 11 B. Mon. (Ky.) 245; *Atty. Gen'l v. Cooper's Co.*, 19

The state cannot remove the trustees of a private corporation and appoint others in their place.<sup>1</sup>

A trustee cannot be removed by the court, ordinarily at least, without due notice and an opportunity to be heard.<sup>2</sup> The proper

Ves. 192; *Matter of Seymour's Estate*, 62 Hun (N. Y.) 531; *Dow v. Dow*, 63 Hun (N. Y.) 628.

A appointed B trustee of an estate which was given to C for life, and on his death to his appointees. C by his will appointed D trustee, giving the estate to B for life, and on his death to his appointees, or, failing such appointment, to B's lawful issue. On the death of C, D took possession of the trust estate, B himself having previously invested it in another state, and continued the investment for twenty years, when it was changed by enlarging the security. Such investment was greatly to B's advantage, and netted him a large, regular income free from taxation, and was amply secured. It was held that D should not be removed as trustee on application of B and his children because of his failure to reduce the estate to cash, and bring it into the state for investment, without a demand for the change of investment, it appearing that he acted in good faith for the benefit of the trust, that he was of good financial standing, and had taken steps on the filing of the petition to comply with the law. *Matter of Seymour's Estate* (Supreme Ct.), 17 N. Y. Supp. 91. See INVESTMENT, vol. 11, p. 813.

To justify the removal of a trustee for a breach of duty, his act must ordinarily be such as to endanger the trust property, or show a want of honesty or capacity, and where the failure in duty has proceeded from a misunderstanding, the court will generally refuse to remove him. *Matthews v. Murchison*, 17 Fed. Rep. 760.

But where a trustee has settled his account as executor, and has had the balance found due from him transferred to his account as trustee under the will, and as such trustee he is required to invest the property and pay over the income, and he does neither, and admits his insolvency, he should be removed and a successor appointed to carry out the trust, and, if necessary, bring suit on the bond. *Cavender v. Cavender*, 3 McCrary (U.S.) 158.

The mere fact that a trustee threatens to call in safely invested trust funds to use the same in his own business is

not cause for his removal, unless the circumstances show bad faith on his part. *Massey v. Stout*, 4 Del. Ch. 274.

Where a sum of money is bequeathed in trust, to be put at interest for the beneficiary, and the trustee lends it, at the legal rate of interest in the state in which the testator resided at the time of his death, and where the funds then were, he will not be removed, because he refuses to put it at interest in another state, where the legal rate of interest is higher. *Lewis v. Cook*, 18 Ala. 334.

See further, as to when trustees will be removed, *Shea v. Dulin*, 3 McArthur (D. C.) 339; *Hille's Estate*, 14 Fed. Rep. 141; *Ferris v. Ferris*, 2 Dem. (N. Y.) 336; *Matter of Clute*, 80 N. Y. 651; *Klein v. Glass*, 53 Tex. 37; *Preston v. Wilcox*, 38 Mich. 578; *Suit v. Creswell*, 45 Md. 529; *Stevenson's Appeal*, 68 Pa. St. 101; *William's Appeal*, 73 Pa. St. 249.

1. *State v. Bryce*, 7 Ohio 82; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.

2. *Ex p. Kilgore*, 120 Ind. 94; *McPherson v. Cox*, 96 U. S. 404; *Matter of Livingston*, 34 N. Y. 555; *Foss v. Sowles*, 62 Vt. 221. But where the removal is sought upon the ground that the trustee has left the state, notice would seem to be unnecessary, as it would be unavailing. *State v. Hunt*, 46 Mo. App. 616.

In *Pennsylvania*, the orphans' court has power to remove a testamentary trustee, but only for good reasons, and where the trustee is the grandson of the testator, chosen by him in view of his knowledge of the trustee's capacity and qualifications, the fact that he is but twenty-five years old, has engrossing business duties, and has little or no property beyond that belonging to him under the will, is not sufficient cause for removal. *Theis' Estate*, 8 Pa. Co. Ct. Rep. 257.

Nor will a trustee be removed at the instance of his co-trustee, where it does not clearly appear that the interests of the estate are likely to be jeopardized, and where a majority of the beneficiaries prefer that he should serve. *Morgan's Estate*, 8 Pa. Co. Ct. Rep. 260.

mode of proceeding by one who seeks the removal of a trustee is to file a bill in chancery or petition the court for such removal;<sup>1</sup> but where a suit is already pending for the administration of the estate, the application for removal may be made by motion.<sup>2</sup> Any person interested in the trust may institute the proceedings,<sup>3</sup> but notice should be given to all parties in interest.<sup>4</sup> The proceedings ought to be instituted in the court having jurisdiction of the original trust,<sup>5</sup> and if any of the parties are minors, a *guardian ad litem* should be appointed.<sup>6</sup>

In *England*, the Conveyancing and Law Property Act of 1881,<sup>7</sup> which applies to settlements executed before as well as after its passage, has made some important changes in the law governing the resignation and removal of trustees. A synopsis of the English law upon the subject will be found in the note below.<sup>8</sup>

**XII. SUCCESSION AND APPOINTMENT OF NEW TRUSTEE.**—As already shown, equity will not permit a trust to fail for want of a trustee,

1. *In re Ballou*, 11 R. I. 360; *Matter of Foster's Will*, 15 Hun (N. Y.) 387; *Matter of Van Wyck*, 1 Barb. Ch. (N. Y.) 565; *Barker v. Piele*, 2 D. & S. 340; *Ex p. Rees*, 3 Ves. & B. 11; *Mitchell v. Pitner*, 15 Ga. 319; *Ex p. Knust*, 1 Bailey Eq. (S. Car.) 489; *Ex p. Greenville Academy*, 7 Rich. (S. Car.) 470; *Ex p. Hussey*, 2 Whart. (Pa.) 330; *Zehnbar v. Spillman*, 25 Fla. 591; *Ex p. Kilgore*, 120 Ind. 94.

2. *Webb v. Shaftesbury*, 7 Ves. 487; *In re Potts*, 1 Ashm. (Pa.) 340.

3. *Buchanan v. Hamilton*, 5 Ves. 722; *Bainbrigg v. Blair*, 1 Beav. 495; *Portsmouth v. Fellows*, 5 Madd. 450; *Howard v. Rhodes*, 1 Keen 581; *In re Smith*, 2 De G. & S. 781; *Finlay v. Howard*, 2 D. & W. 490; *Lake v. De Lambert*, 4 Ves. 592; *Ex p. Tunno*, 1 Bailey Eq. (S. Car.) 395; *Cooper v. Day*, 1 Rich. Eq. (S. Car.) 26; *Joyce v. Gunnels*, 2 Rich. Eq. (S. Car.) 260; *In re Mayfield*, 17 Mo. App. 684; *Matter of Livingston*, 34 N. Y. 567.

In case of a public charity, the attorney general may institute the proceedings. *Atty. Gen'l v. Stephens*, 3 M. & K. 347; *Atty. Gen'l v. London*, 3 Bro. C. C. 171; *In re Bedford Charity*, 2 Swanst. 538.

4. *Guion v. Melvin*, 69 N. Car. 242; *In re Abbott's Petition*, 55 Me. 580; *Keene's Appeal*, 60 Pa. St. 506; *Bradstreet v. Butterfield*, 129 Mass. 339; *Henry v. Doctor*, 9 Ohio 49; *Williamson v. Wickersham*, 2 Coll. 52; *Wardle v. Hargreaves*, 11 L. J. 7 N. S. Ch. 126. But see *Hartman's Appeal*, 90 Pa. St. 206. See also *Matter of Robinson*, 37

N. Y. 261; *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 592; 100 Am. Dec. 710.

So, in *New York*, it has been held that a suit by some of the holders of bonds secured by securities deposited with a trustee, to remove the trustee for misconduct, and appoint another to administer the trust, without making the holders of the rest of the bonds parties, cannot be maintained, although they are named defendants, as "the unknown persons, owners and holders of the debenture bonds mentioned in the complaint." *Farrington v. American L. & T. Co.* (Super. Ct.), 9 N. Y. Supp. 433. See also *Bear v. American Rapid Tel. Co.*, 36 Hun (N. Y.) 400; *Gartside v. Gartside*, 113 Mo. 348.

5. *Howard v. Gilbert*, 39 Ala. 726.

6. *Hunter v. Gibson*, 16 Sim. 158.

As to when a receiver will be appointed on removal of a trustee, see *infra*, this title, *Rights and Remedies of the Beneficiary*.

7. 44 and 45 Vict., ch. 41.

8. Prior to the first day of January, 1882, when the Conveyancing and Law Property Act of 1881 took effect, a trustee could only resign or be removed as follows: 1. Under an express power; 2. Under Lord Cranworth's Act (23 and 24 Vict., ch. 145, § 37); 3. By the consent of the trustee and all the beneficiaries, which could only be obtained where all were *sui juris* (*Wilkinson v. Parry*, 4 Russ. 276); 4. By order of court (*In re Gregson's Trust*, 34 Ch. Div. 209.) A beneficiary might obtain an order of

and if no trustee is nominated by the settlor, or if the person named is incompetent, refuses to accept, dies, resigns, or is removed, the court may, and will, in a proper case, appoint a new trustee.<sup>1</sup>

the court for the removal of a trustee where the trustee had behaved improperly, *Millard v. Eyre*, 2 Ves. Jr. 94; *Palairret v. Carew*, 32 Beav. 567; or was incapable of acting properly, *Buchanan v. Hamilton*, 5 Ves. 722; *In re Lemann's Trust*, 22 Ch. Div. 633; *In re Phelps*, 31 Ch. Div. 351; or was a felon or dishonest misdemeanant, 15 and 16 Vict., ch. 55, § 32; or a recent bankrupt, *In re Adams' Trust*, 12 Ch. Div. 634; *In re Barker's Trusts*, 1 Ch. Div. 43; or was residing permanently, or for a long or indefinite period, abroad, *Buchanan v. Hamilton*, 5 Ves. 722; *In re Bignold's Trusts*, L. R., 7 Ch. 223; and *In re Moravian Soc.*, 26 Beav. 101; or could not be heard of, *In re Harrison*, 22 L. J. Ch. 69. And the court can discharge an old trustee without necessarily appointing a new one in his place, if it be difficult or impossible to do so. *In re Stokes' Trusts*, L. R., 13 Eq. 333. The costs of the application will come out of the estate if the trustee is justified in retiring, *Coventry v. Coventry*, 1 Keen 758; *Greenwood v. Wakeford*, 1 Beav. 581; *Forshaw v. Higginson*, 20 Beav. 485; *In re Stokes' Trusts*, L. R., 13 Eq. 333; *Barker v. Piele*, 2 D. & S. 340; or where the removal is not caused by impropriety on his part.

Under the said conveyancing and law property act, trustees may be removed in any of the ways above specified except in the mode provided by Lord Cranworth's act. And, in addition, where there are more than two trustees, one of them may retire by executing a deed declaring that he is desirous of being discharged from the trust, provided that his co-trustees, and such other person—if any—as may be empowered to appoint trustees, by deed consent to his retirement.

1. See *supra*, this title, *Who May be a Trustee*. Thus, the court may appoint a successor to a deceased trustee to sell property to pay a mortgage debt. *Buchanan v. Hart*, 31 Tex. 647.

So, where a fund is bequeathed to a city in trust, to be administered in aid of its poor, and it refuses the trust, a trustee will be appointed on application of the state's attorney; and, on his failure to act, application may be

made by any beneficiary. *Dailey v. New Haven*, 60 Conn. 314.

A will bequeathed to certain persons a sum of money in trust for the benefit of a church, and directed that the trustees, or their successors, invest the same for the benefit of the church. It was held that they took the money as legatees, but were trustees as to the performance of the duties imposed, to the extent that upon refusing to act, a court of equity might appoint successors rather than permit the trust to fail for want of a trustee. *In re Petranek's Estate*, 79 Iowa 410.

In *California*, where land situated elsewhere was conveyed by a trust deed of certain persons resident there, the deed providing that in case of the trustees failing to act, a court of competent jurisdiction might appoint a new trustee, it was held that the *California* court having jurisdiction of the parties, might name a new trustee and direct him to execute the trust. *Smith v. Davis*, 90 Cal. 25.

And, in a recent case, it was held that a provision in a mortgage that, in case of the resignation of the trustee, the parties might appoint another, would not prevent the appointment of a new trustee by the court where the original trustee, being a corporation, had become insolvent, and gone into the hands of a receiver. *People v. American L. & T. Co.*, 17 N. Y. Supp. 76; 62 Hun (N. Y.) 622.

So, in a proper case, where it is for the best interest of the parties, the court may even transfer the trust fund to heirs and substitute them as trustees. *Chapman v. Kimball*, 83 Me. 389.

The matter is largely within the discretion of the court. *City of Augusta, v. Walton*, 77 Ga. 517. And, while a court of equity will see that trustees are appointed to manage trust property when required for its safety or proper administration, it will not appoint them when no good will be accomplished thereby. *Schlessinger v. Mallard*, 70 Cal. 326; *Ward v. Dortch*, 69 N. Car. 279.

But the general rule is that equity never permits a trust to fail for want of a trustee, and the assent of one named as trustee, in a deed of gift, is

immaterial to the validity of the instrument. *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 358; *Dawson v. Dawson*, Rice Eq. (S. Car.) 243; *Field v. Arrow-smith*, 3 Humph. (Tenn.) 442; 39 Am. Dec. 185; *Saunders v. Harris*, 1 Head (Tenn.) 185; *Furman v. Fisher*, 4 Coldw. (Tenn.) 626; 94 Am. Dec. 210. See also *Harris v. Rucker*, 13 B. Mon. (Ky.) 564; *Treat's Appeal*, 30 Conn. 113; *White v. Hampton*, 13 Iowa 259; *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295; *Bundy v. Bundy*, 38 N. Y. 410; *Goodrum v. Goodrum*, 8 Ired. Eq. (N. Car.) 313; *Martin v. Paxson*, 66 Mo. 260; *Johnson v. Roland*, 2 Baxt. (Tenn.) 203; *Braswell v. Downs*, 11 Fla. 62.

The matter of the appointment of new trustees is often regulated by statute. Thus in *New Jersey*, the orphans' court act provides that where a trustee dies, that court may appoint a new trustee, and it is held that a trustee so appointed can convey a good title to land devised in trust to sell. *Yard v. Larison*, 39 N. J. Eq. 386.

So in *Massachusetts*, it has been held that where a will creates separate trusts in respect to a testator's real and personal property, his trustee can accept the trust as to the personal property and decline it as to the realty, and under the *Massachusetts* statute, it is provided that when a trustee refuses to serve, and the will makes no adequate provision for the selection of his successor, a new trustee may be appointed by the probate court, and that that court has power to appoint a trustee to carry out the testator's provisions as to the realty. *Carruth v. Carruth*, 148 Mass. 431.

It has also been held under the same statute, which provides that the probate court "shall after notice to all persons interested appoint a new trustee" in case a vacancy occurs, but notice "may be dispensed with when all the parties entitled thereto signify in writing their assent to such proceeding or waive notice," that it is sufficient that the assent required is given by all persons in being who have a vested interest. *Dexter v. Cotting*, 149 Mass. 92. See also as to notice in *California*, *Dyer v. Leach*, 91 Cal. 191.

Under § 3732 of the *Alabama* Code, the register in chancery is given authority upon the death of the trustees of an express trust, to appoint their successors upon application made by persons in interest. See *Allison v.*

*Little*, 85 Ala. 512. The circuit court had authority in that state under the statute of 1829. *State Bank v. Smith*, 6 Ala. 75.

In *Tennessee*, upon the death of a trustee while suit was pending in which the trust property had been previously attached, the chancery court, and not the county court, has jurisdiction over the application for the appointment of his successor. *Mask v. Miller*, 7 Baxt. (Tenn.) 527.

In *Pennsylvania*, under the act of April 26, 1855 (P. L. 331), which provides that no disposition of property for any religious or charitable use shall fail for want of a trustee, and authorizes courts of equity jurisdiction to appoint a trustee, it was held in *Frazier v. St. Luke's Church*, 147 Pa. St. 256, that a common pleas court might appoint a trustee of ground rents devised to a religious society, and may sue for and recover the same.

The orphans' court also has power to appoint a trustee where the trustee under a will has been removed, but notice must be given to all parties in interest. *Lancaster's Appeal*, 111 Pa. St. 524.

Under the *Wisconsin* statute (Revised Statutes, section 2098), notice to all parties interested is not required, and the appointment may be made without formal hearing, where a vacancy is caused by the death of a trustee. *Reigart v. Ross*, 63 Wis. 449. But such is not the rule where a new trustee is appointed in place of one who declines to act. *Reigart v. Ross*, 63 Wis. 449.

Notice to the beneficiary is required in *Kentucky*. *Clay v. Edwards*, 84 Ky. 548.

In *Michigan* and in *New York*, it has been held that the statutes authorizing the chancery court to name some person to complete the execution of a trust when the original trustee has died, resigned or been removed, apply only to trusts in real estate. *Ledyard's Appeal*, 51 Mich. 623; *Bucklin v. Bucklin*, 1 Abb. App. Dec. (N. Y.) 242.

In *Maryland*, where a trustee has failed to give a bond, or has furnished one which is not sufficient, the circuit court may, on the application of a party in interest, compel him to execute an adequate bond, and upon failure to comply with such order remove him and appoint another in his place. Act of 1870, ch. 370; *Suit v. Creswell*, 45 Md. 529.

In *New York*, the successor of a

Upon the death of a trustee, the legal estate generally passes to his heirs or personal representatives, to be administered or accounted for by them; but if it would be beneficial to the estate to have a new trustee appointed, the court may make such appointment.<sup>1</sup> But a new trustee will not be appointed in place of one who has died where it clearly appears that the trust is void.<sup>2</sup>

In the absence of a statutory provision to the contrary, trusts of real estate, upon the death of the trustee, devolve upon the heir, and trusts of personalty vest in the executor or administrator.<sup>3</sup> Unless the trust is a personal one, intended to cease at the death of the trustee,<sup>4</sup> it may be devised by the trustee;<sup>5</sup> and

trustee under a will may, upon the death of the trustee, be appointed by the surrogate court, under section 2818 of the *New York Code of Civil Procedure*. *Matter of Morian's Estate*, 1 Conn. (N. Y.) 503. And the executors of a deceased testamentsary trustee cannot question the power of the surrogate court to appoint a successor in accordance with such statute, as they are not interested therein. *Elsworth v. Hinton*, 4 N. Y. Supp. 573; 51 Hun (N. Y.) 641. So, although the section referred to provides that when a "sole" testamentsary trustee dies, becomes a lunatic, resigns, or is removed, leaving the trust not fully executed, the surrogate court may appoint a successor, it has been held that the same power exists in said court, under said statute, to appoint a successor or successors where there are several trustees and all resign. *Royce v. Adams*, 123 N. Y. 402. But the supreme court also has authority to appoint successors in such a case, as, under 1 R. S. (N. Y.) 730, § 71; and 734, § 72, upon the death of an original trustee the trust devolves upon the supreme court, and it has jurisdiction to appoint new trustees to execute the trust. *Royce v. Adams*, 123 N. Y. 405; *Delaney v. McCormack*, 88 N. Y. 174; *Matter of Hawley*, 104 N. Y. 250; *Greenland v. Waddell*, 116 N. Y. 243; 15 Am. St. Rep. 400.

1. *Tiedeman on Real Prop.*, § 509; 1 *Perry on Trusts*, §§ 341, 344; *Mauldin v. Armistead*, 14 Ala. 702; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Tyler v. Mayre*, 95 Cal. 160; *Nichols v. Campbell*, 10 Gratt. (Va.) 561; *De Peyster v. Ferrers*, 11 Paige (N. Y.) 13; *Keister v. Howe*, 3 Ind. 268; *Gray v. Lynch*, 8 Gill (Md.) 404; *Duffy v. Calvert*, 6 Gill (Md.) 487; *Watkins v. Specht*, 7 Coldw. (Tenn.) 585; *Stewart v. Pettus*, 10 Mo. 755; *Macdonald v. Walker*, 14 Beav. 556; *Jenks v. Back-*

*house*, 1 Binn. (Pa.) 91; *Gray v. Henderson*, 71 Pa. St. 368; *Evans v. Chew*, 71 Pa. St. 47; *King v. Lawrence*, 14 Wis. 238; *Mitchell v. Adams*, 1 Ired. (N. Car.) 298; *Boone v. Chiles*, 10 Pet. (U. S.) 213; *Russell v. Peyton*, 4 Ill. App. 473; *Clark v. Tainter*, 7 Cush. (Mass.) 567; *Warden v. Richards*, 11 Gray (Mass.) 277. In *New York, Missouri, Alabama* and some other states the property is, by statute, left to the court to administer by the appointment of a new trustee. See *Royce v. Adams*, 123 N. Y. 402; *Clark v. Crego*, 51 N. Y. 647; *Hook v. Dyer*, 47 Mo. 214; *McDougald v. Carey*, 38 Ala. 320; and note to *Hill on Trustees*, \*190 *et seq.*, where a synopsis of the different statutes is given.

2. *Matter of Butterfield's Will*, 133 N. Y. 473. See also *Howards v. Davis*, 6 Tex. 174; *Schlessinger v. Mallard*, 70 Cal. 326.

3. *Schenck v. Schenck*, 16 N. J. Eq. 174; *Tyler v. Mayre*, 95 Cal. 160 (trust in personal property held to devolve on administrator). The *New Jersey* case *cites Hill on Trustees*, 175; *Willis on Trustees*, 53; and *Lewin on Trustees*, 205. See also *Underhill on Trusts and Trustees*, 215; *Ewing v. Shannahan*, 113 Mo. 188; *Anderson v. Northrop*, 30 Fla. 612.

4. *Hinckley v. Hinckley*, 79 Me. 320.

5. *Titley v. Wostenholme*, 7 Beav. 435; *Osborne v. Rowlett*, 13 Ch. Div. 774; *Taylor v. Benham*, 5 How. (U. S.) 270; *Jackson v. Delancy*, 13 Johns. (N. Y.) 537; 7 Am. Dec. 403; *Ballard v. Carter*, 5 Pick. (Mass.) 112; 16 Am. Dec. 377; *Drane v. Gunter*, 19 Ala. 731; *Richardson v. Woodbury*, 43 Me. 206; 1 *Perry on Trusts*, §§ 335, 339. *Compare Cooke v. Crawford*, 13 Sim. 91; *In re Morton*, 15 Ch. Div. 143. And see for change in *England* by recent acts, *Underhill on Trusts and Trustees* 350.

his heirs or devisees to whom it goes may execute it,<sup>1</sup> except where it was held by the trustee upon a personal confidence.<sup>2</sup>

If all the parties are *sui juris* and agree upon the new trustee, the court will at once appoint him and direct a conveyance to be made.<sup>3</sup> So, if expressly authorized by the settlor in the instrument creating the trust, a trustee may appoint his successor;<sup>4</sup> but he cannot do so unless authority is given him to that effect.<sup>5</sup>

1. *Hall v. May*, 3 Kay & J. 585; *Osborne v. Rowlett*, 13 Ch. Div. 774; *Titly v. Wostenholme*, 7 Beav. 425. See *Underhill on Trusts and Trustees* 350, where this is stated as the law prior to the recent acts in *England* which cast the office upon the personal representative of the trustee.

2. *Robson v. Flight*, 4 De G. J. & S. 608; 34 L. J. Ch. 226; 2 *Perry on Trusts*, § 496; *In re Abbott's Petition*, 55 Me. 580; *Mortimer v. Ireland*, 11 Jur. 721.

3. *Young v. Young*, 4 Cranch (C. C.) 499; *O'Keefe v. Calthorpe*, 1 Atk. 18. See also *Mitchell v. Pitner*, 15 Ga. 319.

In *Cates v. Mayes* (Tex. 1889), 12 S. W. Rep. 51, where a trust deed authorized the beneficiaries to appoint a substitute in case the trustee refused to make a sale of the trust property, and all the beneficiaries united in a formal appointment of such a substitute except one, and that one indorsed upon a written appointment a statement to the effect that he acquiesced in it, and that all of his interest in the debt secured by the trust had been settled, it was held that the appointment of a substitute was effective.

Where, by the terms of a will, a testator directs that the probate judge shall approve of the appointment of the trustee to be made by persons designated in the will, the individual who occupies the office of judge of probate acts under authority conferred upon him by the will, and not as a mere judicial officer, and notice to the parties in interest is not required. *National Webster Bank v. Eldridge*, 115 Mass. 424. See also *Shaw v. Paine*, 12 Allen (Mass.) 293.

4. *In re Roche*, 1 Conn. & L. 306; *Lonsdale v. Beckett*, 4 De G. & S. 73; *Lord Camoys v. Best*, 19 Beav. 414; *In re Coates*, 34 Ch. Div. 370; *In re Norris*, 27 Ch. Div. 333; *In re Glenny*, 25 Ch. Div. 611; *Walsh v. Gladstone*, 14 Sim. 5; *Crook v. Ingoldsby*, 2 Ir. Eq. 375; *Tweedy v. Urquhart*, 30 Ga. 446; *Leggett v. Grimmatt*, 36 Ark. 498; *Morri-*

*son v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Bowditch v. Bannelos*, 1 Gray (Mass.) 220; *Whelan v. Reilly*, 3 W. Va. 597. So, it seems, a *cestui que trust* may name a new trustee if the deed so provides. *Clark v. Wilson*, 53 Miss. 119. See also *Schott's Estate*, 11 Phila. (Pa.) 120; *Drusadow v. Wilde*, 63 Pa. St. 170.

Although a deed of trust or will gives an individual the power to appoint new trustees, yet a court of chancery may control his exercise of the power, at least to the extent of preventing an abuse of discretion; and may require an appointee named, who is of doubtful financial responsibility, to give security. *Bailey v. Bailey*, 2 Del. Ch. 95.

Where a trust deed of personal property authorized the substitution of another trustee by the beneficiaries in place of the one mentioned, upon the latter declining to act, but did not prescribe a mode of appointment, it was held that the appointment might be by parol, and the new trustee would succeed to all rights and powers of the original trustee. *Leggett v. Grimmatt*, 36 Ark. 496.

It is too late after suit has been instituted for administration of the trust, for a trustee to appoint a successor, unless the court consents. *Peatfield v. Benn*, 17 Beav. 522; *Kennedy v. Turnley*, 6 Ir. Eq. 399; *Webb v. Shaftesbury*, 7 Ves. 480; *Millard v. Eyre*, 2 Ves. Jr. 94. See also *Kenaday v. Edwards*, 134 U. S. 117.

5. *In re Abbott's Petition*, 55 Me. 580; *Whelan v. Reilly*, 3 W. Va. 597; *Oglander v. Oglander*, 2 De G. & S. 381; *Bowles v. Weeks*, 14 Sim. 291; *Bayley v. Mansell*, 4 Madd. 226; *Winthrop v. Atty. Gen'l*, 128 Mass. 258; *Wilson v. Towle*, 36 N. H. 129; *Pierce v. Weaver*, 65 Tex. 44. And there is no inherent right in a creditor secured by a trust deed to appoint a new trustee. *Clark v. Wilson*, 53 Miss. 119.

Powers given to trustees, in the trust instrument, to appoint their successors, are strictly construed. *Turner v. Maule*,



Under the statutes in most of the states, the title vests in the new trustee without a conveyance;<sup>1</sup> but in the absence of such a statute a conveyance to him seems to be necessary,<sup>2</sup> unless the instrument creating the trust provides that the property shall vest in the new trustee.<sup>3</sup>

As a general rule, any person interested in the trust may institute proceedings for the appointment of a new trustee.<sup>4</sup> If the trust instrument provides that notice shall be given to certain persons, the appointment will be irregular unless such notice is given,<sup>5</sup> and it is the safest plan in any case to make all persons

15 Jur. 761; *Withington v. Withington*, 16 Sim. 104; *Sharp v. Sharp*, 2 B. & Ad. 404; *Lord Camoys v. Best*, 19 Beav. 414; *In re Coates*, 34 Ch. Div. 370; *Guion v. Pickett*, 42 Miss. 77; *Mastin v. Barnard*, 33 Ga. 520. See POWERS, vol. 18, p. 877.

So, where a deed of trust authorizes the appointment of a substitute trustee upon the failure or refusal of the original trustee to act, the appointment of a substitute trustee while the original trustee is advertising the property for sale under the deed, confers no title on the trustee so substituted. *Chestnut v. Gann*, 76 Tex. 150.

And one who has resigned, cannot thereafter transfer his original powers to a new trustee appointed by the court to act under its direction. *Kenaday v. Edwards*, 134 U. S. 117. But generally the new trustee has the same powers as the original trustee had, *Chase v. Davis*, 65 Me. 102; *Stearly's Appeal*, 3 Grant Cas. (Pa.) 270, except in cases in which discretionary powers were given the original trustee on account of personal trust and confidence. See POWERS, vol. 18, p. 970.

Where real estate was conveyed in trust for a corporation, to be conveyed by the trustee on the order of the directors, with a provision that in case of his failure to act, the company might "by deed duly executed appoint other trustees who should by such deed be vested with power to execute the trust," it was held that a deed signed by the president and persons purporting to be the successors in the trust, was ineffectual to convey a title, unless the new trustees were appointed to carry out the trust by deed duly executed. *Bumgarner v. Cogswell*, 49 Mo. 259.

But where a will appointed a trustee to hold the share of one of the devisees, with power of sale, and upon the trustee named failing to take, the court

appointed a trustee to execute the trust, who afterwards resigned, and the court appointed another trustee, it was held that the power of sale was but an incident of the trusteeship, and accompanied it, though not referred to in the order appointing the last trustee. *Lahey v. Kortright*, 56 N. Y. Super. Ct. 527.

1. *Stearly's Appeal*, 3 Grant Cas. (Pa.) 270; *Gibbs v. Marsh*, 2 Met. (Mass.) 253; *Parker v. Converse*, 5 Gray (Mass.) 336; *Golder v. Bressler*, 105 Ill. 419; *Wooldridge v. Planters' Bank*, 1 Sneed (Tenn.) 297; *Duffy v. Calvert*, 6 Gill (Md.) 487; *Burdick v. Goddard*, 11 R. I. 516; *Smith v. Smith*, 3 Dr. 72; *In re Fisher's Will*, 1 W. R. 505; *Indiana Rev. St.* (1881), § 2978; *Conveyancing and Law Property Act of 1881* (44 and 45 Vict., ch. 41), § 34.

2. *O'Keefe v. Calthorpe*, 1 Atk. 18; *Foley v. Wontner*, 2 Jac. & W. 245; *Owen v. Owen*, 1 Atk. 496; *Miller v. Priddon*, 1 De G. M. & G. 339; *Crosby v. Huston*, 1 Tex. 203; *Foster v. Goree*, 4 Ala. 440.

A devise to one in trust does not of itself vest the estate in the successor of the trustee where the devise is silent on the point, and the court appointing the successor makes no provision for vesting the title in him. *West v. Fitz*, 109 Ill. 425.

3. *National Webster Bank v. Eldridge*, 115 Mass. 424; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 13.

4. *Bainbrigg v. Blair*, 1 Beav. 495; *Findlay v. Howard*, 2 Dr. & W. 490; *Buchanan v. Hamilton*, 5 Ves. 722; *Coventry v. Coventry*, 1 Keen 758; *Lake v. DeLambert*, 4 Ves. 592; *Joyce v. Gunnels*, 2 Rich. Eq. (S. Car.) 260. See *supra*, this title, *Resignation and Removal of Trustee*.

5. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 592; 100 Am. Dec. 710.

who are interested in the trust, parties, and to give them notice,<sup>1</sup> unless the statute provides that notice is unnecessary.<sup>2</sup> But it has been held that where a *cestui que trust* gave an order on the trustees in favor of her children, the latter had no such interest as entitled them to be made parties to a proceeding for the appointment of new trustees.<sup>3</sup> And if the old trustee transfers the trust property to the new trustee appointed by the court, he will be bound by the proceedings, although notice was not given him of their institution.<sup>4</sup> So, a beneficiary, by recognizing the competency of a substituted trustee to act, may estop himself from questioning the validity of the trustee's appointment.<sup>5</sup> But mere

1. *In re Abbott's Petition*, 55 Me. 580; *Henry v. Doctor*, 9 Ohio 49; *Williamson v. Wickersham*, 2 Coll. 52; *Wardle v. Hargreaves*, 11 L. J., N. S. Ch. 126; *Tompkins v. Morsman*, 5 Redf. (N. Y.) 402; *Clay v. Edwards*, 84 Ky. 548; *Lancaster's Appeal*, 111 Pa. St. 524; *Bass v. Fontleroy*, 11 Tex. 608.

Thus, it has been held that the court will not appoint a trustee on an *ex parte* motion or petition in cases where the former trustee has died, removed from the county, or become incompetent. All persons interested must be made parties, and have full time and opportunity to set up their respective claims. *Guion v. Melvin*, 69 N. Car. 422.

So, it has been held that an appointment, on motion merely, of a trustee to sell land in place of one who has died, is void. *Williams v. Nell*, 4 Heisk. (Tenn.) 279. Compare *Dyer v. Leach*, 91 Cal. 191.

2. See *Reigart v. Ross*, 63 Wis. 449; *Dyer v. Leach*, 91 Cal. 191; *National Webster Bank v. Eldridge*, 115 Mass. 424; *Milbank v. Crane*, 25 How. Pr. (N. Y. Supreme Ct.) 193; *Matter of Robinson*, 37 N. Y. 261, holding notice unnecessary.

And, where a trustee is appointed by deed, providing that in case of his decease or legal incapacity, the chancellor shall be vested with all the trusts and confidences reposed in the trustee named, the chancellor may appoint a trustee, by virtue of his office, to execute the desire of the grantor, and the right of the chancellor does not depend upon his acquiring jurisdiction over the heirs and personal representatives of the *cestui que trust*. *Morrison v. Kelly*, 22 Ill. 610; 14 Am. Dec. 169.

So the instrument of trust may by its own terms dispense with notice to the settlor, and where a mortgage executed in favor of trustees provided that

a vacancy in the trust might be filled by the nomination of one of the beneficiaries with the approval of the judge of the superior court, it was held that the mortgagor was entitled to no notice of an appointment made in that manner. *Macon, etc., R. Co. v. Georgia R. Co.*, 63 Ga. 103.

3. *Hawley v. Ross*, 7 Paige (N. Y.) 103. See also *Marshall v. Sladden*, 7 Hare 427.

So it has been held that where a trustee under a will has died, his executors cannot question the power of the surrogate under the *New York Code of Civil Procedure*, § 2818, to appoint his successor, as they have no interest therein. *Elsworth v. Hinton*, 4 N. Y. Supp. 573; 51 Hun (N. Y.) 641.

And where railroad property has been mortgaged to a trustee, his heirs and assigns, in trust for bondholders, the court may upon his death appoint his successors, upon the application of the interested parties, and in such case the heir at law of the former trustee is not entitled to be made a party to a suit to foreclose the mortgage. *Gibbes v. Greenville, etc., R. Co.*, 13 S. Car. 228.

It has, however, been held that the children of a life tenant who are entitled to the remainder, are, equally with the tenant for life, necessary parties to a suit by the executrix of the deceased trustee for the appointment of a successor in the trust to whom she might account as executrix. *Bolling v. Stokes*, 7 S. Car. 364. See also *Bradstreet v. Butterfield*, 129 Mass. 399.

4. *Thomas v. Higham*, 1 Bailey Eq. (S. Car.) 222. See also *State v. Vincennes University*, 5 Ind. 77.

5. Thus in a recent case, where, upon the trustee's death, the court appointed his successor, and one of the two beneficiaries joined in an affidavit to the effect that the trustee so substituted was a fit person for the position, it was held

lapse of time will not validate an illegal appointment where the trustee has never had possession of the trust property.<sup>1</sup>

In some of the states a new trustee is required by statute to give a bond,<sup>2</sup> but, in the absence of such a statute, the matter seems to rest largely in the discretion of the court.<sup>3</sup>

that by this affidavit she was estopped from questioning the validity of the trustee's appointment. The court also held that as a consequence, a joint action by the two beneficiaries to set aside a subsequent conveyance by the substituted trustee, on the ground that his appointment was invalid, would not lie, although such appointment may not have been valid as to the other beneficiaries. *Lowe v. Suggs*, 87 Ga. 577.

1. *Augusta v. Walton*, 77 Ga. 517. See also *Carskadon v. Torreyson*, 17 W. Va. 43.

A mere irregularity in the appointment of a trustee will not, where the court has jurisdiction of the subject-matter, make the appointment void in a collateral proceeding, until it is set aside. *Budd v. Hiler*, 27 N. J. L. 43. See also *Loveman v. Taylor*, 85 Tenn. 1.

So, where the supreme court appointed a testamentary trustee in a county, other than the one in which the will had been probated, but in which a portion of the trust estate was situated, no objection having been made to the appointment, it was held that the appointment could not be collaterally impeached, and that it was immaterial that the petition for the appointment was addressed to the court in another county. *Bradstreet v. Butterfield*, 129 Mass. 339. See also *Bassett v. Crafts*, 129 Mass. 513.

But it was held in *Alabama*, that the appointment of a trustee by a register in chancery in that state, on a petition simply alleging that the property of the trust was in the possession of the trustee in *Georgia*, and that he was desirous of delivering it to a trustee appointed here, was void for want of jurisdiction. *Howard v. Gilbert*, 39 Ala. 726.

And a court of another state cannot appoint a trustee of lands lying in *Pennsylvania*, in the place of one already appointed by the *Pennsylvania* court. *Williams v. Maus*, 6 Watts (Pa.) 278; 31 Am. Dec. 465. See *Butler v. State Mut. L. Assurance Co.*, 55 Hun (N. Y.) 296.

2. A bond of an executor to faithfully discharge his duties as executor,

does not cover and secure the faithful discharge of his duties as trustee of a trust created by the will. *Hinds v. Hinds*, 85 Ind. 312.

A bond executed by a trustee under a void appointment, although not good as a statutory bond, may be enforced as a common-law bond against both principal and surety, where the former has received the trust estate and failed to account for it. *Clay v. Edwards*, 84 Ky. 548.

A and B were co-sureties for C, a testamentary trustee, who converted the trust money to his own use and died insolvent. A was appointed trustee, and gave a bond, with B as surety, to well and truly execute the trust. A then presented a claim for the trust money against the estate of C, and received a dividend thereon. It was held that as both A and B were liable as sureties for the balance of the trust money, A was to be regarded as having received the money, and that both were liable on the new bond for A's neglect to make certain payments from the trust fund, as required by the trust. *Prindle v. Holcomb*, 45 Conn. 111.

When a trustee dies before his trust has been completed and his accounts settled, a court of equity has jurisdiction to entertain a bill filed by his successor against the sureties on his bond, and may decree the payment by such sureties of the amount found to be due the trust estate. *Thurston v. Blackiston*, 36 Md. 501.

3. *Rigler v. Cloud*, 14 Pa. St. 361; *Strayhorn v. Green*, 92 N. Car. 119; *Berry v. Williamson*, 11 B. Mon. (Ky.) 245; *Holcomb v. Coryell*, 12 N. J. Eq. 289; *State v. Rondebush*, 114 Ind. 347; *Lane v. Lewis*, 4 Dem. (N. Y.) 468; *Bradstreet v. Butterfield*, 129 Mass. 339; *Clarke v. Saxon*, 1 Hill Eq. (S. Car.) 69.

Trustees are generally, however, required to give security. *Gibson's Case*, 1 Bland (Md.) 138; 17 Am. Dec. 257; *Matter of Whitehead*, 3 Dem. (N. Y.) 227; *Bates v. State*, 75 Ind. 463; *Hinds v. Hinds*, 85 Ind. 312.

A trustee whose powers are derived solely from the instrument creating the

trust, cannot be required to give a bond against the direction of the instrument, unless the statute so requires. *Ex p. Kilgore*, 120 Ind. 94.

**Appointment of New Trustees Under English Conveyancing and Law of Property Act of 1881.**—Under the said act, where a trustee dies, or remains out of the kingdom for more than twelve months, or desires to be discharged, or refuses, or is unfit to act, or is incapable of acting, then—unless a contrary intention is shown in the settlement—the person or persons nominated for that purpose by the settlement, or if there be no such person, or none such able and willing to act, then the surviving or continuing trustees or trustee for the time being (including a retiring trustee, if willing to act under this power), or the personal representative of the last surviving or continuing trustee, may, by writing, appoint a new trustee in the place of the one so dead—even where he died before the trust was created—remaining out of the kingdom, desiring to be changed, or refusing, or being unfit or incapable to act. On any such appointment (but not otherwise) the number of trustees may be increased or diminished, provided that (except where only one trustee was originally appointed) a retiring trustee will not be discharged, unless, on his retirement, there will be at least two trustees to perform the trust. Every new trustee so appointed, both before and after the trust property is vested in him, has the same powers, authorities and discretions, and may in all respects act as if he had been an original trustee. Where an administration decree has been made, a new trustee can only be appointed under the supervision of the court. On the appointment of a new trustee, everything requisite should be done for vesting the trust property jointly in the persons who are for the future to be the trustees. This may be done as follows:—1. It may be effected by the ordinary modes of conveying or transferring property. 2. The deed by which he is appointed may contain a declaration by the appointor, to the effect that any estate or interest in any land, or in any chattels, or the right to recover and receive any chose in action, subject to the trust, shall vest in the persons who, by virtue of the deed, became and are the trustees. Such a declaration, without a conveyance or assignment, operates to vest such estate, interest or right, in those persons as

joint tenants, with the exception of the legal estate in copyholds or customary lands, lands held by way of mortgage for securing money subject to the trust, and shares, stock, annuities or property only transferable in the books kept by a company or other body, or in manner prescribed by or under act of Parliament. Where a trustee retires, by executing a deed, a similar declaration, made by the retiring and continuing trustees, and by the other persons (if any) empowered to appoint new trustees, will vest the trust property (save as aforesaid) in the continuing trustees alone, as joint tenants. Where none of the foregoing means are feasible, application may be made, by petition, to the chancery division of the high court of justice (or, in case of lunacy or unsoundness of mind, to the lord chancellors or lord justices), for a vesting order under the provisions of the Trustee Acts of 1850 and 1852, in any of the following cases, viz.: (a) Where land, stock, or a chose in action is vested in a lunatic or person of unsound mind, or an infant, or person out of the jurisdiction, or a person who cannot be found, or about whom it is uncertain whether he be living or dead; (b) Where it is not known which of several trustees of land was the survivor, or where a trustee of land has died intestate, and without leaving an heir (or, since 1881, with regard to freeholds, a personal representative), or where such heir or a devisee of trust estates is not known, or where stock is standing in the name of a deceased person whose personal representative is a lunatic or person of unsound mind, or where a chose in action is vested in such personal representative; (c) Where lands are subject to a contingent right in any unborn person or class of persons, who, upon coming into existence, would become seised or possessed thereof upon any trust; (d) Where trustees of lands or stock refuse to convey such lands, or transfer such stock, for twenty-eight days after demand made by a person entitled to require the same. In any case not covered by the foregoing, the property, of whatever kind it may consist, may be vested by an application to the court to appoint new trustees, and vest the trust property in them. But the court has no jurisdiction to reappoint trustees, already validly appointed, merely for the purpose of making a vesting order. Whenever it is expedient to appoint a trustee or trustees,

New trustees appointed by the court, acting under its discretion, generally have all powers necessary to carry out the provisions of the trust instrument,<sup>1</sup> but discretionary powers given the original trustees on account of personal trust or confidence in them cannot ordinarily be exercised by their successors.<sup>2</sup>

**XIII. STATUTE OF LIMITATIONS — LACHES — LAPSE OF TIME — 1. Generally.**—The Statute of Limitations, as applicable to trusts of certain kinds, has been treated under other titles in this work,<sup>3</sup> and all that is necessary or proper in this connection is to complete the subject and cite such cases upon the questions already considered as have been decided since the former articles were written. Different rules apply where the controversy is between the trustee or *cestui que trust* and a third person, from those applicable where the controversy is between the trustee and *cestui*

whether of a settlement of which no trustees were originally appointed, or the original trustees of which have died, retired or been removed, and it is found inexpedient, difficult, or impracticable to do so without the assistance of the court (but not otherwise), the court may, on petition, appoint a trustee or trustees, and may, by order, vest in such new trustee or trustees any lands subject to the trust, and the right to call for the transfer of any stock, or to receive the dividends thereof, and the right to sue for and recover any chose in action, or any interest in respect thereof. When the court appoints new trustees, it fills up all vacancies, unless there are exceptional circumstances. A separate set of trustees may be appointed for any part of the trust property which is held on trusts distinct from those relating to the other parts of the trust property, or if only one trustee was originally appointed, then one separate trustee may be appointed for such part. Underhill on Trusts and Trustees 363-377. See also *In re Gregson's Trusts*, 34 Ch. Div. 209; *Eastwood v. Clarke*, 23 Ch. Div. 134; *In re East*, L. R., 8 Ch. 735; *In re Williams*, 56 L. T. 884; *In re Vicat*, 33 Ch. Div. 103; *Dodkin v. Brunt*, L. R., 6 Eq. 580; *In re Colyer*, 50 L. J. Ch. 79.

1. *Chase v. Davis*, 65 Me. 102; *Doe v. Ladd*, 77 Ala. 223; *Druid Park*, etc., Co. v. Oeltinger, 53 Md. 46; *Schouler*, Petitioner, 134 Mass. 426; *Lahey v. Kortright*, 56 N. Y. Super. Ct. 527; *Sullivan v. Latimer*, 35 S. Car. 422.

A trustee by will was given extensive discretionary powers, and there was no provision for succession in case of his failure to act. It was held upon his

death, that the court would exercise the trust through a successor appointed by it, and by the substitution of equitable rules in the place of arbitrary power. *Weiland v. Townsend*, 33 N. J. Eq. 393.

2. See **POWERS**, vol. 18, p. 970.

Trustees appointed as successors cannot claim commissions on the trust fund received from the original trustees, but if litigation is necessary to secure it, they will be entitled to legitimate expenses. *Jenkins v. Whyte*, 62 Md. 427.

A substituted trustee is not entitled to an order upon the administrator of his predecessor for the amount due the trust estate, upon the confirmation of the account of the deceased trustee, filed by his administrator. The new trustee is a creditor of the estate of the deceased trustee, not of the administrator. *Gaw's Estate*, 12 Phila. (Pa.) 88.

Where the surplus funds of an association pass into the hands of new trustees, between whom and the original contributors there is no privity, such new trustees are not accountable to the original contributors for the funds. *Abels v. McKeen*, 18 N. J. Eq. 462.

So where a trustee lent funds belonging to the trust to one who held a contingent interest in the fund in remainder, taking as security a pledge of his interest and that of the life tenant, the borrower being insolvent, it was held on the removal of the trustee from office that he must account for this loan, and that he could not throw the burden of trying to collect it upon his successor. *In re Craven*, 43 N. J. Eq. 416.

3. See **LIMITATION OF ACTIONS**, vol. 13, p. 667; **IMPLIED TRUSTS**, vol. 10, p. 1.

*que trust*, and it is therefore advisable to treat the subject under these two main divisions.

2. **As Between Trustee or Beneficiary and Stranger.**—The general rule is well settled that courts of equity, acting by way of analogy or in obedience to the Statute of Limitations, will usually adjudge the lapse of time a bar in cases in which it would have constituted a bar under the Statute of Limitations if the action had been at law,<sup>1</sup> and there are also cases where the lapse of time under such circumstances as to constitute laches, will prevent relief at equity, although it has not been for the full statutory period.<sup>2</sup> These rules are generally applicable in controversies between the trustee or beneficiary and a stranger.<sup>3</sup> As said by Lord Hardwicke, in a leading case: "The rule that the Statute of Limitations does not bar a trust estate, holds only between *cestui que trust* and trustee, not as between *cestui que trust* and trustee on one side and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both."<sup>4</sup> If the trustee is barred, so also is the

1. See LIMITATION OF ACTIONS, vol. 13, pp. 667, 675 *et seq.*; EQUITY, vol. 6, pp. 683, 705, 711; notes to France v. Kenney, 12 Am. Dec. 368, and Smith v. Thompson, 54 Am. Dec. 130.

"The legal limitation cannot be avoided by changing the tribunal." 2 Perry on Trusts, § 859; Hammond v. Messenger, 9 Sim. 327; Bolton v. Powell, 14 Beav. 275; Wych v. East India Co., 3 P. Wms. 309; Mason v. Mason, 33 Ga. 435; 83 Am. Dec. 172.

2. See LACHES, vol. 12, p. 533, where the subject is fully treated. See also the following recent cases: St. Paul, etc., R. Co. v. Sage, 49 Fed. Rep. 315; Calverly v. Harper, 40 Ill. App. 96; Goree v. Clements, 94 Ala. 337; Daniell v. East Boston Ferry Co. (Mass. 1892), 31 N. E. Rep. 711; Cooke v. Barrett, 155 Mass. 413; Gatzner v. St. Vincent School Soc., 147 Pa. St. 313; Naddo v. Bardon, 47 Fed. Rep. 782; Goode v. Gaines, 145 U. S. 141; Felix v. Patrick, 145 U. S. 317; Kelly v. Green Bay, etc., R. Co., 80 Wis. 328; Ferguson v. Soden, 111 Mo. 208; Bacon v. Chase, 83 Iowa 521; and note to Smith v. Thompson, 54 Am. Dec. 130.

3. Turner v. Smith, 11 Tex. 620; Watkins v. Specht, 7 Coldw. (Tenn.) 585; Williams v. Otey, 8 Humph. (Tenn.) 563; 47 Am. Dec. 632; Merriam v. Hassam, 14 Allen (Mass.) 516; 92 Am. Dec. 795; Clark v. Miller, 89 Pa. St. 242; Collins

v. McCarty, 68 Tex. 150; 2 Am. St. Rep. 475, and note; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152; Felix v. Patrick, 145 U. S. 317; Hammond v. Hopkins, 143 U. S. 224; Potter v. Smith, 36 Ind. 231; Martin v. Martin, 118 Ind. 227. But it has been held that where a debtor borrows money, knowing it to be trust money and in breach of the trust, he will be deemed to hold it as trustee, and cannot set up the statute of limitations in bar of the *cestui que trust*. Spickernell v. Hotnam, Kay 669; Ernest v. Croysdill, 6 Jur. N. S. 740; Bridgman v. Gill, 24 Beav. 302; Sheridan v. Joyce, 7 Ir. Eq. 115; Upham v. Wyman, 7 Allen (Mass.) 499.

Yet as even between trustee and beneficiary, courts of equity, "acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, and the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*." Badger v. Badger, 2 Wall. (U. S.) 87.

4. Llewellyn v. Mackworth, 3 Eq. Cas. Ab. 579; Barn. 446; Melling v. Leak, 32 Eng. L. & Eq. 442; Atty. Gen'l v. Federal St. Meeting-House Soc., 3 Gray (Mass.) 1. See also

beneficiary.<sup>1</sup> And it has been held that part payment by a trustee who simply has authority to sell property and apply the proceeds upon debts, without any power to make a new promise for the debtor, will not take the entire debt out of the statute as to the trustee.<sup>2</sup>

The effect of fraudulent concealment, ignorance or mistake, and the rules of pleading, practice, and evidence, are stated and fully considered elsewhere in this work.<sup>3</sup>

**3. As Between Trustee and Beneficiary.**—It is a general rule that in case of an express continuing trust the Statute of Limitations has

Hovenden v. Annesley, 2 Sch. & Lef. 629; Pentland v. Stokes, 2 Ball & B. 75; Allen v. Sayer, 2 Vern. 368; Crowther v. Crowther, 23 Beav. 305; Wych v. East India Co., 3 P. Wms. 309; Thomas v. Thomas, 2 K. & J. 79; Maddox v. Allen, 1 Metc. (Ky.) 495; Mason v. Mason, 33 Ga. 435; 83 Am. Dec. 172; Goss v. Singleton, 2 Head (Tenn.) 67; Watkins v. Specht, 7 Coldw. (Tenn.) 585; Fleming v. Gilmer, 35 Ala. 62; Love v. Love, 65 Ala. 555; Crook v. Glenn, 30 Md. 55; Herndon v. Pratt, 6 Jones Eq. (N. Car.) 327; Smilie v. Biffle, 2 Pa. St. 52.

Where a trustee of land sells it to a purchaser for value, by warranty deed and without any intimation in the deed of a subsisting trust, and the purchaser enters and occupies the land, doing no act which recognizes the existence of the trust, and there is no fraud or concealment, and the beneficiary is not under disability, the vendee's possession must be regarded as adverse, both to the trustee and the beneficiary, and the time which would bar the legal right will also bar the equitable right. Merriam v. Hassam, 14 Allen (Mass.) 516; 92 Am. Dec. 795.

1. Chase v. Cartright, 53 Ark. 358; 22 Am. St. Rep. 207; Barclay v. Goodloe, 83 Ky. 493; Coleman v. Walker, 3 Metc. (Ky.) 65; 77 Am. Dec. 163; Varner v. Gunn, 61 Ga. 54; Crawley v. Richardson, 78 Ga. 213; Ford v. Cook, 73 Ga. 215; Know v. Raymond, 73 Ga. 749; Weaver v. Leiman, 52 Md. 708; Smith v. Gillam, 80 Ala. 296; Bryan v. Weems, 29 Ala. 423; 65 Am. Dec. 407; Waring v. Cheraw, etc., R. Co., 16 S. Car. 417; Clayton v. Cagle, 97 N. Car. 300; Watkins v. Specht, 7 Coldw. (Tenn.) 585; Williams v. Otey, 8 Humph. (Tenn.) 563; 47 Am. Dec. 632. But see Parker v. Hall, 2 Head (Tenn.) 641; Anding v. Davis, 38 Miss. 574; 77 Am. Dec. 658; Spickernell v.

Holtham, Kay 669; Lechmere v. Carlisle, 3 P. Wms. 215; Wingfield v. Virgin, 51 Ga. 139; Fisk v. Wilson, 15 Tex. 430; Ernest v. Croysdill, 6 Jur. N.S. 740; Bridgman v. Gill, 24 Beav. 302; Sheridan v. Joyce, 7 Ir. Eq. 115; Upham v. Wyman, 7 Allen (Mass.) 499. The question is considered at length in the notes to Herron v. Marshall, 42 Am. Dec. 447; Collins v. Loftus, 34 Am. Dec. 725, and Miles v. Thorne, 99 Am. Dec. 398.

But if the *cestui que trust* is under disability, it has been held that the statute will not begin to run until the disability is removed. Thompson v. Simpson, 1 D. & W. 489; Life Assoc. v. Siddall, 3 De G. F. & J. 58; Atty. Gen'l v. Magdalen College, 18 Beav. 239; Price's Appeal, 54 Pa. St. 472. See, however, authorities above cited: McLeran v. Benton, 73 Cal. 329; 2 Am. St. Rep. 814; and Wilmerding v. Russ, 33 Conn. 68. And if he holds only in remainder or reversion, it seems that the statute will not begin to run until he has the right to possession upon the determination of the particular estate. Parker v. Hall, 2 Head (Tenn.) 641; McCoy v. Poor, 56 Md. 197; Lamar v. Pearre, 82 Ga. 354; 14 Am. St. Rep. 168; Allen v. De Groodt, 98 Mo. 159; 14 Am. St. Rep. 626, and note. But see Chase v. Cartright, 53 Ark. 358; 22 Am. St. Rep. 207; Meeks v. Olpherts, 100 U. S. 564; Waring v. Cheraw, etc., R. Co., 16 S. Car. 416; Edwards v. Woolfolk, 17 B. Mon. (Ky.) 376.

2. Leach v. Asher, 20 Mo. App. 659. But see St. John v. Boughton, 9 Sim. 219. Where a *cestui que trust* has received the benefit of a debt due him, but paid to his trustee, who had no authority to receive it, he will not be allowed to collect it. Mayer v. Bills, 16 Iowa 586.

3. LIMITATION OF ACTIONS, vol. 13, p. 667.

no application,<sup>1</sup> unless the trust has been repudiated or the trustee has held adverse possession with the knowledge of the beneficiary.<sup>2</sup> But this rule applies only in cases of express or direct trusts.<sup>3</sup> And while the relation of trustee and *cestui que trust* continues unbroken, the possession of the trustee is regarded as

1. *Riddle v. Whitehill*, 135 U. S. 621; *Speidel v. Henrici*, 120 U. S. 377; *Prevost v. Gratz*, 6 Wheat. (U. S.) 497; *Lewis v. Hawkins*, 23 Wall. (U. S.) 126; *Union Pac. R. Co. v. Durant*, 95 U. S. 576; *Chicago, etc., R. Co. v. Hay*, 119 Ill. 493; *Ellis v. Ward*, 137 Ill. 509; *Fishwick v. Sewell*, 4 Har. & J. (Md.) 393; *Gordon v. Small*, 53 Md. 550; *Bostwick v. Dickson*, 65 Wis. 593; *Haynie v. Hall*, 5 Humph. (Tenn.) 290; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; 24 Am. Dec. 556; *Andrews v. Smithwick*, 20 Tex. 111; *Payne v. Hathaway*, 3 Vt. 212; *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190; *Robertson v. Dunn*, 87 N. Car. 191; *Lyon v. Marclay*, 1 Watts (Pa.) 271; *Kutz's Appeal*, 40 Pa. St. 90; *Clay v. Clay*, 7 Bush (Ky.) 95; *Thomas v. White*, 3 Litt. (Ky.) 177; *Cunningham v. McKindley*, 22 Ind. 149; *Hileman v. Hileman*, 85 Ind. 1; *Gutch v. Fosdick*, 48 N. J. Eq. 353; *Shibla v. Ely*, 6 N. J. Eq. 181; *West v. Sloan*, 3 Jones Eq. (N. Car.) 102; *Bonner v. Young*, 68 Ala. 35; *McCarthy v. McCarthy*, 74 Ala. 546; *Simms v. Smith*, 11 Ga. 195; *Wilson v. Green*, 49 Iowa 251; *Redwood v. Reddick*, 4 Munf. (Va.) 222; *Cholmondeley v. Clinton*, 2 Jac. & W. 1.; *Hovenden v. Annesley*, 2 Sch. & Lef. 607; *Wedderburn v. Wedderburn*, 4 Myl. & C. 41; *Boteler v. Allington*, 3 Atk. 459; *Bridgeman v. Gill*, 24 Beav. 302; *Miles v. Thorne*, 38 Cal. 335; 99 Am. Dec. 384, and note. Other cases might be cited, but the general rule is so well established and so many authorities are cited above, that others are unnecessary.

The trusts which are not affected in equity by the Statute of Limitations are technical and continuing trusts, not cognizable at common law. *Lawson v. Badgett*, 20 Ark. 195; *Young v. Mackall*, 3 Md. Ch. 398.

Where there is no doubt either as to the origin or the existence of a trust, and proceedings are instituted within a reasonable time, an express trust created by deed or will, will not be barred by lapse of time. *McDonald v. Sims*, 3 Ga. 383. In another *Georgia* case, it was said that as between the trustee and *cestui que trust*, the Statute of Limitations

begins to run from the settlement and receipt given; but if at the time of the settlement, the trustee exercises undue influence over the beneficiary, suspicion is thrown upon the transaction, and the beneficiary may have the settlement looked into at any time within the statutory bar. In case of fraud, the statute begins to run from the discovery, if the party labors under no difficulty, and is not guilty of laches. *Wellborn v. Rogers*, 24 Ga. 558.

A son was absent and his whereabouts unknown, and his mother became his guardian, received his estate, and afterwards died. It was distributed among her representatives, who had knowledge of the manner in which she held it, and who supposed that the ward was dead, and it was held that they took the estate subject to the same trust in favor of the son; that the property never became theirs, and their holding not being adverse, the Statute of Limitations did not apply; and that they were liable for the profits, but not for deterioration resulting from their neglect. *Moore v. Shepherd*, 2 Duv. (Ky.) 125.

2. *Boteler v. Allington*, 3 Atk. 459; *Wood v. Wood*, 3 Ala. 756; *Lucas v. Daniels*, 34 Ala. 188; *Hastie v. Aiken*, 67 Ala. 313; *Smith v. Ricords*, 52 Mo. 581; *Scott v. Haddock*, 11 Ga. 258; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Speidel v. Henrici*, 120 U. S. 386; *Robertson v. Dunn*, 87 N. Car. 191; *Roberts v. Berdell*, 61 Barb. (N. Y.) 37; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; 11 Am. Dec. 417; *Murdock v. Hughes*, 7 Smed. & M. (Miss.) 219; *White v. Leavitt*, 20 Tex. 703; *Cooper v. Lee*, 75 Tex. 114; *Sheldon v. Sheldon*, 3 Wis. 699; *Pipher v. Lodge*, 4 S. & R. (Pa.) 310; *Cunningham v. McKindley*, 22 Ind. 149; *Dyer v. Waters*, 46 N. J. Eq. 484; *Hearst v. Pujol*, 44 Cal. 235; *McClure v. Colyear*, 80 Cal. 378; *Wren v. Followell*, 52 Ark. 76; *Reynolds v. Sumner*, 126 Ill. 78.

3. *Newsom v. Bartholomew County*, 103 Ind. 526; *Churchman v. Indianapolis*, 110 Ind. 259; *Carter v. Bennett*, 6 Fla. 214; *Hayward v. Gunn*, 82 Ill. 385; *Patridge v. Wells*, 30 N. J. Eq. 176; *Kennedy v. Baker*, 59 Tex. 150;



Tinnen v. Mebane, 10 Tex. 246; 60 Am. Dec. 205; Clay v. Clay, 7 Bush (Ky.) 95; Thomas v. Brinsfield, 7 Ga. 154; Johnson v. Smith, 27 Mo. 591; Landis v. Saxton, 105 Mo. 486; 24 Am. St. Rep. 403; Cooper v. Cooper, 61 Miss. 676; Robertson v. Dunn, 87 N. Car. 191; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; 11 Am. Dec. 417; Price v. Mulford, 107 N. Y. 303; Zacharias v. Zacharias, 23 Pa. St. 452; Harlow v. Dehon, 111 Mass. 195; Kennedy v. Kennedy, 25 Kan. 151; Speidel v. Henrici, 120 U. S. 377.

Implied trusts are barred by the statute. Speidel v. Henrici, 120 U. S. 377; Logan County v. Lincoln, 81 Ill. 156. See IMPLIED TRUSTS, vol. 10, p. 1; LIMITATION OF ACTIONS, vol. 13, pp. 667, 684.

The exceptions to the general rule, and the limitations upon its application, are thus stated by Stevens, J., in Raymond v. Simonson, 4 Blackf. (Ind.) 77: "The general rule, however, that the Statute of Limitations is a bar to suits in equity, as well as actions at law, has its limits. It is opposed by another general rule that, in cases of frauds and trusts, the Statute of Limitations does not run. The trusts coming within this rule are direct trusts, technical and continuing trusts, which are not cognizable at law, but which are mere creatures of a court of equity, and fall within the proper and exclusive jurisdiction of chancery. There are numerous eventual and possible trusts that are raised by law and otherwise, and that fall within the control of the statute. Every deposit is a trust; every person who holds money to be paid to another, or to be applied to a particular and specific purpose, is a trustee, and may be sued either at law or in equity."

It is often difficult, however, to determine whether or not the trust is an express continuing trust, cognizable only by courts of equity. The subject was carefully considered in a recent case by the supreme court of *Indiana*, and we quote at length from the opinion of Elliott, J., in the case referred to. The plaintiff's father, Joseph Parks, had collected a bounty for him, and had admitted to several persons that he was keeping it for the plaintiff, who did not bring suit until after the expiration of fifteen years. Upon appeal by the plaintiff, the court said: "If the trust imposed upon Joseph Parks must be regarded as an ordinary trust imposed by law, then it is within the statute, inas-

much as the trust is not one of exclusive equity cognizance, and such a trust is not a continuing one. If the trust was completed when the money was received, then a cause of action enforceable at law arose, for the appellant might have sued upon an implied contract or for money had and received. It is well settled that in such case the statute prevails. Smith v. Calloway, 7 Blackf. (Ind.) 88; Newsom v. Bartholomew County, 103 Ind. 526, and authorities cited; Stone v. Brown, 116 Ind. 80; Godden v. Kimmell, 99 U. S. 201; Johnson v. Smith, 27 Mo. 591. Where, however, there is a continuing trust or obligation, the rule does not, as we shall presently show, operate in full force or vigor. . . . The difficult question in the case is as to whether the facts stated, excluding mere evidence, show that the deceased agreed with his son to keep the money for him. If he did so agree, then we think it quite clear that it must be adjudged that the right of action is not shown to be barred. Where one receives the money of another to keep for him—takes it, in other words, as a continuing trust—the statute does not run until there is a disavowal of the trust or a refusal to perform upon proper demand. If, for illustration, a son is about to enter the army, and the father receives or collects money under an agreement to keep it for him, the statute does not begin to run until there has been a breach or a disavowal of the trust. This is the doctrine of many closely analogous cases. Sawyer v. Tappan, 14 N. H. 352; Rusling v. Rusling, 42 N. J. Eq. 594; Zuck v. Culp, 59 Cal. 142; Cross v. Eureka Lake, etc., Canal Co., 73 Cal. 302. The doctrine is substantially the same at law as in equity. Morse Banking, § 322; Payne v. Gardiner, 29 N. Y. 146; Smiley v. Fry, 100 N. Y. 262; Finkbone's Appeal, 86 Pa. St. 368. The statute does not begin to run until the cause of action accrues, and where there is a continuing trust, or where the contract is a continuing one, and of such a character as to make a demand necessary to a complete cause of action, the statute does not begin to run until demand has been made. Presley v. Davis, 7 Rich. Eq. (S. Car.) 105; 62 Am. Dec. 396. It is true that there are cases where the demand must be made within the period fixed by statute. Newsom v. Bartholomew County, 103 Ind. 526, and cases cited. But it is also true that there are cases

that of the *cestui que trust*.<sup>1</sup> The general rule also holds good as

where a very different rule applies. Such a case, for instance, is that of a continuing trust, or of a contract to keep for another, money of which he makes a deposit. *Girard Bank v. Bank of Penn. Tp.*, 39 Pa. St. 92; 80 Am. Dec. 507; *Wilson v. Brookshire*, 126 Ind. 497. No general rule can be laid down that will fit all cases, since there are cases where justice requires that a demand should be made within the statutory period, while in others the nature of the contract and the situation of the parties require that it be adjudged that the trust or obligation is a continuing one, which is not violated or broken until there is a refusal to honor a demand, and that until then the statute does not begin to run. *Daugherty v. Wheeler*, 125 Ind. 426. But while we believe the law would be with the appellant if the assumption of counsel that there was a direct and continuous trust could be made good, we are compelled to hold that, upon the facts stated in the special finding, the assumption is unsupported, and that there is no express or direct continuing trust or obligation shown. The utmost that can be said is that there was a trust cast upon the appellee's intestate, and that by subsequent acts and declarations he acknowledged the trust." *Parks v. Satterthwaite*, 132 Ind. 411. See also *Zuck v. Culp*, 59 Cal. 142; *Kutz's Appeal*, 40 Pa. St. 90; *Gutch v. Fosdick*, 48 N. J. Eq. 353; *Dickinson v. Leominster Sav. Bank*, 152 Mass. 54. But ordinary bailments, it is said, are subject to the operation of the statute of limitations. *Wood on Limitations*, 418, § 200. Compare *Reizenstein v. Marquardt*, 75 Iowa 294; 9 Am. St. Rep. 477.

An order by a *cestui que trust* to pay a certain sum out of his estate, accepted by the trustee and assigned by the payee, constitutes a direct trust between the trustee and such assignee, and is not within the operation of the statute of limitations. *Bigelow v. Catlin*, 50 Vt. 408.

Money paid to a town to equalize bounties for soldiers, is held in trust for them, and the statute of limitations does not run against them in an action to recover the same. *McGuire v. Linneus*, 74 Me. 344.

As between vendor and vendee, after sale and before a conveyance, the vendor in possession is deemed a trustee

for the vendee, and the statute of limitations will not run against the latter's right to specific performance unless the vendor gives notice, or does some act showing that his holding is adverse. *Love v. Watkins*, 40 Cal. 547; 6 Am. Rep. 624; *Graham v. Nelson*, 5 Humph. (Tenn.) 605; *Harris v. King*, 16 Ark. 122; *Scarlett v. Hunter*, 3 Jones Eq. (N. Car.) 84.

So, if the vendee is in possession under the contract, the statute will not run against his right to a conveyance. *Love v. Watkins*, 40 Cal. 547; 6 Am. Rep. 624; *Bodley v. Ferguson*, 30 Cal. 511; *Richardson v. Kuhn*, 6 Watts (Pa.) 299; *Marlin v. Willink*, 7 S. & R. (Pa.) 207; *Hemming v. Zimmer-schitte*, 4 Tex. 159; *Holman v. Criswell*, 15 Tex. 395; *Coulson v. Walton*, 9 Pet. (U. S.) 62.

As a rule, a mere power to sell property does not create an express continuing trust of such a nature as to prevent the operation of the statute. *Dickenson v. Teasdale*, 1 De G., J. & S. 52. But compare *Cook v. Williams*, 2 N. J. Eq. 209, as to when a direct trust may be created with reference to such a matter. See *LIMITATION OF ACTIONS*, vol. 13, pp. 667, 686, 687; *PARTNERSHIP*, vol. 17, p. 1282; *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 165; *GUARDIAN AND WARD*, vol. 9, p. 85.

1. *Russell v. Peyton*, 4 Ill. App. 473; *Edwards v. University*, 1 Dev. & B. Eq. (N. Car.) 325; 30 Am. Dec. 170; *McKethan v. Murchison*, 73 N. Car. 435; *Colvin v. Menefee*, 11 Gratt. (Va.) 92; *Whiting v. Whiting*, 4 Gray (Mass.) 237; *Melling v. Leak*, 16 C. B. 652; 81 E. C. L. 652; *Doe v. Phillips*, 10 Q. B. 130; 59 E. C. L. 130; *Harwood v. Oglander*, 6 Ves. 199; *Young v. Waterpark*, 13 Sim. 204; *Garrard v. Tuck*, 8 C. B. 248; 65 E. C. L. 247; *Hovenden v. Annesley*, 2 Sch. & Lef. 607.

And the statute does not run in favor of the trustee as against the beneficiary, while the latter is in possession. *Clark v. Clark*, 21 Neb. 402; *Gilbert v. Sleeper*, 71 Cal. 294.

So, where a trust is created by agreement of the parties, the possession of the *cestui que trust* is not adverse to that of the trustee, and no matter how long it has been continued, cannot divest him of the title. *Taylor v. Gooch*, 4 Jones (N. Car.) 436.

Where a person in possession is trustee for two persons claiming adversely

against the *cestui que trust*, and he cannot set up the Statute of Limitations in bar of the trustee or a co-beneficiary.<sup>1</sup>

Under the rule that the statute will run where the trustee has repudiated the trust and taken adverse possession with the knowledge of the beneficiary, it frequently becomes important to determine what is sufficient to constitute a disavowal of the trust or an adverse possession. The mere fact that money due the beneficiary is permitted to remain in the trustee's hands does not change the nature of the debt or bar the beneficiary, unless the circumstances are such that he is guilty of laches.<sup>2</sup> The repudiation of the trust, in order to start the statute, must be by clear and unequivocal acts or words.<sup>3</sup> But where adverse possession has been taken, or the trust has been clearly repudiated, and knowledge thereof and of the adverse claim of the trustee is brought home to the beneficiary, who is *sui juris* and has been, during all the time, capable of maintaining an action to enforce his rights, he will be completely barred at the end of twenty years,<sup>4</sup> and equity

to each other, neither can take advantage of such possession to bar the other. *Foscue v. Foscue*, 2 Ired. Eq. (N. Car.) 321.

1. *Knight v. Bowyer*, 4 De G. & J. 619; *Spickernell v. Hotham*, Kay 669; *Foscue v. Foscue*, 2 Ired. Eq. (N. Car.) 321; *Hastie v. Aiken*, 67 Ala. 317. See also *Webster v. Newbold*, 41 Pa. St. 482; 82 Am. Dec. 487; *Manby v. Bewicke*, 3 K. & J. 342; *Watson v. Saul*, 1 Giff. 188; *Dickenson v. Teasdale*, 1 De G. J. & S. 52; *Sturgis v. Morse*, 3 De G. & J. 1.

The mere possession of the *cestui que trust* is not, in the absence of other circumstances, adverse to the trustee. *Buswell on Limitations*, § 343; *Taylor v. Gooch*, 4 Jones (N. Car.) 436; *Keene v. Deardorn*, 8 East 248; *Pomfret v. Windsor*, 2 Ves. 472. But see *Scott v. Gallagher*, 14 S. & R. (Pa.) 333; 16 Am. Dec. 508; *Moore v. Jackson*, 4 Wend. (N. Y.) 58.

2. *Crisfield v. State*, 55 Md. 192.

The beneficiary cannot be said to have slept upon his right to relief against a trustee in a court of equity, until a position of antagonism or defiance of his rights has, with his knowledge, been assumed by the trustee, and a mere retention of a portion of the income of the trust fund by the latter, with the consent of the beneficiary, and without any claim of right, does not produce such hostile attitude. *Dyer v. Waters*, 46 N. J. Eq. 484.

3. *Speidel v. Henrici*, 120 U. S. 377; *Chicago R. Co. v. Hay*, 119 Ill. 493; *Hubbard v. U. S. Mortgage Co.*, 14 Ill.

App. 40; *Thomas v. Merry*, 113 Ind. 83; *Zeller v. Eckert*, 4 How. (U. S.) 295; *Lewis v. Castleman*, 27 Tex. 407; *Whitehead v. Lord*, 11 Eng. L. & Eq. 587; *Lister v. Pickford*, 34 L. J. Ch. 582. See also *Scott v. Haddock*, 11 Ga. 258; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 369; 54 Am. Dec. 41; *Riddle v. Whitehill*, 135 U. S. 621; *Causler v. Wharton*, 62 Ala. 358; *Hendy v. March*, 75 Cal. 566; *Boggs v. Johnson*, 26 W. Va. 821; *Adams v. Taylor*, 14 Ark. 62. But compare *Gray v. Kerr*, 46 Ohio St. 652; *Douglas v. Corry*, 46 Ohio St. 349.

Where one took money of certain children who lived with him, and promised to invest it in land in their names, but took title in his own name and used it as a home for himself and the children, it was held that he had committed a breach of trust, but that the trust was a continuing one and the possession was not adverse, and that the lapse of less than twenty-one years raised no presumption that the trust had been discharged or extinguished. *Paschall v. Hinderer*, 28 Ohio St. 568. See also *Tyler v. Daniel*, 65 Ill. 316.

4. *Ward v. Harvey*, 111 Ind. 471; *Davis v. Coburn*, 128 Mass. 377; *Merriam v. Hassam*, 14 Allen (Mass.) 522; 92 Am. Dec. 795; *Otto v. Schlappkahl*, 57 Iowa 226; *Baker v. Whiting*, 3 Sumn. (U. S.) 486; *Wickliffe v. Lexington*, 11 B. Mon. (Ky.) 161; *Turner v. Smith*, 11 Tex. 629; *Hunter v. Hubbard*, 26 Tex. 537; *Neel v. McElhenny*, 69 Pa. St. 300; *Harrison v. Brolaskey*, 20 Pa. St. 299; *Curtis*

may refuse relief where he is guilty of laches, even though the full statutory period has not elapsed.<sup>1</sup>

Presumptions often arise from lapse of time that payments have been made, releases and conveyances executed, or rights abandoned, and where there is positive evidence to support such presumptions, they will be indulged in, in the absence of evidence to the contrary, although the statutory period has not elapsed.<sup>2</sup> But where the trustee recognizes the trust as still continuing, the presumption of payment that would otherwise arise after twenty years, is rebutted.<sup>3</sup> And no conveyance by the trustee will be presumed where he is under no obligation to convey.<sup>4</sup> One who is ignorant of his rights will not be presumed to have abandoned them,<sup>5</sup> and a person under disability will not be presumed to have released a right.<sup>6</sup>

*v. Daniel*, 23 Ark. 363; *Hubbell v. Medbury*, 53 N. Y. 98; *Kane v. Bloodgood*, 7 John. Ch. (N. Y.) 90; 11 Am. Dec. 430; *Bright v. Legerton*, 2 De G. F. & J. 606; *Portlock v. Gardner*, 1 Hare 594; *Wedderburn v. Wedderburn*, 4 Myl. & C. 52; *Brawner v. Staup*, 21 Md. 328; *White v. White*, 1 Md. Ch. 56; *Syester v. Brewer*, 27 Md. 288; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Sollee v. Croft*, 7 Rich. Eq. (S. Car.) 34.

A trustee, by denying the right of the beneficiary and asserting an adversary claim in himself, abandons his fiduciary character, and the Statute of Limitations then begins to run against the claim of the *cestui que trust*. *Murdock v. Hughes*, 7 Smed. & M. (Miss.) 219.

The liability of a trustee purchasing at his own sale begins as soon as he takes possession of the property in pursuance of such sale, and openly and notoriously occupies it as his own, asserting an individual right thereto, and the Statute of Limitations then begins to run. *Hubbell v. Medbury*, 53 N. Y. 98.

1. *Helm v. Rogers*, 81 Ky. 568. See also *infra*, this title, *Account*.

2. 2 *Perry on Trusts*, § 866; *Pattison v. Hawkesworth*, 10 Beav. 375; *England v. Slade*, 4 T. R. 682; *Jones v. Turberville*, 2 Ves. Jr. 13; *Atty. Gen'l v. Moor*, 20 Beav. 119; *Scott v. Knox*, 4 Ir. Eq. 411; *Maddox v. Dent*, 4 Md. Ch. 543; *Perkins v. Cartmel*, 4 Harr. (Del.) 270; 96 Am. Dec. 689; *Clemenson v. Williams*, 8 Cranch (U. S.) 72; *Baker v. Whiting*, 3 Sumn. (U. S.) 466; *Hammond v. Hopkins*, 143 U. S. 224; *Phillipi v. Phillipi*, 115 U. S. 159; *Jackson v. Sackett*, 7 Wend. (N. Y.)

94; *Drysdale's Appeal*, 14 Pa. St. 531; *Ashurst's Appeal*, 60 Pa. St. 290; *Bass v. Bass*, 8 Pick. (Mass.) 187; *Phillips v. State*, 5 Ohio St. 122; *Syester v. Brewer*, 27 Md. 288; note to *Alston v. Hawkins*, 18 Am. St. Rep. 879. See *EVIDENCE*, vol. 7, p. 43; *PAYMENT*, vol. 18, p. 207; *LIMITATION OF ACTIONS*, vol. 13, p. 669; *PRESUMPTIONS*, vol. 19, p. 55.

3. *Werborn v. Austin*, 82 Ala. 498. See also *Eby v. Eby*, 5 Pa. St. 435; *Reed v. Reed*, 46 Pa. St. 239; *White v. Beaman*, 96 N. Car. 122; *Murphy v. Coates*, 33 N. J. Eq. 424; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296.

No mere delay on the part of the *cestui que trust* in bringing suit, can defeat his right to recovery so long as both parties treat the trust as subsisting and continuing. *Reihl v. Likowski*, 33 Kan. 515; *Snyder v. McComb*, 39 Fed. Rep. 292.

4. *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204.

Nor will such a presumption arise while the trustee controls the *cestui que trust*, and has duties to perform relative to the trust. *Keaton v. McGuier*, 24 Ga. 217; *Wellborn v. Rogers*, 24 Ga. 558; *Doe v. Staple*, 2 T. R. 684; *Keene v. Deardorn*, 8 East 248; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 694.

5. *Cholmondeley v. Clinton*, 2 Mer. 362; *Stackpoole v. Daveron*, 1 Bro. P. C. 1; *Randall v. Errington*, 10 Ves. 427; *Pickering v. Stamford*, 2 Ves. Jr. 285; *Roche v. O'Brien*, 1 B. & B. 330; *Chalmer v. Bradley*, 1 J. & W. 65; *Bennett v. Colley*, 2 Myl. & K. 232; *Stone v. Godfrey*, 5 De G., M. & G. 76; *Blennerhassett v. Day*, 2 B. & B. 118; *Massie v. Heiskell*, 80 Va. 805; *Jackson v. Lynch*, 129 Ill. 72.

6. *March v. Russell*, 3 Myl. & C. 31;

Where a party relies upon the lapse of time or upon presumptions arising therefrom, and not upon the statute, to defeat a suit, he should plead the facts, as a demurrer may be insufficient.<sup>1</sup>

Acquiescence in a transaction under such circumstances as to constitute an estoppel, will also amount to a bar, notwithstanding it may be for a very short period.<sup>2</sup> Thus, the remedy of a *cestui que trust* for a breach of trust by the trustee, will be barred in the absence of any excuse, by his acquiescence after knowledge of the facts and of his rights in the premises.<sup>3</sup>

4. **Accounts.**—The jurisdiction of courts of equity to compel an accounting in all cases involving a trust or fiduciary relationship, is well established.<sup>4</sup> But the circumstances of a case may be such that the court will refuse to order an accounting, notwithstanding it has jurisdiction over the subject, and even where an accounting is decreed, the comprehensiveness of the decree as to the period for which the defendant is required to account, will depend largely upon the relationship of the parties, and the circumstances of the particular case.<sup>5</sup>

Thompson v. Simpson, 1 D. & W. 489; Bennett v. Colley, 5 Sim. 181; McLellan v. Crofton, 6 Me. 334.

But it has been held that, after possession held by the *cestui que trust* for more than twenty-five years, delivery and acceptance of a conveyance in trust will be presumed, although the trustee is a lunatic at the time of the conveyance, and continues so. Eyrick v. Hetrick, 13 Pa. St. 488.

1. Deloraine v. Browne, 3 Bro. C. C. 633; Mitf. Pl. 212. See also, as to when and how excuse for delay should be alleged by the complainant who brings suit after a long period of time has elapsed, Steares v. Page, 7 How. (U. S.) 829; Badger v. Badger, 2 Wall. (U. S.) 95; Lonsdale v. Smith, 106 U. S. 391.

2. Kent v. Jackson, 14 Beav. 384; Graham v. Birkenhead R. Co., 2 M. & G. 146; Styles v. Guy, 1 H. & T. 523; Rennie v. Young, 2 De G. & J. 142; Leeds v. Amherst, 2 Ph. 123; Jorden v. Money, 5 H. L. Cas. 185; Phillipson v. Gatly, 7 Hare 523; McGiveney v. McGiveney, 142 Mass. 160; Godwin v. Whitehead, 88 Va. 600.

3. 2 Pom. Eq., § 1083; Broadhurst v. Balgny, 1 Y. & C. C. 28; Wiswall v. Stewart, 32 Ala. 433; 70 Am. Dec. 549; Kennedy v. Winn, 80 Ala. 165; Hoffman Steam Coal Co. v. Cumberland, etc., Coal Co., 16 Md. 508; 77 Am. Dec. 311; Davis v. Simpson, 5 Har. & J. (Md.) 147; 9 Am. Dec. 500; Jennison v. Hapgood, 7 Pick. (Mass.) 1; 19 Am. Dec. 258; Van Dyke v. Johns, 1

Del. Ch. 93; 12 Am. Dec. 76; Harrison v. McHenry, 9 Ga. 164; 52 Am. Dec. 435; Mulford v. Murch, 11 N. J. Eq. 16; 64 Am. Dec. 472; Hammond v. Hopkins, 143 U. S. 224; Ames Iron Works v. West, 24 Fed. Rep. 313. But see Ames v. Brooks, 143 Mass. 344; Jones v. Lloyd, 117 Ill. 597, and Rowe v. Bentley, 29 Gratt. (Va.) 756, in which last case war and ignorance of the beneficiaries were held to constitute a sufficient reason for not sooner bringing suit.

4. Marvin v. Brooks, 94 N. Y. 80; Uhlman v. New York L. Ins. Co., 109 N. Y. 421; Cochrane v. Adams, 50 Mich. 17; Barnes v. Dow, 59 Vt. 531; Colonial, etc., Mortgage Co. v. Hutchinson, 44 Fed. Rep. 223; Foley v. Hill, 2 H. L. Cas. 28; Moxon v. Bright, L. R., 4 Ch. App. 292; Smith's Princ. Eq., § 470; 3 Pom. Eq. Jur., § 1421. See EQUITY, vol. 6, pp. 683, 720, 721.

5. Thus, in a *Massachusetts* case, it is said: "The length of time during which a court of chancery will require the trustees of a charity to account for the income, which has not been applied according to the intentions of the donors, is much affected by the particular circumstances of each case, and the Statute of Limitations affords no absolute bar or limit." Atty. Gen'l v. Old South Soc., 13 Allen (Mass.) 474. In this case it was held that where, in good faith, rent had been received instead of interest at the ordinary rate, which would have amounted to more than the rent, for a period of thirty

Where a trustee is called upon for an accounting as to rents and mesne profits, it often becomes important to determine what effect, if any, the Statute of Limitations will have, and just how far back the court will order the account to be made. If the trust is an express one, the Statute of Limitations will have no application as against the beneficiary.<sup>1</sup> But if the claim to rents and profits is based upon a legal, and not an equitable, title, the legal limitation will govern.<sup>2</sup> And if the beneficiary is guilty of laches, the court will not carry the account further back than the decree,<sup>3</sup> or, at most, to the filing of the bill.<sup>4</sup> Where the plaintiff is not a beneficiary, and there is no trust, infancy, fraud, or concealment, the account will not be carried back beyond the filing of the bill,<sup>5</sup> unless there has been a demand, in which case an accounting may be had from the time of the demand.<sup>6</sup> And even in case of a trust, a court of equity may refuse to order any accounting at all where the claim is stale and the original transaction has become obscure, so that it is difficult for the court to do entire justice as between the parties.<sup>7</sup>

**XIV. NATURE OF THE TRUSTEE'S ESTATE.**—In order that the trustee may acquire any estate or interest in the property conveyed, some power must be reposed in him or some duty imposed

years, ending more than twenty years before the suit was brought, the rent was to be deemed a substitution of and satisfaction for such interest during the same period. See also *Oehler v. Walker*, 2 Har. & G. (Md.) 323.

1. *Atty. Gen'l v. Brewer's Co.*, 1 Mer. 408; *Matthew v. Brise*, 14 Beav. 341; *Riddle v. Whitehill*, 135 U.S. 621.

In such a case the beneficiary will, ordinarily, be entitled to an accounting from the time his title first arose, or from the time his rights were first withheld by the defendant. *Barnewall v. Barnewall*, 3 Ridgw. P. C. 66; *Sturgis v. Morse*, 24 Beav. 541; *Kidney v. Coussmaker*, 12 Ves. 158.

2. *Jesus College v. Bloom*, 3 Atk. 262; *Landsdowne v. Landsdowne*, 1 Madd. 137; *Carlisle Corp. v. Wilson*, 13 Ves. 276; *Dinwiddie v. Bailey*, 6 Ves. 136; *O'Connor v. Spaight*, 1 Sch. & Lef. 309; *Moneypenny v. Bristow*, 2 Russ. & M. 125; *Winchester v. Knight*, 1 P. Wms. 406; *Parrott v. Palmer*, 3 Myl. & K. 632; *Pulteney v. Warren*, 6 Ves. 89; *Universities v. Richardson*, 6 Ves. 701; *Lee v. Alston*, 1 Bro. C. C. 194; *Grierson v. Eyre*, 9 Ves. 346; *Garth v. Cotton*, 1 Dick. 211; *Riddle v. Whitehill*, 135 U.S. 621. See *Boone v. Miller*, 73 Tex. 557; *Montgomery v. Noyes*, 73 Tex. 203.

3. *Acherley v. Roe*, 5 Ves. 565.

4. *Dormer v. Fortescue*, 3 Atk. 130;

*Petteward v. Prescott*, 7 Ves. 541; *Pickett v. Loggon*, 14 Ves. 215; *Kidney v. Coussmaker*, 12 Ves. 158; *Bowes v. East London Water Co.*, 3 Madd. 375; *Cook v. Arnham*, 2 Eq. Cas. Ab. 245; *Schroder v. Schroder*, 1 Kay 591.

5. *Pulteney v. Warren*, 6 Ves. 93; *Hicks v. Sallitt*, 3 De G., M. & G. 813; *Thomas v. Thomas*, 2 K. & J. 79; *Edwards v. Morgan*, McClel. 554.

6. *Penny v. Allen*, 7 De G., M. & G. 409. And see *Edwards v. Morgan*, McClel. 554.

7. *Buswell on Limitations*, § 333; 2 *Beach Modern Eq.*, § 843. See also *Groenendyke v. Coffeen*, 109 Ill. 325; *Codman v. Rodgers*, 10 Pick. (Mass.) 119; *Bell v. Hudson*, 73 Cal. 285; *Sheldon v. Rockwell*, 9 Wis. 181; 76 Am. Dec. 265; *Harrison v. Gibson*, 23 Gratt. (Va.) 212; *Stout v. Seabrook*, 30 N. J. Eq. 189; *Matter of Neilley*, 95 N. Y. 390; *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 811; *Godden v. Kimball*, 99 U. S. 201; *Halsey v. Tate*, 52 Pa. St. 311; *Gregg v. Gregg*, 15 N. H. 190; *Taylor v. Blair*, 14 Mo. 437; *Whedbee v. Whedbee*, 5 Jones Eq. (N. Car.) 392.

"There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the Statute of Limitations, courts of equity refuse to interfere

upon him, that will constitute him more than a mere repository of the title; or he must hold title for the purpose of sustaining some contingent estate or remainder; otherwise, the Statute of Uses will execute the trust at once and vest in the beneficiary the legal title as well as the equitable.<sup>1</sup> But the Statute of Uses applies

after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost." *Per* Taney, C. J., in *McKnight v. Taylor*, 1 How. (U. S.) 168. See also *Piatt v. Vattier*, 9 Pet. (U. S.) 416; *Wissler v. Craig*, 80 Va. 30; *Lyon v. Chase*, 51 Barb. (N. Y.) 17; *Osbone v. O'Reilly*, 43 N. Y. Eq. 647.

1. See REAL PROPERTY, vol. 19, p. 1057; Lewin on Trusts and Trustees (1st Am. ed.), p. 209; Perry on Trusts, §§ 298, 305. See also *supra*, this title, *Origin and History*; *Society, etc. v. Hartland*, 2 Paine (U. S.) 536; *Henderson v. Griffin*, 5 Pet. (U. S.) 151; *Webster v. Cooper*, 14 How. (U. S.) 488; *Adams v. Law*, 17 How. (U. S.) 417; *Chapman v. Glassell*, 13 Ala. 50; 48 Am. Dec. 41; *Tindal v. Drake*, 51 Ala. 574; *Wilkinson v. May*, 69 Ala. 33; *Witham v. Brooner*, 63 Ill. 344; *Adams v. La Rose*, 75 Ind. 471; *McCoy v. Monte*, 90 Ind. 441; *Adkins v. Hudson*, 11 Ind. 372; *Bayer v. Cockrill*, 3 Kan. 282; *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 762; *Thatcher v. Omans*, 3 Pick. (Mass.) 521; *Bullard v. Goffe*, 20 Pick. (Mass.) 252; *Richardson v. Stodder*, 100 Mass. 528; *Chamberlain v. Crane*, 1 N. H. 64; *Upham v. Varney*, 15 N. H. 466; *Hutchins v. Heywood*, 50 N. H. 495; *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Jackson v. Fish*, 10 Johns. (N. Y.) 456; *Parks v. Parks*, 9 Paige (N. Y.) 107; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437; 13 Am. Dec. 516; *Battle v. Petway*, 5 Ired. (N. Car.) 576; 44 Am. Dec. 59; *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. Car.) 480; *Moore v. Shultz*, 13 Pa. St. 98; 53 Am. Dec. 446; *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399; *Rush v. Lewis*, 21 Pa. St. 72; *Ramsay v. Marsh*, 2 McCord (S. Car.) 252; 13 Am. Dec. 717; *Faber v. Police*, 10 S. Car. 376; *Snelling v. Lamar*, 32 S. Car. 72; 17 Am. St. Rep. 835; *Bristow v. McCall*, 16 S. Car. 545; *Howard v. Henderson*, 18 S. Car. 184; *Ayer v. Ritter*, 29 S. Car. 135; *Reeves v. Brayton*, 36 S. Car. 384;

*Chapman v. Blissett*, Forrest 145; *Boughton v. Langley*, 1 Salk. 678.

The statute of uses has been enacted substantially in the following states: *Alabama* (2185); *Dakota* (Civil Code 274-278); *Delaware* (83, 1); *Georgia* (2314); *Illinois* (30, 3); *Indiana* (2981); *Kansas* (114, 13); *Michigan* (5566-5567); *Minnesota* (43, 1 to 5); *Missouri* (3938); *New Jersey* (Conveyances, 66); *New York* (2, 1, 2, 45 to 49); *South Carolina* (1958-1960); *Wisconsin* (2071 to 2075). See also *Perry on Trusts*, § 299, and note to *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399.

And adjudged cases show the adoption of the statute as a part of the common law in *Connecticut*. *Barrett v. French*, 1 Conn. 354; 6 Am. Dec. 241; *Bryan v. Bradley*, 16 Conn. 474.

In *New Hampshire*. *French v. French*, 3 N. H. 234.

In *Indiana*. *Adkins v. Hudson*, 11 Ind. 372.

In *Iowa*. *Pierson v. Armstrong*, 1 Iowa 282; 63 Am. Dec. 440.

In *Maine*. *Emery v. Chase*, 5 Me. 232; *Marden v. Chase*, 32 Me. 329.

In *Massachusetts*. *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 580; *Brewer v. Hardy*, 22 Pick. (Mass.) 376; 33 Am. Dec. 747; *Johnson v. Johnson*, 7 Allen (Mass.) 197; 83 Am. Dec. 676; *First Baptist Soc. v. Hazen*, 100 Mass. 322.

In *Pennsylvania*. *Earp's Appeal*, 75 Pa. St. 119; *Deibert's Appeal*, 78 Pa. St. 296; *Rush v. Lewis*, 21 Pa. St. 72.

In *Texas*. *Flint on Trusts*, § 121.

In *Virginia*. *Rowletts v. Daniel*, 4 Munf. (Va.) 473.

It is partially in force in *Florida*. *Flint on Trusts*, § 121.

In *Illinois*. *Witham v. Brooner*, 63 Ill. 344.

In *Kentucky*. *Flint on Trusts*, § 121.

In *North Carolina*. *Smith v. Lookabill*, 76 N. Car. 465.

In *Rhode Island*. *Nightingale v. Hidden*, 7 R. I. 132.

But not in *Ohio*. *Helfenstine v. Garrard*, 7 Ohio 275; *Foster v. Dennison*, 9 Ohio 124; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 497; nor in *California*, *Flint on Trusts*, § 121; nor in

*Tennessee*, Flint, § 121; nor in *Vermont*, Gorham v. Daniels, 23 Vt. 600; *Sherman v. Dodge*, 28 Vt. 26; nor in *Virginia*, Bass v. Scott, 2 Leigh (Va.) 359.

If land is devised to B, his heirs and assigns forever, upon the uses, trusts, and conditions that B shall permit Jane and James to use, occupy, and enjoy the same during their lives and the life of the survivor, and at the death of both Jane and James, that one-half of the same shall be to the use of Sarah forever, and the other half to the use of Lydia for life, and after the death of Lydia to the use of Lydia's children forever, this devise vests in A no estate in trusts, but an estate to the use merely. *Hayes v. Tabor*, 41 N. H. 521.

In *Alabama*, it has been held that under the statute of uses no estate of interest whatever vests in a trustee, who by a deed of appointment is made merely the repository of the legal title, with no well-defined duties to perform, and no responsibility to rest upon him (Revised Code, § 1576); but that the whole estate, legal as well as equitable, passes to the beneficiary under the deed. *Tindal v. Drake*, 51 Ala. 574.

Where a trust of lands is wholly nominal, the trust becomes executed by the statute in the beneficiary, who may bring an action of ejectment to recover lands in his own name, without a previous conveyance from the trustee. *Welch v. Allen*, 21 Wend. (N. Y.) 147.

If the trustee's only duty is to convey, at some future day, the legal estate which he holds, his services are useless, and the transfer will be made by the statute of uses, and chancery ends the office. *Adams v. Guerard*, 29 Ga. 651; 76 Am. Dec. 624.

A deed to X, Y and Z, their heirs, etc., in trust for the only proper use of the grantors during life, and afterward for the use of their grandchildren, conveys the legal estate as an executed use, and does not vest a trust estate in the grantees. *Jones v. Bush*, 4 Harr. (Del.) 1.

As to persons *in esse*, the legal estate is vested immediately, and, as to persons not *in esse*, it vests immediately upon their coming into being, if they come in good time, otherwise it passes over to the next remainder-man. *Roy v. Garnet*, 2 Wash. (Va.) 9.

A devise in trust to allow the widow of the testator to enjoy the rents and income of his estate during her widow-

hood, conveys legal estate to the widow under the statutes for the time prescribed. *Parks v. Parks*, 9 Paige (N. Y.) 107.

Where there was a conveyance to A and his heirs, upon a naked trust for the state, it was held that the legal title vested in the state. *Lamar v. Simpson*, 1 Rich. Eq. (S. Car.) 71; 42 Am. Dec. 345.

Land was conveyed to A in trust for the use and benefit of B, her heirs and assigns, and A executed, at the time, a mortgage to the grantor to secure a part of the purchase-money. It was held that A acquired no estate, legal or equitable, in the land, but the entire estate vested in B, subject to the same conditions as the legal estate would have been subject had it vested in A; that the deed and mortgage are to be construed as one instrument, and that B took the legal and equitable estate subject to the mortgage. *Rawson v. Lampman*, 5 N. Y. 456.

Where property was conveyed to a trustee to hold to the use of X for life, her husband also to have possession for life, and upon the death of either to the survivor for life, the remainder going to the children in fee, it was held that as no use was declared for the children, the trust ended with the life estate and the legal estate vested in them. *Park v. Check*, 4 Coldw. (Tenn.) 20.

A clause, "I appoint H. trustee for M.," without more, gives the trustee no duty, and hence the trust is executed. Therefore the legal title passes to the beneficiary by the statute of uses, if it be real estate; by common law, if personal estate. *Bowman v. Long*, 26 Ga. 142.

The estate which the statute of uses executes in the *cestui que trust* is identical with that conferred on the trustee. *Perry on Trusts*, § 312; *Vanhorn v. Harrison*, 1 Dall. (U. S.) 137; *Nelson v. Davis*, 35 Ind. 474; *Newhall v. Wheeler*, 7 Mass. 189; *First Baptist Soc. v. Hazen*, 100 Mass. 322; *Jackson v. Fish*, 10 Johns. (N. Y.) 456.

In *Wainwright v. Low*, 132 N. Y. 313, a woman, shortly before her marriage, conveyed land to the trustee to collect and pay the rents to her, or at her election, to permit her to hold and use the land for her benefit. It was held, upon her election to retain possession and control of the land, that no title vested in the trustee.

M. and his wife, together with their son John and his wife, being the owners



of a legal title to the property in controversy, quit-claimed to K., who immediately reconveyed to the son, who also on the same day executed a bond to his father and mother to the effect that the rents and profits should be paid to them, and that he held the title "in trust for the benefit of the children" of said M. and his wife, "excepting Charles G., A., J., Eliza, J., P., R., R.," this property to be divided equally among the children, upon the death of M. and his wife. The court held that as this trust was passive in all its terms, the estate did not vest in a trustee, and passed directly to the seven children as beneficiaries under the revised statutes of *Wisconsin*. *Hannig v. Mueller*, 82 Wis. 235; *citing White v. Fitzgerald*, 19 Wis. 480; *Goodrich v. Milwaukee*, 24 Wis. 430; *Ruth v. Oberbrunner*, 40 Wis. 238; *Smith v. Ford*, 48 Wis. 133; *Skinner v. James*, 69 Wis. 610.

In *Everts v. Everts*, 80 Mich. 222, the deed in controversy had been executed without consideration by the plaintiff's husband. It conveyed land to the defendant and his assigns, the word "heirs" being stricken out, and stipulated that the lands were conveyed in trust for the benefit of the plaintiff and her husband, and to be held by the defendant for their use and benefit, and contained also the following provisions: "And it is fully understood that the said first parties are to have the use and benefit of said land, being the income thereof, during the natural lives of both of said first parties."

It appeared from the evidence, that the purpose of the deed was to prevent the grantor from wasting the property, and that up to the time of the grantor's death the defendant had nothing further to do with the land than to merely hold the title. The control, possession, and benefit remained altogether in the hands of the plaintiff and her husband. The court held that this deed created a passive trust, whereby the legal title, under the *Michigan* Statute of Uses, passed to the *cestui que trust*.

The existence of a duty to be performed by the trustee prevents the statute of uses from operating so as to execute the trust, and continues the legal title in the trustee. *Webster v. Cooper*, 14 How. (U. S.) 488; *Meacham v. Steele*, 93 Ill. 135; *Kellogg v. Hale*, 108 Ill. 164; *Morton v. Barrett*, 22 Me. 261; 39 Am. Dec. 575; *Norton v. Leonard*, 12 Pick. (Mass.) 152; *Leggett v. Perkins*, 2 N. Y. 297; *Wood v. Ma-*

*ther*, 38 Barb. (N. Y.) 473; *Adams v. Perry*, 43 N. Y. 487; *Blount v. Walker*, 31 S. Car. 13; *Nickell v. Handly*, 10 Gratt. (Va.) 336.

A trust for a married woman and her infant children will stand, although no active duties are to be performed by the trustee. *Dean v. Long*, 122 Ill. 447.

A trust to receive and pay the income of real estate and personal estate to a *feme covert* for life, does not come to an end on discovery, but continues until the death of the beneficiary. *Bacon's Estate*, 6 Phila. (Pa.) 335.

An agreement in the marriage articles by the father of the intended wife, to stand seised to her use, after marriage, of a piece of real estate, does not operate after the marriage to convey the legal estate by the statute of uses. But the use continues executory in the trustee and his heir at law. *Magniac v. Thompson*, 1 Baldw. (U. S.) 344.

A devise for the trustee of real and personal estate to hold in trust for, and to collect, and receive the income from said estate, and pay over the same to the son of the testatrix, during his natural life, without being subject to his debts and liabilities, is an active, operative trust, and the whole estate passes to the trustee. *Shankland's Appeal*, 47 Pa. St. 113.

Where an estate is conveyed to a trustee for certain purposes, and it is intended to protect the estate until the time fixed for the division, and this can only be done by the legal title continuing in the trustee, the use will not be executed in the beneficiary. *Poser v. Cook*, 1 Hill (S. Car.) 413.

A conveyance or devise of an estate to trustees for the sole and separate use of a married woman, does not come under the operation of the statute of uses. *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

A devise to trustees of real and personal property, in trust to rent and let the real estate and to invest the personal estate, to collect and receive the rents, interest and profits thereof, and to pay over to the testator's children the net income, is an active, operative trust, and the estate vests in the trustees; the use is not executed, even though all the beneficiaries are *sui juris*. *Barnett's Appeal*, 46 Pa. St. 392.

The statute of uses did not operate to execute limitations in trusts to preserve contingent remainders when such trusts were legal. *Vanderheyden v. Crandall*, 2 Den. (N. Y.) 9.

only to trusts in real property, and not to trusts in chattels or in personal property.<sup>1</sup>

It becomes, then, a vital question in measuring the scope of the trustee's estate, to ascertain whether these essential powers and duties have been created. The estate of the trustee is commensurate with the powers conferred by the trust and the purposes to be achieved by it.<sup>2</sup> Whatever estate is needed to

Where a grant is made to individuals for the use of a church, unincorporated at the time, the grantees stand ceded to the use; and when the church acquires a legal capacity to hold real estate, the possession to the use is executed by the statute and the estate vests. *Reformed Dutch Church v. Veeder*, 4 Wend. (N. Y.) 494.

The trustee of a deed of trust will be protected by equity, so far as consistent with law, and equity will not order the transfer of the legal title to the beneficiary while there are ulterior trusts which he might destroy. *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. Car.) 480.

Where land is given in trust to a husband for the use and benefit of his wife, and upon her death in trust for the heirs of her body, and "at any time should the said husband deem it best for the interest of his said wife and children, to sell said property, and reinvest the proceeds, he is hereby empowered so to do," the legal title remains in the husband as trustee, and the statute of uses does not control. *Carrigan v. Drake*, 36 S. Car. 354.

If the duties imposed upon the trustees require that they invest the funds, pay over the income, etc., and the trust runs for the use of a *feme covert* for life, and then to her children, the courts will consider the trust an active one and maintain it. *Keene's Estate*, 9 Phila. (Pa.) 339.

1. The statute of uses does not apply to trusts of personal property. *Schley v. Lyon*, 6 Ga. 530; *Denton v. Denton*, 17 Md. 403; *Slevin v. Brown*, 32 Mo. 176; *Kane v. Gott*, 24 Wend. (N. Y.) 641; 35 Am. Dec. 641; *Artcher v. Zeh*, 5 Hill (N. Y.) 203; *Savage v. Burnham*, 17 N. Y. 571; *Day v. Roth*, 18 N. Y. 448; *Gilman v. McArdle*, 99 N. Y. 451; *Matter of Carpenter*, 131 N. Y. 86; *Bunn v. Vaughn*, 5 Abb. Pr. N. S. (N. Y.) 271; *Brown v. Harris*, 25 Barb. (N. Y.) 136; *Forsyth v. Rathbone*, 34 Barb. (N. Y.) 408; *Cutting v. Cutting*, 20 Hun (N. Y.) 371; *Rice v. Burnett*, *Spear's Eq. (S. Car.)* 579; 42

Am. Dec. 336; *Joor v. Hodges*, *Spear's Eq. (S. Car.)* 593; *Harley v. Platts*, 6 Rich. (S. Car.) 310.

As regards personal estates in trust, the legal title remains in the trustee, and does not pass to the *cestui que trust* upon the accomplishment of the purposes of the trust. *Denton v. Denton*, 17 Md. 403.

Where there is a gift of personal estate to a trustee without words of limitation, it vests in him the whole estate subject to the trust. *Hanson v. Worthington*, 12 Md. 418.

2. *Hill on Trustees* 229-252, 269-277; *Flint on Trusts and Trustees*, ch. 12; *Perry on Trusts*, § 312; *Ward v. Amory*, 1 Curt. (U. S.) 419; *King v. Ackerman*, 2 Black (U. S.) 408; *Neilson v. Lagow*, 12 How. (U. S.) 98; *Webster v. Cooper*, 14 How. (U. S.) 499; *Comby v. McMichael*, 19 Ala. 751; *Powell v. Glenn*, 21 Ala. 468; *Schaffer v. Lavretta*, 57 Ala. 14; *Jones v. Reese*, 65 Ala. 134; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Nelson v. Davis*, 35 Ind. 474; *Gill v. Logan*, 11 B. Mon. (Ky.) 233; *Deering v. Adams*, 37 Me. 265; *Leonard v. Diamond*, 31 Md. 541; *Sears v. Russell*, 8 Gray (Mass.) 86; *Gould v. Lamb*, 11 Met. (Mass.) 84; 45 Am. Dec. 187; *Cleveland v. Hallett*, 6 Cush. (Mass.) 407; *Newhall v. Wheeler*, 7 Mass. 189; *King v. Parker*, 9 Cush. (Mass.) 71; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Longley v. Hall*, 11 Pick. (Mass.) 124; *Stearns v. Palmer*, 10 Met. (Mass.) 32; *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168; *Upham v. Varney*, 15 N. H. 462; *Norton v. Norton*, 2 Sandf. (N. Y.) 296; *Fisher v. Fields*, 10 Johns. (N. Y.) 504; *Nicoll v. Walworth*, 4 Den. (N. Y.) 385; *Bennett v. Garlock*, 79 N. Y. 302; 35 Am. Rep. 517; *Hawley v. James*, 5 Paige (N. Y.) 318; *Crooke v. Kings County*, 97 N. Y. 421; *Matter of Tienken*, 131 N. Y. 391; *Payne v. Sale*, 2 Dev. & B. Eq. (N. Car.) 455; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Steady v. Rice*, 27 Pa. St. 75; 67 Am. Dec. 447; *Meeting St. Baptist Soc. v. Hall*, 8 R. I. 240; *Smith*

effectuate the settlor's intention in creating the trust, even to a fee simple, the trustee acquires; but the exigencies of the trust

*v. Metcalf*, 1 Head (Tenn.) 64; *Turley v. Massengill*, 7 Lea (Tenn.) 359; *Henderson v. Hill*, 9 Lea (Tenn.) 32; *Hooberry v. Harding*, 10 Lea (Tenn.) 397; *Harding v. St. Louis L. Ins. Co.*, 2 Tenn. Ch. 468; *Murdock v. Johnson*, 7 Coldw. (Tenn.) 611; *Williamson v. Wickersham*, 3 Coldw. (Tenn.) 55; *Scott v. West*, 63 Wis. 529; *Collier v. Walters*, L. R., 17 Eq. 252; *White v. Baylor*, 10 Ir. Eq. 54.

An estate co-extensive with the duties to be performed, will vest the trustee, and he will take exactly that quantity of interest which is required by the purposes of the trust, which being accomplished, the trust estate terminates. *Smith v. Metcalf*, 1 Head (Tenn.) 64.

In *Ellis v. Fisher*, 3 Sneed (Tenn.) 231; 65 Am. Dec. 52, the court, by McKinney, J., said: "The established doctrine is, that trustees take exactly that quantity of interest which the purposes of the trust require. The question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what, less estate? And, therefore, a devise to trustees may be either restricted or extended, as the nature and purpose of the trust require. Although the devise be expressly to the trustees and their heirs, it is well settled that if the duties imposed on them, or the purposes of the trust require only an estate *pur autre vie* to be vested in them, their legal interest will be cut down to that extent, notwithstanding the express limitation to them in fee. This construction has been held to prevail even in the case of a deed by necessary implication, arising from the object of the trust in connection with the nature of the subsequent limitations; and much more readily will it prevail in the case of a will. And on the other hand, in the absence of any express limitation sufficient to carry the legal inheritance, the estate of the trustees may be enlarged and extended into such an estate as the nature and purposes of the trust require. The construction in this respect is governed mainly by the intention of the testator, as gathered from the general scope of the will."

A surviving partner is trustee for the

firm with powers commensurate with the trust. *Offut v. Scott*, 47 Ala. 104.

In *Sears v. Russell*, 8 Gray (Mass.) 86, the court, by Bigelow, J., said: "The rule is well settled that trustees will be held to take that quantity of interest in estates devised to them which the exigencies of the trust may demand; and where lands are devised to trustees to convey to the objects of the testator's bounty, the legal estate necessarily vests in the trustees till they have conveyed it, and it must be commensurate with the estate which they are bound to convey; if they are to grant a fee it is necessary they should have a fee."

Trust with power to sell confers a fee simple. *Hawker v. Hawker*, 3 B. & Ald. 537; 5 E. C. L. 368; *Bagshaw v. Spencer*, 1 Ves. 144; *Shaw v. Weigh*, 2 Str. 798; *Villiers v. Villiers*, 2 Atk. 72; *Garth v. Baldwin*, 2 Ves. 645; *Mott v. Buxton*, 7 Ves. 201; *Doe v. Edlin*, 4 Ad. & El. 582; 31 E. C. L. 143; *Preacher's Aid Soc. v. England*, 106 Ill. 125; *Glover v. Monckton*, 3 Bing. 13; 11 E. C. L. 9; *Gibson v. Montfort*, 1 Ves. 485; *Warter v. Hutchinson*, 5 Moore 143; 1 B. & C. 121; *Watson v. Pearson*, 2 Exch. 594; *Kirkland v. Cox*, 94 Ill. 402; *Spessard v. Rohrer*, 9 Gill (Md.) 262; *Jackson v. Robins*, 16 Johns. (N. Y.) 537.

In *Stockbridge v. Stockbridge*, 99 Mass. 244, the deed of trust conferred unlimited discretion as to the time and method of exercising the power of sale, and provided that the proceeds of all sales were "to be reinvested and held on the same trusts and way as the property so sold." The court held that such a trust required and implied a fee simple in the grantee. The conveyance was made to Caroline, wife of W. R. Stockbridge "for and during her natural life, and from after her decease to the persons who would then be the heirs at law of Stockbridge if he had then died intestate; but upon the trusts and with the powers following: That Caroline, at any time during the life of Stockbridge, and with his concurrence testified in writing under his hand and seal, may sell and convey the granted premises, or any part or parts thereof, in fee simple or for any less estate at public or private sale, at such a time or times, to such person or persons,

put a strict limit upon his estate, and beyond this the courts will not suffer it to be enlarged. It matters little what form of words has been employed to create the trust, particularly in instruments of a testamentary character, the doctrine just stated being

and for such consideration as may seem to her judicious, without the necessity of applying to any court for leave so to do; the net proceeds of all such sales to be reinvested and held on the same trusts and way as the property so sold," and that her deed with the written consent of Stockbridge should "cut off the rights of such remaindermen in the granted premises as fully and effectually as if such remainder had not been hereby created and the absolute estate in fee-simple had been hereby granted to the said Caroline." The court held that deed of Caroline Stockbridge, executed with her husband's concurrence, would be effectual to pass the entire title; that no part of the title remained in the settlor to convey; that Caroline acquired as her beneficial interest the use during her life, and that the estate in remainder could not be sold and the proceeds reinvested separately from the estate in possession.

In *Zabriskie v. Morris, etc., R. Co.*, 33 N. J. Eq. 22, it was held that a trust to sell or improve lands and invest and reinvest the proceeds, to collect rents and income, to pay taxes, assessments, commissions and other annual expenses and charges, to pay over the net income and divide the estate, vests a fee-simple title in the designated trustee. The court, by Runyon, Chancellor, said: "The trust is to sell, to improve, invest and reinvest, to collect rents and incomes, to pay taxes and commissions and other annual expenses and charges, to pay the net income over, and to divide the estate. The authority given is not a mere power of disposition which may be executed without any legal title, but a trust of such a character as renders it necessary that the legal estate, the title in fee to the property, should be in the trustees. . . . The trustees have power to lease, and to sell and convey, and where a devise to trustees upon trusts which, standing alone, would not vest in them the whole legal estate, is followed or accompanied by a power to sell, lease or mortgage, not limited to the period of the continuance of the active trusts, the trustees are held to take the whole legal fee, and not a mere

limited estate with a superadded power of sale, mortgage or leasing." Citing *Hawk. on Wills* 153; *Barker v. Greenwood*, 4 M. & W. 421; 2 *Jarman on Wills* 201; *Hill on Trustees* 231, 232; *Perry on Trusts*, § 213.

A and his wife conveyed all their property, both real and personal, to B, in trust to immediately sell so much as would be sufficient to pay all the then existing debts of A, and to hold the residue in trust for his wife and children. It was held that the trustee had an absolute legal estate, and that a sale made by him was valid, although, contrary to the terms of the trust, the proceeds were applied to the payment of new debts of the husband, after the old ones had been paid in full. *Stokes v. Middleton*, 28 N. J. L. 32.

In *Ryan v. McGehee*, 83 N. Car. 500, real estate was conveyed by deed to A (who had been named as one of the parties entitled to the equitable estate) "in trust for B and others as aforesaid and their heirs." It was held that by this deed a fee-simple would be vested in the trustee.

An estate was devised in trust to executors for the children of the testator until the youngest should attain his majority, the directors being directed, in the meantime, to manage the estate and receive the income. It was held that a fee-simple estate in trust was vested in the executors, defeasible when the youngest child should attain the age of twenty-one years. *Pearce v. Savage*, 45 Me. 90.

Where an estate is devised to a trustee in fee for the sole use of a *feme covert* for life, and after her death for the sole use of a person or a class of persons, who are *in esse* and are *sui juris*, the legal estate in fee given to the trustee is cut down to an estate commensurate with the separate estate for life of the *feme covert*—an estate *pur autre vie*—which it is his duty to preserve, and the use as to the residue is immediately executed by statute in the remainder-men, concerning whose interest the trustee has no special duty to perform. So, where the legal estate given to the trustee is not sufficiently large to enable him to perform the duties of his trust, his legal estate will

be enlarged by implication to an extent commensurate with the objects and duties of the trust. *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

And it was held in *Cleveland v. Hallett*, 6 Cush. (Mass.) 403, that if the purposes for which a trust is created by deed or devise of land, are of such a nature that they do, or by any possibility may, require a legal estate in the trustee for a period beyond his own life, the trustee will take a fee without words of limitation. See also *West v. Fitz*, 109 Ill. 425; *Atty. Gen'l v. Federal St. Meeting House*, 3 Gray (Mass.) 1.

The omission of words of limitation will not prevent the trustee's taking a legal estate in fee, if such estate be needed to carry out the trust. *Bagshaw v. Spencer*, 2 Atk. 577; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Kirkland v. Cox*, 94 Ill. 402; *Nelson v. Davis*, 35 Ind. 476; *North v. Philbrook*, 34 Me. 537; *Hawkins v. Chapman*, 36 Md. 94; *Cleveland v. Hallett*, 6 Cush. (Mass.) 407; *Toronto General Trust Co. v. Chicago, etc.*, R. Co., 123 N. Y. 37; *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Webster v. Cooper*, 14 How. (U. S.) 499; *Neilson v. Lagow*, 12 How. (U. S.) 98; *Neilson v. Lagow*, 4 Ind. 607; *North v. Philbrook*, 34 Me. 532; *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. (Mass.) 32; *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 237; *Welch v. Allen*, 21 Wend. (N. Y.) 147; *Fisher v. Fields*, 10 Johns. (N. Y.) 495; *Toronto General Trust Co. v. Chicago, etc.*, R. Co., 123 N. Y. 37.

The case of *Brewster v. Striker*, 2 N. Y. 19, was one in which a testator had devised certain real estate to his three grandchildren and their heirs forever. He directed that the real estate be disposed of by his executor as follows: "The said real estate shall not, at any time hereafter, be sold or alienated, but my said executors or the survivors of them, or the executors or administrators of such survivors, shall, from time to time, lease or rent the same on such terms as they shall deem most advantageous to my said heirs (grandchildren), and the rents, issues and profits of the same shall be annually paid to my said heirs in equal proportions; and if either of my said heirs or their children shall choose to occupy any part of my said real estate, he, she, or they, shall have a preference over any other applicant on paying a reasonable rent for the same." It was held that

under the provisions of this will the executors took a legal estate by implication of law as trustees, the grandchildren taking an equitable estate as beneficiaries. The court said: "Independently, therefore, of other reasons, the necessity of vesting in the executors the legal title to the estate, in order to enable them to carry that intention into effect, would be a powerful consideration in support of the devise of the premises to them by implication of law. . . . Mere powers, the amplest recognized and allowed by the revised statutes, without the legal estate, might not be adequate to all the exigencies of the trust. The testator has done more than confer an authority or power on the executors; he has enjoined upon them duties and active trusts which were to continue for several lives, and would require the exercise of judgment and discretion, and might, moreover, bring them into conflict with the devisees and heirs at law, and often render necessary or expedient the application of high coercive acts of ownership, and the recourse to remedies confessedly incident to the legal estate, but which an agent acting under powers only, could not adapt or apply."

In *Wood v. Wood*, 5 Paige (N. Y.) 603; 28 Am. Dec. 451, *Walworth, Chancellor*, says: "It is because a seisin of the legal estate is necessary to enable the trustee to collect the rents and profits that a devise of the legal estate in the rents and profits to a trustee for a term of years or for any other limited period, carries with it the legal estate in the land for the same term or time by necessary implication at the common law."

Where a legal title in the trustee is essential to the performance of the duties imposed, the trustee will be considered as taking the legal title by implication. *Wilson v. Russ*, 17 Fla. 696; *West v. Fitz*, 109 Ill. 425; *Gill v. Logan*, 11 B. Mon. (Ky.) 233; *Merton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *North v. Philbrook*, 34 Me. 537; *Warner v. Sprigg*, 62 Md. 14; *Cleveland v. Hallett*, 6 Cush. (Mass.) 403; *Packard v. Marshall*, 138 Mass. 301; *Fisher v. Fields*, 10 Johns. (N. Y.) 505; *Welch v. Allen*, 21 Wend. (N. Y.) 147; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *Killam v. Allen*, 52 Barb. (N. Y.) 605; *Toronto General Trust Co. v. Chicago, etc.*, R. Co., 123 N. Y. 37; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Freedley's Appeal*, 60

Pa. St. 349; *Barkley v. Dosser*, 15 Lea (Tenn.) 529.

When a deed names the grantee as trustee of A, and the covenants are with him in that capacity, the title passes to A, as far as the grantee is concerned, under the *Kansas* Act. *Bayer v. Cockrill*, 3 Kan. 276.

A more liberal construction of deeds and wills is favored by the modern decisions in order to arrive at the real intent of the makers, and in all cases of devises or conveyances to trustees for the separate use of married women, the court will, if possible, so construe them as to vest the legal estate in the trustees, because this will best carry out the intentions of the donor. *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 672.

Where land is devised to trustees, they will take the legal estate, wherever the purposes of the trust require it; but if they be not required to do an act, or exercise any control over the land or the income, the legal estate will vest in the beneficiary. *Upham v. Varney*, 15 N. H. 462. Compare *Brewster v. Striker*, 1 E. D. Smith (N. Y.) 321; *Porter v. Doley*, 2 Rich. Eq. (S. Car.) 49.

In all cases where it is doubtful what estate the trustee has, he is presumed to take an estate sufficient to enable him to accomplish the purposes of the trust, but no more. *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168.

If lands are conveyed to a trustee to hold for the benefit of a *cestuique trust* named, for life, and collect the rents and pay them to the *cestui que trust*, the trustee takes the legal estate. *Locke v. Barbour*, 62 Ind. 577.

In *Neilson v. Lagow*, 12 How. (U. S.) 98, 110, the deed granted the realty to the trustees "and their successors in trust to sell and convey in fee simple absolute," and it was held that the legal estate, being in trust, must be commensurate with the trust, and will be deemed to be an estate in fee simple without the usual words of limitation.

The trustee's estate is commensurate in extent and duration with the object and extent of the trust. *Doe v. Ladd*, 77 Ala. 223. See also *Newhall v. Wheeler*, 7 Mass. 189; *Sears v. Russell*, 8 Gray (Mass.) 86; *Stearns v. Palmer*, 10 Met. (Mass.) 32; *Gould v. Lamb*, 11 Met. (Mass.) 84; 45 Am. Dec. 187; *Brooks v. Jones*, 11 Met. (Mass.) 191; *King v. Parker*, 9 Cush. (Mass.) 71; *Cleveland v. Hallett*, 6 Cush. (Mass.)

407; *Goodrich v. Proctor*, 1 Gray (Mass.) 570; *Deering v. Adams*, 37 Me. 265; *Fisher v. Fields*, 10 Johns. (N. Y.) 505; *Brown v. Brown*, 12 Md. 87; *Farquharson v. Eichelberger*, 15 Md. 72; *Hawkins v. Chapman*, 36 Md. 94; *Spessard v. Rohrer*, 9 Gill (Md.) 262; *Schaffer v. Laveetta*, 57 Ala. 14; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Lamar v. Pearre*, 82 Ga. 354; 14 Am. St. Rep. 168; *Zabriskie v. Morris*, etc., R. Co., 33 N. J. Eq. 22; *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Ellis v. Fisher*, 3 Sneed (Tenn.) 231; 65 Am. Dec. 52; *Brailsford v. Heyward*, 2 Desaus. Eq. (S. Car.) 290; *Newman v. Dotson*, 57 Tex. 117; *Webster v. Cooper*, 14 How. (U. S.) 499; *Doe v. Howland*, 8 Cow. (N. Y.) 277; 18 Am. Dec. 445; *Jackson v. Robins*, 16 Johns. (N. Y.) 537; *Trent v. Hanning*, 7 East 97.

**Instances.**—In *Ames v. Ames*, 15 R. I. 12, a trust created by a will empowered the trustee to manage the estate for a life tenant, to apply the *corpus* for his use and benefit, if necessary, and upon his death to convey absolutely to the remainder-men. This trust was held by the court to vest in the trustee a fee simple title, with power to sell and convey in fee simple.

The decedent, by his will, left to A, trustee, "and his heirs, all the estate, real and personal, of which I may die seised, possessed and entitled to," to hold for the use and benefit of B, with power to sell, etc. The will contained no residuary clause disclosing any of the estate remaining undisposed of. It was held that A, as trustee, took all the testator's estate, and that the fee simple did not descend to the decedent's heirs as a qualified or determinable fee, subject to be divested by the exercise of the power of sale and becoming absolute if such power was not exercised. By the same will, the estate was to be held in trust for the sole and separate use of B for her life, so that it could not be reached by her creditors or disposed of by her; but the trustee was given authority, on her written request, to sell the same, or any part, if he should deem it expedient, and either reinvest the proceeds, or "turn the same over to B for her sole, separate, and absolute use, freed and discharged of all trust." It was held that a fee in the trustee was essential in order to carry out the purposes of the trust, and the fact that he was never actually called on to exercise the power of sale

does not affect the question. *Blount v. Walker*, 31 S. Car. 13.

A trust with authority to manage the estate for the life tenant, to apply the *corpus* for his benefit, if necessary, and convey to the remainder-man upon the death of the life tenant, vests a fee in the trustee with power to sell and convey in fee. *Ames v. Ames*, 15 R. I. 12.

Where there is a devise and bequest in trust to pay the net income to a daughter of the testator for life, and upon her death, to choose out of the property a sufficient sum to pay a certain amount to her surviving husband, and to appraise and divide the residue, and convey it in equal portions to her children or their issue in fees, the trustees take an estate in fee; and at the daughter's death, the sum having been paid to her husband, are bound to appraise, divide, and convey the residue to her issue. *Sears v. Russell*, 8 Gray (Mass.) 86.

In *Devries v. Hiss*, 72 Ind. 560, the decedent left a will by which all his residuary estate was given to trustees, their heirs and successors, in trust; that one-sixth part should "go to and become the property of" H, absolutely and forever; and the remaining five-sixths should be held by the trustees for the use and benefit of certain beneficiaries. Authority was given to the trustees to sell and convey the whole or any part of the estate for the purpose of making a partition, or for any other necessary purpose. The court decided, that under this will, a legal estate in the entire property vested in the trustees, and that the trust in the one-sixth part did not come to an end until that share of H should be ascertained by a partition.

Where the conveyance was made to the trustee "in trust to take, hold, and convey the remainder, on the death of the life beneficiary" to certain persons named, an active trust is created which prevents the merger of the legal and the equitable estates. *Henson v. Wright*, 88 Tenn. 501.

In *Holl's Appeal*, 133 Pa. St. 351, property was bequeathed to be invested by the executor "in good and reliable securities for the use of" the legatee, the interest to be paid to him semi-annually during his life, and thereafter, the principal to go to his children; or, should he die without issue, to revert to the estate of the testator. By this bequest, an active trust was

held to be created, entitling the trustee to possession.

A husband conveyed his property to D and his heirs in trust for the use of the grantor's wife during her life, and thereafter, in trust for the grantor during his life, and finally, after the death of the survivor of them, in trust for the use and benefit of the right heirs of the wife in fee. This conveyance was held to invest D with the entire legal estate, and the beneficiaries with a mere equitable interest. *Leonard v. Diamond*, 31 Md. 536.

A conveyance to trustees to receive the yearly income, rents, profits and produce, and apply the same yearly to the use of the grantor, free from the control or influence of her husband, is, by *New York* statutes, recognized as a valid express trust, and vests in the trustees the entire legal and equitable estate, subject only to the execution of the trust imposed; and every interest and estate not embraced in the trust, and not otherwise disposed of by force of the statute, remains in and reverts to the grantor and her heirs as a legal estate. *Townshend v. Frommer*, 125 N. Y. 446.

In *Packard v. Marshall*, 138 Mass. 301, a testator devised a portion of his estate to certain trustees, "for the use and benefit of my son C, to be applied and appropriated to the use and benefit of said C, at the discretion of my said trustees," and authorized the trustees "to sell and pass deeds to convey any and all of my real estate at their discretion." It was held to vest in the trustees an estate in fee.

In *Preachers' Aid Soc. v. England*, 106 Ill. 125, a conveyance was made to A, and held in trust for the Preachers' Aid Society to be by it disbursed for the benefit of superannuated preachers and their widows and orphans, "and when the Preachers' Society shall have been organized and put upon a working footing, then the said A is to convey said premises to said society to be held by it in the same manner." The court held that the legal title under this conveyance vested in A in fee simple.

A testator devised real estate to his sons for the use of his daughters and their families respectively, the titles thereof to be held by the sons in trust, and the income of the respective portions to be paid over to the daughters, "for their sole and separate use to each daughter during life," and then to her

universal, that is to say, that despite the language of the instrument, whatever estate is necessary for the full execution of the trust, vests in the trustee, and no more.<sup>1</sup>

husband, in case her husband shall survive; and after the death of the daughters and their husbands the said shares to be conveyed to the right heirs of the daughters respectively in fee simple; and it was held that the active duties of the trustees did not depend upon the coverture of the daughters; that under the will the daughters were possessed of equitable interests and the use limited to them was never executed; that to enable the trustees to perform their duties the legal estate must continue in the trustees, and the duty of receiving and paying the income involved the necessity of the management and preservation of the real estate for those in remainder; and that the heirs of each daughter were entitled to a legal estate at her death and that there was no union of her estate with theirs. *Bacon's Appeal*, 57 Pa. St. 504.

In *Locke v. Barbour*, 62 Ind. 577, the court, by Perkins, J., said: "It seems to be pretty well established that a devise to trustees to hold real property for the sole use and benefit of a named beneficiary, and for and during the life of such beneficiary, and to pay him or her the rents annually, taking receipts therefor, is such a power of management as vests the legal estate in the trustee." See also *Barnett's Appeal*, 46 Pa. St. 392; *Shankland's Appeal*, 47 Pa. St. 113; *Dobson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Killam v. Allen*, 52 Barb. (N. Y.) 605; *Wood v. Wood*, 5 Paige (N. Y.) 596; 28 Am. Dec. 451; *Vail v. Vail*, 4 Paige (N. Y.) 317; *Brewster v. Striker*, 2 N. Y. 19; *West v. Fitz*, 109 Ill. 425; *Sympton v. Turner*, 1 Eq. Cas. Abr. 383; *Garth v. Baldwin*, 2 Ves. 645; *Robinson v. Grey*, 9 East 1; *Doe v. Briggs*, 2 Taunt. 109; *Barker v. Greenwood*, 4 M. & W. 421.

Where the instrument of trust creates a valid trust, with a power in the trustee to sell at the request and for the benefit of the beneficiary under the deed, no power of revocation being reserved, no estate in the premises remains in the grantor, which is capable of being transferred. *Marvin v. Smith*, 46 N. Y. 571.

In *Matter of Tienken*, 131 N. Y. 391, the testator devised his residuary real estate in trust to his executors during his wife's life, directing them to pay her

\$2000 each year, and after paying out of the remaining income all taxes, necessary repairs, etc., "to apply the balance or remainder once a year between my children, share and share alike, for their use, benefit, and maintenance." This provision was held not to vest the entire estate in the trustees, but only for the life of the widow; so that outside of the trust there was a remainder in fee which, in the absence of any testamentary disposition otherwise, went, upon his death, to the heirs of the testator.

1. The estate of the trustee will not be enlarged beyond the actual demands of the trust, even though the language employed might justify it. The purpose is to give no greater powers than it was the evident intent of the settlor to create. *Bryan v. Weems*, 29 Ala. 423; 65 Am. Dec. 407; *Greenwood v. Coleman*, 34 Ala. 150; *West v. Fitz*, 109 Ill. 425; *McElroy v. McElroy*, 113 Mass. 509; *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 762; *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168; *Slevin v. Brown*, 32 Mo. 176; *Wilcox v. Wheeler*, 47 N. H. 488; *Norton v. Norton*, 2 Sandf. (N. Y.) 206; *Ivory v. Burns*, 56 Pa. St. 300; *Koenig's Appeal*, 57 Pa. St. 352; *McBride v. Smyth*, 54 Pa. St. 245; *William v. Holmes*, 4 Rich. Eq. (S. Car.) 475; *Ellis v. Fisher*, 3 Sneed (Tenn.) 231; 65 Am. Dec. 52; *Gardenhire v. Hinds*, 1 Head (Tenn.) 402; *Smith v. Metcalf*, 1 Head (Tenn.) 64.

In *Walton v. Follansbee*, 131 Ill. 147, land had been conveyed by a deed to trustees "and to the survivor of them, and to the heirs and assigns of such survivors," that they should "execute such leases, conveyances, contracts and agreements," attaching the land conveyed as the *cestui que trust* might request. The deed stipulated that in the event the *cestui que trust* died before the grantor, the land should descend to her surviving children; and in case the grantor died first, the trust should terminate. It was held that the trustees had no power to convey the fee, even with the consent of the *cestui que trust*, their estate being only for the joint lives of the *cestui que trust* and the grantor.

Where the purposes of a trust can be



"The court is always reluctant," says a standard author, "to enlarge an estate in trustees beyond the terms of the gift; and it will not be done unless it is necessary for the execution of the trust."<sup>1</sup> An estate "in trust to suffer and permit" the beneficiary to collect rents, for example, imposes no duty on the trustee, and under the Statute of Uses no such estate can stand.<sup>2</sup>

In point of duration, likewise, the trustee's estate is measured by the terms of his trust. It will stand so long as any legitimate

answered by a less estate than a fee-simple, a greater estate than is sufficient to answer such purposes shall not be permitted to pass to the trustee; but the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute of uses. *Doe v. Simpson*, 5 East 162; *Doe v. Hicks*, 7 T. R. 433; *Curtis v. Price*, 12 Ves. 89; *Coulter v. Robertson*, 24 Miss. 278; 57 Am. Dec. 168.

"Courts will abridge the estate where words of inheritance are used, if the execution of the trust does not require a fee; and so they will enlarge the estate if no words of inheritance are used in a deed." *Perry on Trusts*, § 320; *Watson v. Pearson*, 2 Exch. 593; *Bagshaw v. Spencer*, 1 Ves. 142.

On the contrary, it was held in *Watkins v. Specht*, 7 Coldw. (Tenn.) 585, that the courts will not by implication merely cut down an estate in fee conferred on the trustee by the terms of the instrument to an estate for life, upon the ground that the purposes of the trust do not require a fee simple estate.

The settlor will not be deprived of his control over the property from the mere fact that the title to the same resides in the trustees, if the deed does not limit his rights over the trust estate. *Sayre v. Sayre*, 17 N. J. Eq. 349.

Where the trust was for A during her natural life and at her death to descend to her children, it was held that A took a life estate only, the remainder vesting directly in the children. *Greenwood v. Coleman*, 34 Ala. 150.

And a trustee appointed to hold during the coverture of a life tenant, a married woman, and for her only, takes no fee as against the remaindermen. *Bagley v. Kennedy*, 81 Ga. 721.

An estate conveyed in trust without words of limitation, is ordinarily deemed an estate in the trustee for the life of the settlor. *Perry on Trusts*, § 314.

But if the estate is held by the trustee, in trust to pay certain annuities to

certain persons named for their lives, the trustee's estate is for the lives of the several annuitants. *Perry on Trusts*, § 314.

1. *Perry on Trusts*, § 317. See also *Lewin on Trusts and Trustees* 216.

2. *Lewin on Trusts and Trustees* 210; *Perry on Trusts*, § 306; *Witham v. Brooner*, 63 Ill. 344; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Ramsay v. Marsh*, 2 McCord (S. Car.) 252; 13 Am. Dec. 717; *Boughton v. Langley*, 1 Eq. Cas. Abr. 383; 2 Salk. 679; *Right v. Smith*, 12 East 455; *Wagstaff v. Smith*, 9 Ves. 524; *Gregary v. Henderson*, 4 Taunt. 773; *Warter v. Hutchinson*, 5 Moore 143; 1 B. & C. 721; *Barker v. Greenwood*, 4 M. & W. 429; *Doe v. Bolton*, 11 Ad. & El. 188; 39 E. C. L. 43; *Adams v. Adams*, 6 Q. B. 860; 51 E. C. L. 860.

Where two tracts of land are devised to trustees in the same words, it does not follow necessarily that, because they take the legal estate in one, and are required to do certain things in relation to it which can only be done by one who holds the legal estate, they take that estate in the other, concerning which such acts are not required. *Webster v. Cooper*, 14 How. (U. S.) 488.

A devise to trustees and their heirs to certain uses named, passes the legal estate to the beneficiary, unless the will imposes upon the trustees some duty requiring the legal estate in them. *Webster v. Cooper*, 14 How. (U. S.) 488. Thus, in *Williams v. Waters*, 14 M. & W. 166, where by a marriage settlement lands were conveyed for the wife, to trustees and their heirs, to the use of the wife and her assigns until the marriage, and thereafter in trust for the wife and her assigns during her life for her sole and separate use, independent of the debts, control, or engagements of the husband, and after her death to the use of the husband, his heirs and assigns, it was held, that the trustees did not take the legal estate during the life of the wife, but

purpose contemplated by the settlor remains unfulfilled. But so soon as the objects for which the trust was created shall have been accomplished, or the need for their attainment shall have failed, the trust estate ceases,<sup>1</sup> and the estate vests in the bene-

that the use was executed in her, notwithstanding the words "to her own sole and separate use."

Where land is devised to the testator's minor daughter to have and hold for her sole use forever, subject to the following condition of the trust: "The trustee hereinafter named is hereby appointed by me to receive, hold, and manage said estate until said daughter shall reach the age of twenty-one years or shall marry," the legal estate in the land is vested in the trustee, but not an interest in fee; he cannot, therefore, maintain a writ of entry for the premises, but may maintain a suit of forcible entry and detainer. *Fay v. Taft*, 12 Cush. (Mass.) 448.

Where the property is conveyed by a debtor to a creditor in trust, by whom the deed of trust is accepted and executed for the purposes of the trust, the overplus of money in his hands may be attached. *Hearn v. Crutcher*, 4 Yerg. (Tenn.) 461.

1. *Doe v. Considine*, 6 Wall. (U. S.) 458; *Young v. Bradley*, 101 U. S. 782; *Comby v. McMichael*, 19 Ala. 747; *Powell v. Glenn*, 21 Ala. 458; *Fox v. Storrs*, 75 Ala. 265; *Doe v. Ladd*, 77 Ala. 223; *Hill v. Jones*, 65 Ala. 214; *Wilson v. Russ*, 17 Fla. 696; *Harden v. Osborne*, 60 Ill. 93; *Locke v. Barbour*, 62 Ind. 585; *Montgomery v. Merrill*, 18 Mich. 338; *Lyle v. Burke*, 40 Mich. 499; *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293; *Bennett v. Garlock*, 10 Hun (N. Y.) 340; *Quin v. Skinner*, 49 Barb. (N. Y.) 133; *Peck v. Brown*, 2 Robt. (N. Y.) 119; *Sterricker v. Dickinson*, 9 Barb. (N. Y.) 520; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Morris Canal Co. v. Emmett*, 9 Paige (N. Y.) 168; 37 Am. Dec. 388; *Irving v. DeKay*, 9 Paige (N. Y.) 521; *Miller v. Wright*, 109 N. Y. 194; *Stacey v. Rice*, 27 Pa. St. 75; 67 Am. Dec. 447; *Culbertson's Appeal*, 76 Pa. St. 145; *Westcott v. Edmunds*, 68 Pa. St. 36; *Williams' Appeals*, 83 Pa. St. 388; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Henderson v. Hunter*, 59 Pa. St. 335; *Rice v. Burnett*, 1 Spear's Eq. (S. Car.) 579; 42 Am. Dec. 336; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 302; *Turner v. Ivie*, 5 Heisk.

(Tenn.) 234; *Belote v. White*, 2 Head (Tenn.) 708; *Beecher v. Hicks*, 7 Lea (Tenn.) 213; *Smith v. Metcalf*, 1 Head (Tenn.) 68; *Adams v. Adams*, 9 Lond. Jur. 300; *Barker v. Greenwood*, 4 M. & W. 421-429. See also *Andrews v. Huckabee*, 30 Ala. 152; *Jenkins v. McConico*, 26 Ala. 213; *Knight v. Bell*, 22 Ala. 198.

Where the title to slaves and personal property was devised to the executors in trust to be given to other persons, whom the will partially designated, leaving it to the trustees to elect, the trustees hold such title until that provision of the will is executed; and such property is liable to be sold under execution against the trustees, nor will the surrender of the slaves to the testator's widow as dower, although the character of the property may be changed to the extent of her interest in it, affect its character in their hands, as they still continue assets as far as the title resided in them. *Meyers v. Daviess*, 10 B. Mon. (Ky.) 394.

Where land is devised to trustees in trust to sell the same and apply the proceeds to certain specified objects, there being no limitation as to the continuance of the trust, the title will remain in the trustees until the sale of the land, or until the court of equity, upon the application of the *cestui que trust*, or some person having the right to call the trustees to an account, shall remove them. *Duke of Cumberland v. Graves*, 9 Barb. (N. Y.) 595.

The testator bequeathed a certain sum of money to a trustee, in trust for the sole and separate use of a mother during her life, and after her death to her children. The children filed a petition to have the amount paid over to them, and the petition was accompanied by the written consent of the mother. The prayer of the petition was refused. *Walker v. Sharpe*, 68 N. Car. 363.

Under a devise to trustees of the income and dividends of \$8,000, old *United States* stock, by a testator, for the support of his niece, they to receive the dividends and apply them to the support of his niece and the maintenance and education of her children, etc., it was held that the trust did not cease when the niece died and her chil-

dren became of age; but the trustees were to pay to the children the entire dividends, including the annual installments of principal, till the whole should be redeemed by the *United States*. *Bringhurst v. Cuthbert*, 6 Binn. (Pa.) 397.

A conveyance of land to B, the wife of C, for her sole and separate use, and for the use of her children, born and to be born, by the said C, to have and to hold the same for the uses aforesaid, creates a trust estate in B, for her sole and separate use, and for the use of her children, as above described. The trust will continue until all probability of the birth of any more children from B by C has become extinct. *Brady v. Walters*, 55 Ga. 25.

In *Henderson v. Hunter*, 59 Pa. St. 335, land was conveyed to trustees, named in the deed, "and their successors," in trust to build thereon a house of worship, "for the use of members of the Methodist Episcopal church in the *United States* (so long as they use it for that purpose and no longer and then to return back to the original owner), according to the rules and discipline" of the church at their general conference. It was held that the legal estate of the trustee could not survive the use, to protect which it was created. As the trustees were unincorporated, they had no legal succession, and the employment of the word "successors," in the deed, could not continue the estate beyond the use designated. It was also held that the equitable estate was in the members of the church, for so long as they continued to use the property as a place of worship, according to the ways of the Methodist Episcopal church. When they ceased their use, the estate must revert. But the abandonment must be by church authority and according to the rules of discipline then existing; and that a mere temporary or unauthorized suspension of services would not necessarily terminate the use.

It has been held that where the trust fund has been allowed by the beneficiary to remain in the trustee's hands, the fund retains its trust character, and the trustee in charge owes it as a trust debt. *Crisfield v. State*, 55 Md. 192.

When a trustee sells the property held in trust and receives the money for it, though he may have promised the beneficiary to pay it, a court of equity will nevertheless retain jurisdic-

tion to enforce the payment. *Nease v. Capehart*, 8 W. Va. 95.

The deed of A conveyed certain property to a trustee, his heirs, executors and administrators, in trust for the use of A during her life, and after her death, for the use, benefit, and behoof of her children by her present husband, and their heirs forever. It was held that the estate of the trustee continued after the death of the first taker. *Bryan v. Weems*, 29 Ala. 423; 65 Am. Dec. 407.

Partition will not be decreed where it is urged by one *cestui que trust* and resisted by another, where its effect will be to override and put an end to an active trust, created by a will, and thus defeat the testator's intention, so long as the trustees stand ready to execute the trust in good faith. *Story v. Palmer*, 46 N. J. Eq. 1.

In *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351, land had been devised to a trustee in trust for the testator's son, the trustee simply to hold the title, while the beneficiary was to collect the income and use the same. The purpose of the trust was to prevent the son's estate becoming subject to execution for his debts. It was held that, though there was no duty imposed upon the trustee, it was necessary that his nominal ownership continue, in order to effectuate the testator's purpose, and a conveyance of the legal title could not be decreed.

In *Morant v. Gough*, 1 M. & R. 41; 7 B. & C. 206, it was held that, where decedent devised to trustees upon certain trusts, until his son should attain the age of twenty-one, the trust determined upon the son's death during minority.

A naked trust for a married woman, intended only to protect the property from her husband, fails upon his death; and the legal estate thereupon vests in her. *Rea v. Cassel*, 13 Phila. (Pa.) 159.

Until the trusts of a deed are executed, the legal title continues in the trustee, and at law he may recover the property from the *cestui que trust*, unless the deed contains a stipulation that the possession shall remain with the latter. *Gunn v. Barrow*, 17 Ala. 743. Compare *Wilson v. Cheshire*, 1 McCord Eq. (S. Car.) 233.

A trust for a married woman will stand during coverture, but will fail as soon as the husband dies. *Roberts v. Mosely*, 51 Mo. 282; *Baker v. Wall*, 59

Mo. 265; *Siptrot v. Holmes*, 1 Ga. 381; *Freyvogel v. Hughes*, 56 Pa. St. 230; *Megargee v. Naglee*, 64 Pa. St. 216; *Warland v. Colwell*, 10 R. I. 369; *Kuntzman's Estate*, 136 Pa. St. 142; 20 Am. St. Rep. 909.

In *Hastings v. Orde*, 11 Sim. 205, an infant made an ante-nuptial settlement of her estate upon her husband for life, after his death in trust for her for life, and after the survivor's death in trust for the children of the marriage, and in case of no child, then in trust for such persons as she should appoint by will, and ultimately in trust for her next of kin. The marriage having terminated without children, the trust failed for want of motive.

Where, by the terms of a will, the legal estate is vested in the defendant, who is the sole *cestui que trust*, and the trusts being fully discharged, there remains a surplus, such surplus follows the legal title and is not charged with any trust. *Atty. Gen'l v. Minister*, 36 N. Y. 452.

In *Cagwin v. Buerkle*, 55 Ark. 5, land was conveyed to a trustee for a building company, upon condition that the trustee should, upon the time named, erect a station, plat and subdivide the land, and put up suitable buildings thereon. One-half of the proceeds for the sale of the land, except such as the company should put buildings upon, were to go to the grantor, and if the conditions were not performed, the conveyance was to be void. The object of the trust having failed, it was held that the land conveyed by the trustee to the company was to be held in trust for the original grantor; but that the company, having made a *bona fide* effort to perform the trust, was entitled to be reimbursed for the money expended in improvements and taxes, less what it had received from the rents and profits.

A surrender of his estate by the trustee will be presumed, if the purposes of the trust have been satisfied. *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464.

Where an estate in remainder is conveyed in trust and there is a failure in the objects of the trust before the decease of the tenant for life, so that the property never comes into the hands of the trustee, if he then makes no claim to it, the same may be properly given to the beneficiaries. *Gladden v. Blodgett*, 38 N. H. 74.

H. devised lands to E. in trust to

pay rents, etc., to H.'s wife for life, and on her death to convey it to Mrs. G., a married woman, and M. in fee. It was held that on the death of H.'s wife the trust ceased. *Edmunds' Appeal*, 68 Pa. St. 24.

A testator bequeathed one-third of his personal estate to his wife absolutely, and the residue of his real and personal property to a trustee to pay debts, etc., and then to receive and pay over one-third of the net income of the real estate to his wife during her natural life, for her separate use; to pay the residue of the net income of his real and personal estate to his said wife, for the support, education and maintenance of his children until the youngest should arrive at the age of twenty-one years, when there should be a division of the personal estate among them; and he afterwards provided that upon the death of his wife, the trusts and limitations created by the will should cease. It was held, upon the death of the widow during the minority of the children, that the trust had terminated, and that the residue in the hands of the trustee must be paid to their guardian. *Fitzpatrick's Appeal*, 49 Pa. St. 241.

A conveyance to a trustee in trust "for the sole and separate use of M., wife of J. M., and her heirs," was construed as creating in M. an equitable estate in fee with an absolute fee simple on the husband's death. *Chadwick's Appeal* (Pa. 1886), 7 Atl. Rep. 178. See *Carswell v. Lovett*, 80 Ga. 36.

By the provisions of the trust deed, land was conveyed in trust for the benefit of a married woman during the joint life of herself and her husband, and in the event she should survive him, then for her use and that of such children as she might then have living by her said husband, during her life, or so long as she should remain his widow; but on her remarriage or death, to be divided equally among the said children, and the issue of such children as might then be dead. The court held that the duties of the trustees terminated upon the husband's death, and that, thereupon, the legal estate vested absolutely in the wife and the children then living, and their deed operated to defeat the contingent remainders to the issue of a daughter, who afterwards died during the lifetime of the mother. *Snelling v. Lamar*, 32 S. Car. 72.

A testator bequeathed to his son M.

the income of certain stocks during life, "the principal of said stocks to be held by my executor during his life, and at his decease I give the same to his child or children who shall survive him; provided that, if my son shall leave his wife surviving him, then his said wife shall be entitled to her support out of the same so long as she remains his widow." M. survived the testator and left a widow and an infant child. It was held that the trust terminated at M.'s death. *Hyde v. Watson*, 131 Mass. 450.

The established doctrine with regard to trustees is that they take exactly that estate, or quantity of interest, which is required by the purposes of the trust, without regard to the terms of the will; therefore, where certain real estate was conveyed to trustees, "their heirs and assigns forever," in trust for the use of a married woman during her life, and "at her death to the use of the heirs of her body, the obvious intention of the trust being merely to protect the property from the marital rights of the husband, it was held that the legal estate of the trustee came to an end on the death of the beneficiary, and the absolute estate then passed to her heirs under the limitations in the will. *Ellis v. Fisher*, 3 Sneed (Tenn.) 231; 65 Am. Dec. 52.

In *Dodson v. Ball*, 60 Pa. St. 493; 100 Am. Dec. 586, the settlor, an unmarried woman, conveyed her estate to B in trust to allow her to occupy it, etc., and receive the rents, etc., without any let or hindrance from any husband she might have, to be conveyed on her death to the persons to whom she should will it, and in default of appointment, to the persons who would inherit if she had died, seised in fee simple; with power to the trustee to charge the investments to be held on the same trusts, the trusts not to be changed without the consent of B; any vacancy in the trust to be filled by the settlor by writing under seal. Afterward she married and her husband died, leaving her surviving. It was held that upon the husband's death the trust was at an end, and she was entitled to a conveyance of the legal estate in the trust property.

A will executed in 1849, devised lands in trust for emancipated slaves, and provided expressly that said lands should never be sold, unless it be unlawful for free persons of color to remain in the state. It was held that

under the existing laws, giving the rights of citizenship to negroes, the necessity for the trust had ceased, and it was proper to order a sale, where all the parties interested were before the court, and it appeared that a sale would be beneficial. *Browning v. Ficklin* (Ky. 1889), 12 S. W. Rep. 714.

X conveyed certain slaves by deed to his son and Z, in trust, to apply the profits to the support and education of the son's daughter, and such other children as he might have, and on the decease of the son the slaves to be equally divided between such of the son's children as might then be living. It was held that the legal estate of B came to an end on the death of the son, and passed absolutely to the children discharged of the trust. *Ferguson v. Stephens*, 5 Mo. 211.

Lands were conveyed to X, his heirs and assigns, in trust for Z during her life, and after her death, in trust for her children. It was held, after the death of X, that the whole estate was vested absolutely in her children, and they had the right of possession. *Bacon v. Taylor, Kirby* (Conn.) 368.

Under the *Pennsylvania* rule, a trust for coverture falls if there is no marriage in fact or in contemplation. *Kuntzleman's Estate*, 136 Pa. St. 142; 20 Am. St. Rep. 909.

And an express trust for the use of a *feme covert*, even where the trust imposes active duties, cannot be created unless the woman is already married, or unless made in actual contemplation of marriage. *Lancaster v. Dolan*, 1 Rawle (Pa.) 231; 18 Am. Dec. 625; *Smith v. Starr*, 3 Whart. (Pa.) 63; 31 Am. Dec. 498; *Hammersley v. Smith*, 4 Whart. (Pa.) 129; *McBride v. Smyth*, 54 Pa. St. 250; *Yarnall's Appeal*, 70 Pa. St. 339; *Ogden's Appeal*, 70 Pa. St. 501; *Wells v. McCall*, 64 Pa. St. 207; *Springer v. Arundel*, 64 Pa. St. 218; *Cridland's Estate*, 7 Phila. (Pa.) 58; *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399.

It was ordered by a testator in his will that the proceeds of his estate should be equally divided among his children and their heirs and assigns, and there was given to a trustee, for the use of the married daughter and her children, a house, etc., which property was to be put unto her for the same sum as it cost the testator, and the balance of her legacy was to be put on interest payable to her every year during her life, and after her death,

her legacy was to go to her children; but should she survive her husband, her trustee was directed to overturn and assign all and everything coming to her as legacy to her and her heirs and assigns forever. It was held that the trust was simply to protect her property against her husband, and terminated on the daughter's divorce from him. *Koenig's Appeal*, 57 Pa. St. 352.

A parent, whose daughter had a dissipated husband, devised property in trust for the daughter for life, the remainder to her children, with the provision that if she became a widow, the trust should end and the property be turned over to her absolutely. It was held to become a widow will be construed to mean husbandless, in view of the testator's probable intent, and the daughter having procured a divorce, she is entitled to have the trust ended. *Rittenhouse v. Hicks*, 23 Wkly. L. Bull. (Ohio Com. Pl.) 269.

A reconveyance to a beneficiary is to be decreed after determination of her coverture, when it appears that the evident intention of the settlement was to protect her from her husband. *Fox v. Scott*, 2 Phila. (Pa.) 151.

A testator, after giving the residue of his estate to his trustee, in trust to hold, invest, and manage the same, and a sum of money to his only son and heir, to be paid to him at the age of twenty-one years, provided by his will that "all such parts of the income of my estate, which may be necessary for the support and education of my son, I order to be used for that purpose, and when he shall be twenty-one years old I direct that \$4,000 shall be paid to him yearly; when he shall be twenty-six years old, \$5,000 yearly, and \$10,000 a year when he shall be thirty years old." On a bill in equity brought by the son after reaching the age of thirty years, it was held that the trustees held so much of the residue of the estate as was needed to produce the net income upon a simple trust to pay the son the annuity; that he was the absolute equitable owner of the trust fund and the income, both of which he might alienate, and his creditors might reach; and that he was entitled to have the trust terminated. *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320.

A conveyance of real estate to a man for the use, benefit, advantage, and in trust for his wife, and the child she now has, and those she may hereafter have, to be held by him in trust for the said

wife and child during his natural life, and upon his decease, the same to go to them or the survivor or survivors of them, in fee simple, or, should he survive his said wife and children, to him in fee simple, discharged of the trust; but so long as any of the beneficiaries survive, to be held by him as their trustee, free from his debts, liabilities and contracts, gives to him, as trustee, the legal estate for the term of his life and no longer; the alternative remainder in his family and himself being a legal remainder, independent of the trust. *East Rome Town Co. v. Cochran*, 81 Ga. 359.

In *McBrayer v. Cariker*, 64 Ala. 50, real estate was conveyed to a person in trust for his mother and her children, then living and after-born. It was held that whether this conveyance creates in the trustee a naked or actual trust under the *Alabama Code*, his estate terminates upon the mother's death, and the entire estate, legal and equitable, is then united in the children.

Under his deed of trust, the trustee was empowered to convey at any time at the request of the beneficiary. The beneficiary died not having authorized any conveyance, but in her will made her husband residuary devisee. After her death, the trustee conveyed to the husband. This conveyance was held to be void, as the relation of trust ended with her death, but the husband was held to take under the devise. *Bradstreet v. Kinsella*, 76 Mo. 63.

A trust for the joint use of husband and wife, during their joint lives, and for the use of the survivor for life, and then, after the death of the survivor, in trust, to deliver up the property to the issue of the marriage, remains in force until delivery of the property after the death of the survivor. *Bacot v. Heyward*, 5 S. Car. 441.

Where the estate was not merely given in trust for the use and benefit of the wife, but for her separate use, thereby giving title to a separate estate in the wife, it was held that upon the determination of the power by the limitation contained in the trust itself, the trustee could no longer hold the trust property in his hands, and if without transferring it to the beneficiary, or disposing of it for her benefit or use, the court should decree her immediate possession. *Waring v. Waring*, 10 B. Mon. (Ky.) 331.

A testamentary trust to pay certain income to a *cestui*, the *corpus* immedi-

ficiary without the formality of a conveyance, the Statute of Uses conveying the title by an arbitrary presumption of a conveyance,<sup>1</sup>

ately after her death to go to certain remainder-men, terminates with her death, and the trustee then has no active duties to perform to the remainder-men. The trustee having died before the *cestui que trust* died, his successor after her death could not receive the *corpus* of the trust. Stokes' Appeal, 80 Pa. St. 337.

The settlor conveyed to a trustee and his heirs certain property in trust for the use and benefit of the settlor's daughter, giving her unlimited control over the property, and power to sell the same with the consent of the trustee. It was held that on the death of the trustee, the legal title passed to his heirs at law, and a conveyance from them to the daughter passed the legal title. Bloom v. Ray (Ky. 1889), 16 S. W. Rep. 714.

A trust to a man for the sole use of his wife ceases when the husband dies. The wife then becomes *ipso facto* the legal owner, and a judgment against her binds the estate, so that the purchaser of the property at the sheriff's sale under such judgment gets a legal title. Coughlin v. Seago, 53 Ga. 250.

A son conveyed certain property to his mother as security for his debt to her. There was no evidence of any indebtedness outside the recital in the agreement made in connection with this conveyance. The mother kept a strict account of her dealings with the property conveyed, and regularly turned over the net income to her son, and repeatedly spoke of the property as his. The court held that a trust was created, which terminated with the mother's death, and that her devise of it to another in trust for her son was invalid. Hinckley v. Hinckley, 79 Me. 320.

A testator devised his factory property in trust for his three sons, who were to occupy it free of rent so long as they could agree and make it profitable; the property otherwise to be sold, and one-third of the invested proceeds paid to each son upon his attaining the age of fifty years, or if he died earlier, "to his legal heirs." Moreover, upon the written request at any time of either son, the property was to be appraised and conveyed to any two of them wishing to take it at its appraised value; and if no two desired to take it,

it was to be sold as the trustees should consider advantageous. Before either son reached the age of fifty, an appraisal was duly had and a sale made to two of the sons, and the trustees requested instructions as to the disposition of the proceeds. It was held that the trust was not terminated by the sale, but would continue as to the share of each son until he became fifty years of age, or until his previous death, and that the share of any one so dying was to be paid to those entitled thereto. Kendall v. Gleason, 152 Mass. 457.

Where there is a devise in trust for the testator's grandchildren, revoking a previous bequest to their mother, and intended expressly for the protection of the property from the marital rights of their father, an estate coextensive only with the purpose of the trust is vested in the trustee, which expires on the death of the mother. Smith v. Metcalf, 1 Head (Tenn.) 64.

**Reversion to Donor.**—Property granted in trust does not revert to the grantor until the *cestui que trust* or beneficial object of the grant ceases to exist in contemplation of law. Regents v. Board of Education, 4 Mich. 213.

A husband conveyed to a trustee upon the following trust: "In trust, nevertheless, for the use and benefit of said (the grantor's) wife, as a separate estate and property for her support." This deed was held to clearly indicate the settlor's object to be the support and maintenance of the wife during her life; and the fact that the conveyance was to the trustee in fee, makes no difference. The trust terminates when the purpose for which it was created is accomplished, the estate thereupon reverting to the grantor. Pillow v. Wade, 31 Ark. 678.

1. Schaffer v. Lavretta, 57 Ala. 14; Mitchell v. Mitchell, 35 Miss. 108; Matter of Livingston, 34 N. Y. 567; Watkins v. Reynolds, 123 N. Y. 211; Harman v. Kelley, 14 Ohio 502; 45 Am. Dec. 552; Westcott v. Edmunds, 68 Pa. St. 34; Aikin v. Smith, 1 Sneed (Tenn.) 304; Marr v. Gilliam, 1 Coldw. (Tenn.) 488; Bragg v. French, 5 Sneed (Tenn.) 246; Harding v. St. Louis L. Ins. Co., 2 Tenn. Ch. 468. See also French v. Edwards, 21 Wall. (U. S.) 147; Bercy v. Lavretta, 63 Ala. 374; Steevens v. Earles, 25 Mich. 40;

or by a deed formally executed.<sup>1</sup> Where the *cestui que trust* has been a long time in possession of lands which the trustee ought to have conveyed to him, the presumption of a conveyance by the trustee will be indulged in favor of the *cestui que trust*.<sup>2</sup>

For the perfecting of the record title, however, the trustee should, perhaps, be required to execute a conveyance, upon satisfactory proof that the material purposes of the trust have all been accomplished.<sup>3</sup> Indeed, it has been held in a recent *Rhode Island*

*Roberts v. Mosely*, 51 Mo. 282; *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464; *Nicoll v. Walworth*, 4 Den. (N. Y.) 385; *England v. Slade*, 4 T. R. 682; *Hillary v. Wallen*, 12 Ves. 239; *Doe v. Sybourn*, 7 T. R. 2; *Cooke v. Soltan*, 2 Sim. & Stu. 154; *Doe v. Wrighte*, 2 B. & Ald. 710; *Bartlett v. Downes*, 3 B. & C. 616; 10 E. C. L. 201; *Emery v. Grocock*, 6 Madd. 54. But compare *Kay v. Scates*, 37 Pa. St. 40; 78 Am. Dec. 399. Compare also *Taylor v. Taylor*, 9 R. I. 119, where it was held that the *cestui que trust* might compel a conveyance to him of an estate held by the trustee under a naked trust.

Where the legal title has been vested in the trustee for life, and then to be conveyed to another, a conveyance or surrender of the legal estate by the trustee, may, in some cases, be presumed, where there is sufficient reason for the presumption, and where the object and effect of the presumption are to support a just title. *Aiken v. Smith*, 1 Sneed (Tenn.) 304.

The right where the objects of the trust have failed, but the legal title still resides in the trustee, to recover the trust estate from him, belongs only to the beneficiaries, and to those claiming under him. *Gully v. Hull*, 31 Miss. 20.

The mere operation of the law does not execute trusts in personal property, as in cases coming within the statute of uses, the trustee must perform some act, as delivering possession, and, where the beneficiary is an infant, incapable of joining in the act, the trust will remain unexecuted. *Harley v. Platts*, 6 Rich. (S. Car.) 310. But compare *Davis v. Rose*, 39 Miss. 152.

Where it was held that a conveyance in trust for the sole and separate use of a *feme covert* for life, and upon her decease that the trustee shall restore the chattel to the plaintiff, passed a legal estate to the plaintiff immediately upon the decease of the tenant for

life, without any return or delivery of the chattel by the trustee. *Davis v. Rose*, 39 Miss. 152.

A bargainor has a complete seisin in deed, without actual entry or livery of seisin under a conveyance taking effect under the statute of uses. *Green v. Lighter*, 8 Cranch (U. S.) 229.

1. A trust created by deed for the benefit of a *feme covert* and her heirs may be determined, after the decease of her husband, by deeds from her and her children. *Parker v. Converse*, 5 Gray (Mass.) 336.

2. *Kinsman v. Loomis*, 11 Ohio 475; *Harman v. Kelley*, 14 Ohio 502; 45 Am. Dec. 552; *Moore v. Jackson*, 4 Wend. (N. Y.) 58; *Noel v. Brewley*, 3 Sim. 103; *England v. Slade*, 4 T. R. 682.

But mere length of time creates no such presumption unless there is an obligation on the trustee to convey. *Keene v. Deardon*, 8 East 248; *Goodson v. Ellison*, 4 Russ. 583; *Doe v. Langdon*, 12 Q. B. 719; 64 E. C. L. 717.

If with this lapse of time are coupled other circumstances which make it morally certain that the trust has been fulfilled, the court will presume that a conveyance has been made by the trustee to his *cestui que trust*, or to the one entitled to a conveyance. *Hillary v. Wallen*, 12 Ves. 239; *Emery v. Grocock*, 6 Madd. 54. See also *Doe v. Langdon*, 12 Q. B. 719; 64 E. C. L. 717; *Keene v. Deardon*, 8 East 248; *Goodson v. Ellison*, 3 Russ. 583.

According to Hill, "Circumstances must exist from which the conveyance may be reasonably presumed." Hill on Trustees 256.

After the expiration of thirty-two years, a release to a *cestui que trust* will be presumed against the heirs at law of a trustee. *Moore v. Jackson*, 4 Wend. (N. Y.) 58.

3. Where the legal title is vested in the trustee, it has been held in *Illinois* that nothing short of a reconveyance can revest it in the grantor; it does not revest by operation of law upon



case that where the land is held in naked trust for certain beneficiaries, and no duty remains for the trustee to perform but to convey the legal title to them, the title of the *cestuis que trustent* is not such that in the absence of a conveyance by the trustee, the purchaser can be compelled to take it in a suit for specific performance of an agreement to purchase.<sup>1</sup>

Should the trustee by any means also become the equitable owner of the property, a merger of the two estates is at once effected, the legal absorbing the equitable.<sup>2</sup>

"At law," says a standard author, "the trustee is regarded as the real owner of the estate vested in him, whether it be real or personal; and the nature and quality of that estate will, in general, depend upon the limitations contained in the instrument under which he takes."<sup>3</sup>

The legal estate in the trustee is distinct and independent. It is under his control, and is held by him subject to the same duties<sup>4</sup> and liabilities which would devolve upon him if he were the absolute owner in fee simple.<sup>4</sup> He sues and is sued as the legal owner,<sup>5</sup> and his dominion over the estate at law is ordinarily complete, unless he be a merely nominal holder of the title, and charged with no duties or interests whatever.<sup>6</sup>

accomplishment of the purposes of the trust. *Vallette v. Bennett*, 69 Ill. 632; *Kirkland v. Cox*, 94 Ill. 400; *Hardin v. Osborne*, 60 Ill. 93. Compare *Harris v. Cornell*, 80 Ill. 54; *McNab v. Young*, 81 Ill. 11.

A trustee of a married woman after she has become *sui juris*, and holds the entire equitable estate, may properly be required to convey to her the legal estate free from the trust; no other person being interested in the trust property. *Rogers v. Rogers*, 10 R. I. 556.

1. *Read v. Power*, 12 R. I. 16.

2. See MERGER, vol. 15, p. 319; *Bolles v. State Trust Co.*, 27 N. J. Eq. 308.

The trust estate of a sole executor, who is also sole devisee and legatee, is solely for the benefit of the testator's creditors, and when they are paid, the equitable estate is merged into the legal title. *Blood v. Kane*, 130 N. Y. 517.

Where a trustee is also one of the beneficiaries of the trust, he takes a legal estate to the extent of his interest. *Mason v. Mason*, 2 Sandf. Ch. (N. Y.) 432.

When lands are devised to a trustee, for the use and benefit of the testator's son and of his wife and children, if he should marry and have children, and active duties are imposed on the trustee, although the son may take a ben-

eficial interest susceptible of alienation and liable to be subjected to the payment of his debts, the legal and equitable estates are not merged under the statute (Code, § 2185), but the legal estate continues in the trustee commensurate with the nature and exigencies of the trust. *Jones v. Reese*, 65 Ala. 134.

A trust once created attaches to the legal estate, and can be detached from it and extinguished only by the union of the two estates in one person: then the equitable will merge into the legal estate. *Badgett v. Keating*, 31 Ark. 400.

**Purchase of Outstanding Title.**—

Where a grantee accepts a conveyance of lands, the title to which is defective, by a deed in which certain trusts are created, and he afterward acquires an outstanding title, which he takes in his own name, so that the title in him is complete, and continues to hold without renouncing the trust, it will be presumed that the latter purchase was made in aid of the former trust. *McCormick v. Ocean City Assoc.*, 45 N. J. Eq. 561.

3. Hill on Trustees, p. 229.

4. See *infra*, this title, *Powers, Duties, and Liabilities*; *Devin v. Henderson*, 32 Iowa 192.

5. See *infra*, this title, *Powers, Duties, and Liabilities—Scope and Limitations; Procedure*.

6. *Huckabee v. Billingsly*, 16 Ala.

The trustee's estate cannot be affected by any act of the *cestui que trust*, nor can the *cestui* create any lien or charge upon it,<sup>1</sup> unless the trustee be a mere repository of the title, and the entire beneficial interest be in the *cestui que trust*.<sup>2</sup>

The legal estate which the trustee holds, however, cannot be reached upon an execution against the *cestui que trust*.<sup>3</sup>

No act of the trustee in his individual capacity can charge the estate which he holds in trust,<sup>4</sup> nor will his acts done outside the

414; 50 Am. Dec. 183; *Sinking Fund Comrs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204.

1. See *infra*, this title, *Rights and Remedies of the Beneficiary*; *Barnett v. Montgomery*, 79 Ga. 726; *Weaver v. Van Akin*, 77 Mich. 588; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. (N. Y.) 34; *Noyes v. Blakeman*, 6 N. Y. 567.

Where there was a conveyance of land in trust, among other things, to sell the premises, and pay off the mortgage thereon, it was held that no conveyance by the *cestui qui trust* could prevent the trustee from selling, for the purposes and according to the directions of the trust. *Leggett v. Dubois*, 5 Paige (N. Y.) 114; 28 Am. Dec. 413.

A trustee, to whom there has been made a conveyance of land to receive the rents and profits and pay them over to a *feme covert* during her life, has, under the revised statutes, the legal and equitable title, subject only to the execution of the trust; and the *cestui que trust* has no interest in the lands or income which she can in any way pledge or bind. *Noyes v. Blakeman*, 6 N. Y. 567.

In *Beckwith v. McBride*, 70 Ga. 642, it was held that a church lot, which constituted the entire trust estate, could not be held liable for gas fixtures placed in the church by order of the vestry, but without any authority from the trustee, it not appearing to have been received by the parish or by the congregation.

A married woman had induced a party to purchase lands held in trust for her and the heirs of her body, and had taken his notes for the purchase-money, payable to the creditors of her husband. The notes not being paid, her trustee brought suit to enforce the vendor's lien, and it was held that the proceeds arising from the sale of the land could not be applied to the payment of the notes. *Williams v. Baldridge*, 66 Ala. 338.

2. *Johnson v. Connecticut Bank*, 21 Conn. 148; *Jackson v. Bateman*, 2 Wend. (N. Y.) 570; *Jackson v. Walker*, 4 Wend. (N. Y.) 462; *Foot v. Colvin*, 3 Johns. (N. Y.) 216.

3. *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. Car.) 480; *Battle v. Petway*, 5 Ired. (N. Car.) 576; 44 Am. Dec. 59.

As to the right to reach the beneficial estate, see *infra*, this title, *Rights and Remedies of the Beneficiary—Nature of the Beneficiary's Estate*.

4. A judgment taken against a trustee in his individual capacity is no lien upon the trust estate, even though the deed of trust names no beneficiary, if the trust has been acknowledged by the trustee. *Boardman v. Willard*, 73 Iowa 20.

Trust property is not subject to an execution which has been issued on a judgment recovered against the trustee on a note which the trustee executed, as an individual. *Bostick v. Keiser*, 4 J. J. Marsh. (Ky.) 597; 20 Am. Dec. 337; *Manley v. Hunt*, 1 Ohio 257; *Robinson v. Chapline*, 9 Iowa 91; *Hollingsworth v. Trueblood*, 59 Ind. 542; *Cox v. Arnsmann*, 76 Ind. 210.

Property held openly by a man in trust for his wife and children, is not liable for debts contracted by him on his own credit, even for goods bought for their support and maintenance. *Townslay v. Barber*, 27 Vt. 417.

A trustee's bankruptcy does not affect his deed as trustee. *Rankin v. Bancroft*, 114 Ill. 441.

Trust property is not liable for the debt of the trustee, and the rule holds as to property in the hands of an executor, both real and personal, whether coming from the testator or from the collection of debts or other assets belonging to the estate. *Williams v. Fullerton*, 20 Vt. 346.

Money paid in case of loss under an insurance policy procured for the benefit of a beneficiary, by a person, upon real estate held by him in trust for the life of the beneficiary, with remainder to himself, in his capacity as trustee,

scope of the authority vested in him by the deed, will, or other instrument creating the trust, bind the estate.<sup>1</sup>

It has been held that the trustee can create no charge upon the estate, and that the creditor must look to him personally for payment, and cannot resort to the trust property to enforce his demands. And such is, perhaps, the better rule, the reason being that the trustee is protected from loss by his lien for reimbursement.<sup>2</sup> The doctrine is not without exceptions, however, for the

belongs to the beneficiary as against the creditors of the trustee, in the absence of any evidence to show that the sum so paid exceeded the life interest in the property. *Lerow v. Wilmarth*, 9 Allen (Mass.) 382.

Thus, where land was conveyed to one in trust to reconvey to the grantor's wife, the court refused to permit the land to be taken in satisfaction of the trustee's personal debts. *Cox v. Arnsmann*, 76 Ind. 210.

It has even been held that no charge is created upon the trust estate by the execution of individual notes of the trustee and of one of the beneficiaries, even though such notes were for supplies furnished for the benefit of the trust, and though the creditor looked to the trust estate alone for payment. If the suit be founded on the notes, and not directly upon the account in lieu of which the notes were executed, no decree will lie which will bind the trust estate. *Frost v. Shackleford*, 57 Ga. 260.

A testator gave to his wife the use of real estate, for the purpose of educating and rearing his children, and to be divided between her and them when the youngest should become twenty-one. It was held that she held the rents and profits as trustee for the children, and that they were not to be taken on execution against her. *Anderson v. Crist*, 113 Ind. 65.

1. One making with a trustee a contract outside of his powers, which is beneficial to the trust estate, can charge the estate only when the trustee is shown to be insolvent and the estate indebted to him. *Blackshear v. Burke*, 74 Ala. 239.

2. *Hewitt v. Phelps*, 105 U. S. 393, *per* Matthews, J. See also *Bloom v. Wolfe*, 50 Iowa 286; *Mason v. Pomeroy*, 151 Mass. 164; *Mayo v. Moritz*, 151 Mass. 481; *Odd Fellows' Hall Assoc. v. McAllister*, 153 Mass. 292; *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 471.

Where a trustee is authorized by the terms of an instrument creating the trust, to make an expenditure which is necessary for the protection or reparation of the trust estate, and has no trust funds in his hands for the purpose, he may, by express agreement with another, exempt himself from liability, and make the expenditure a charge upon the estate. To create such a lien or charge, however, there must be some agreement to that effect; it is not sufficient that the one doing the work or making the expenditure, did it on the faith and credit of the estate. Where there has been no such agreement, and in consequence, the trustee is chargeable individually for the expenditure, the trustee cannot, by a subsequent promise to pay out of the estate, confer a lien thereon; to transfer the property from the trustee to the estate, there must either be an agreement based upon some new consideration, or an assignment of the lien or claim which the trustee has upon the estate for the expenditure. [*Miller, J., dissenting.*] *New v. Nicoll*, 73 N. Y. 127; 29 Am. Rep. 111; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 694.

As a general rule, the contracts of a guardian, or any kind of trustee, bind himself personally, but do not bind the estate, or subject it to an action. *Hines v. Potts*, 56 Miss. 346.

One who, at the trustee's request, has rendered valuable services to the estate, must look to the trustee for his compensation. He has no recourse against the trust except to subject an equitable demand of the trustee to the payment of the debt. *Wade v. Pope*, 44 Ala. 690. See also *Steele v. Steele*, 64 Ala. 438; 38 Am. Rep. 15; *Blackshear v. Burke*, 74 Ala. 239; *Mosely v. Norman*, 74 Ala. 422.

One holding the legal title to property as testamentary trustee, who contracts debts in the management thereof, is personally liable to a creditor, irrespective of whether he acts as an indi-

trust instrument often confers powers broad enough to give the trustee free control of the property held in trust.<sup>1</sup>

Where the interest of the beneficiary in the income of the trust estate is inalienable, the trustee has no authority to dispose of the trust fund absolutely, even with the assent of the beneficiary.<sup>2</sup> Ordinarily, however, the use of the income may, in this way, be alienated before coming due, unless some restriction has been put thereon.<sup>3</sup>

It has been held, however, that no personal judgment can be rendered against the trustee in a suit against him as trustee for certain named *cestuis que trustent*.<sup>4</sup> Property purchased in the name of the trustee, but held for the use of his *cestui que trust*, is not liable for the personal debts of the trustee, merely because

vidual or in his fiduciary capacity in creating the debt. *Hackman v. Maguire*, 20 Mo. App. 286.

The trustees, including executors, administrators, and guardians, assume a personal liability when making purchases in obedience to the duties of the trust, and the seller must look to them, and they to the trust estate for reimbursement. *Sanford v. Howard*, 29 Ala. 684.

One who advances money or renders services to a trust estate, must ordinarily look to the trustee personally for payment; but if the trustee would be entitled to reimbursement from the estate if he should pay, and is insolvent, equity, in order to prevent a failure of justice, will entertain a bill against the estate directly. 53 Miss. 466. And like jurisdiction may be exercised where the trustee cannot be personally sued because of his non-residence. *Norton v. Phelps*, 54 Miss. 467.

Mortgage trustees of a railroad company, as such, have no property within the state subject to sequestration; and the rights of the beneficiaries would not be affected by a sequestration as against the trustees. *Bank of Bellows Falls v. Rutland, etc.*, R. Co., 28 Vt. 470.

1. See *infra*, this title, *Powers, Duties, and Liabilities of Trustees—Contracts of Trustees*. It has been held in *Maryland* that, as a general rule, a trustee is personally liable on an account made by him as trustee; but that where the deed of trust authorizes the trustee to borrow money, and he executes a mortgage in pursuance of such authority, a covenant by him in the mortgage to pay the mortgage debt does not bind him personally. *Glenn v. Allison*, 58 Md. 527.

A trustee is not liable, personally, on

a note made and negotiated, as the taker knew, for the benefit of the estate, and signed "A, trustee for B." *Prin-tup v. Trammel*, 25 Ga. 240.

One who contracts with executors and trustees concerning property, they acting within the limits of their power, may enforce the contract against the trust estate, and under proper circumstances, may maintain a lien thereupon. *Fowler v. Mutual L. Ins. Co.*, 28 Hun (N. Y.) 195.

Where trustees, under a power in the trust deed, and with the assent of the *cestuis que trust*, purchased a manufacturing establishment on behalf of the trust, it was held that the whole trust estate was liable for debts incurred on account of the manufactory. *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9.

In *Kupferman v. McGehee*, 63 Ga. 250, one who held a trustee's note in payment for supplies furnished to the trust estate, had been fraudulently induced to surrender it and take instead the individual note of the trustee, with another note payable to the trustee individually as collateral security. The maker of the collateral note, who was indebted to the trust estate only, paid it and became insolvent. It was held that the original creditor, upon the trustee's insolvency, might proceed against the trust estate to enforce his claim, even though its entire income would be absorbed.

2. *Hone v. Van Schaick*, 7 Paige (N. Y.) 221.

3. *Martin v. Davis*, 82 Ind. 38.

4. *Vason v. Gardner*, 70 Ga. 517.

Where there has been no misconduct on the part of the trustee of a *feme covert*, it is error to make a personal decree against him for the debt of his

held in his name, unless the creditor can show that he considered the property to belong to the trustee, and dealt with him on the faith of it.<sup>1</sup>

The trust property may become subject to a mechanic's lien.<sup>2</sup>

The validity of a mechanic's lien upon trust property, depends upon the power of the trustee to make repairs and improvements. In the absence of authority to build or contract, the trustee can create no lien upon the estate.<sup>3</sup> And it has been held that no lien may be established upon a new and large building erected by the trustee in place of an old one.<sup>4</sup> But one who has furnished material for the improvement of the estate, in ignorance of the trust, has been held to possess an equitable interest in the increased rents arising out of the improvements.<sup>5</sup>

The deed of trust terminates the settlor's absolute ownership in the land conveyed,<sup>6</sup> and subsequent creditors of the settlor cannot pursue the trust property to enforce against it their claims upon the settlor, who has parted with his title in good faith.<sup>7</sup>

beneficiary. *Woodson v. Perkins*, 5 Gratt. (Va.) 345.

1. *Hancock v. Titus*, 39 Miss. 224.

The devise of land to one person for the benefit of others, creates a trust in favor of the latter, and upon an execution against the trustee a levy and sale of the land so held passes no title to the purchaser as against the *cestuis que trust*; if, however, the trustees have acquired any interest in the land by descent from either of the *cestuis que trust*, that interest may be reached by the purchaser at the execution sale. *Booker v. Carille*, 14 Bush (Ky.) 154.

Where a husband, trustee for his wife, takes a deed of land, purchased with the trust property, in his own name, the land will be protected by equity against the judgment creditors of the trustee. *Lathrop v. Gilbert*, 10 N. J. Eq. 344.

See *infra*, this title, *Rights of Third Parties—Notice*.

2. See MECHANICS' LIENS, vol. 15, pp. 1, 11, 64, 167; *Columbia Bldg., etc., Assoc. v. Taylor*, 25 Ill. App. 429; *Cheatham v. Rowland*, 92 N. Car. 340. Compare *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, wherein a trust deed provided that the trustee might sell or improve the land conveyed, "provided there shall be no lien, incumbrance or charge created thereby on said premises." The record of the deed was afterwards destroyed by fire. It was held that the operation of the record as notice was not thereby altered, and that the land could not be charged with a

mechanic's lien by virtue of any contract made by the trustee, and the fact that after the execution of such contract the burnt record was restored by a decree which falsely recited that the trustee had power to incumber, cannot make valid such lien, since the contract could not have been made on the faith of the decree. To same effect, *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289.

3. *Phillips on Mechanics' Liens*, § 80; *Meyers v. Bennett*, 7 Daly (N. Y.) 476.

4. *Herbert v. Herbert*, 57 How. Pr. (N. Y. C. Pl.) 333.

5. See *Malone v. Buice*, 60 Ga. 152.

6. See *infra*, this title, *Termination of the Trust*.

When a deed of trust shows that the grantor conveyed property absolutely to the trustees for certain purposes, and that he is not further interested in the property or in the execution of the trust, a valid transfer may be made of the property by the trustees without the consent of the grantor. *Butler v. Miller*, 15 B. Mon. (Ky.) 617.

7. See *Brown v. Doe*, 10 Smed. & M. (Miss.) 268.

The right of a *cestui que trust*, holding under a deed of trust executed before an execution has been levied against the grantor on the land, cannot, if unaffected by fraud, be affected by the execution. *Major v. Deer*, 4 J. J. Marsh. (Ky.) 585.

Where a husband purchases land with his own money, but directs that the title shall be vested in a third per-

Nor can the settlor subsequently convey any greater title than the equity remaining in him after the execution of the trust deed and such interest as may have vested in him thereafter.<sup>1</sup>

The purpose of the trust having been fully accomplished, there being no other person in interest, the settlor may demand of the trustee a reconveyance to himself, discharged of the trust.<sup>2</sup> No title vests in the trustee upon the failure or termination of the trust.<sup>3</sup>

The same relation exists between the trustee and his beneficiary that exists between landlord and tenant, so far as the title is concerned.<sup>4</sup> The beneficiary may not dispute his trustee's title, after the trust relationship has been once established.<sup>5</sup> Nor will he be permitted to acquire any rights or interests hostile to the continuance of the trust or to the title of the trustee.<sup>6</sup> If the duties imposed require that the trustee have possession of the land intrusted to him, he is entitled to possession; and he takes immediate possession of personal property as a matter of course.<sup>7</sup> The application of these general rules is not limited to trusts in lands.<sup>8</sup>

son in trust for his wife, he has no such estate as can be sold under execution. *Williams v. Council*, 4 Jones (N. Car.) 206.

A contracted for land and stipulated that the title should be vested in B, in trust for A's wife, upon the payment of the purchase-money. A entered and held as tenant for the vendor. It was held that A had no legal right that he could convey or which could be sold on execution, and the only effect that his or the sheriff's deed could have, would be to put the vendee into possession so as to make him capable of receiving the release. *Williams v. Council*, 4 Jones (N. Car.) 206. But the execution of a deed of trust will not affect the rights of any creditors the grantor already has.

A purchase of trust property by the beneficiary at a sale by the trustee, is voidable by the grantor's creditors in a deed of trust. *Chester v. Greer*, 5 Humph. (Tenn.) 26.

J., insolvent and desirous of providing for his wife and two daughters, requested L., a wealthy friend, to take stock in a company then being organized, and hold the same as trustee for J.'s family, assuring L. that the operations of the company would be so profitable that the dividends would soon reimburse him (L.) for the advance. L., as a matter of friendship, took the stock, in his own name, as trustee for J.'s wife and daughters. The value of the stock greatly increased. When J.'s daughters married, L. transferred two-

fifths of the stock to each of them, and when J. died, transferred the remaining fifth to the widow. It was held that these stocks could not be subjected to the payment of J.'s debts. *Waddingham v. Loker*, 44 Mo. 132; 100 Am. Dec. 260.

1. *Brown v. Doc*, 10 Smed. & M. (Miss.) 268. See *infra*, this title, *Termination of the Trust*.

2. *Eaton v. Tillinghast*, 4 R. I. 276.

Where a trustee in a deed, executed for the benefit of his creditors, quitclaims to the grantor all his right, title, and interest in the trust estate, the latter is thereby reinvested with the legal title, and no such title is conveyed to the purchaser, by a subsequent sale under the deed, as will sustain an action of trespass to try titles. *Huckabee v. Billingsly*, 16 Ala. 414; 50 Am. Dec. 183.

3. *Fox v. Horah*, 1 Ired. Eq. (N. Car.) 358; 36 Am. Dec. 48.

4. *Walden v. Bodley*, 14 Pet. (U. S.) 156.

5. A *cestui que trust* who obtained possession in that character, cannot, at law, deny the title of the trustee. *Den v. Albertson*, 3 Dev. (N. Car.) 241; 22 Am. Dec. 719.

6. The beneficiary who permits the land to be sold for taxes, acquires no title under the sale. *Frierson v. Branch*, 30 Ark. 453.

7. See *infra*, this title, *Powers, Duties, and Liabilities of the Trustee—Possession and Safe Keeping*.

8. *Prather v. Weissiger*, 10 Bush

The trust remains in force until the personal property so held is delivered,<sup>1</sup> the act of delivery of itself constituting an execution of the trust.<sup>2</sup>

Executed estates in trust are governed by the rule in Shelley's case, in the same manner as legal estates are.<sup>3</sup> As to equitable estates of this nature, the rules applicable to legal estates control. Equity has no more place for imaginary distinctions and artificial estates than law has.

Covenants which run with the land pass by a trust deed, and the trustee taking the legal title takes it subject to them.<sup>4</sup> The limitations and conditions of the trust follow the property into which the estate is converted by sale and reinvestment. In other words, the trust follows the fund and may not be divested by changing the character of the property.<sup>5</sup>

(Ky.) 117; *Hanson v. Worthington*, 12 Md. 418.

1. *Joor v. Hodges*, 2 Spear (S. Car.) 593.

2. *Schaffer v. Lavretta*, 57 Ala. 14; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Davis v. Ney*, 125 Mass. 590; 28 Am. Dec. 272; *Day v. Roth*, 18 N. Y. 448; *Gilman v. McArdle*, 99 N. Y. 451; 52 Am. Rep. 41; *Stettheimer v. Tone*, 114 N. Y. 501; *Bringham v. Cuthbert*, 6 Binn. (Pa.) 398; *Rife v. Geyer*, 59 Pa. St. 395; 98 Am. Dec. 351; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Delbert's Appeal*, 83 Pa. St. 462.

3. 1 Perry on Trusts, § 359; *Imlay v. Huntington*, 20 Conn. 162; *Siceloff v. Redman*, 26 Ind. 251; *Locke v. Barbour*, 62 Ind. 577; *Berry v. Williamson*, 11 B. Mon. (Ky.) 251; *Wood v. Burnham*, 6 Paige (N. Y.) 518; *Armstrong v. Zane*, 12 Ohio 387; *Dennison v. Goehring*, 7 Pa. St. 177; 47 Am. Dec. 505; *Findlay v. Riddle*, 3 Binn. (Pa.) 152; 5 Am. Dec. 355; *Garner v. Garner*, 1 Desaus. Eq. (S. Car.) 444; *Porter v. Doby*, 2 Rich. Eq. (S. Car.) 49; *Lincoln v. Newcastle*, 12 Ves. 227; *Jervoise v. Northumberland*, 1 Jac. & W. 570; *Deerhurst v. St. Albans*, 5 Madd. 233; *Blackburn v. Stables*, 2 V. & B. 369; *Douglas v. Congreve*, 1 Beav. 59; 4 Bing. N. Cas. 1; *Neves v. Scott*, 9 How. (U. S.) 211. See also *Green v. Green*, 23 Wall. (U. S.) 486. Compare *Nelson v. Davis*, 35 Ind. 474. And see *SHELLEY'S CASE (RULE IN)*, vol. 22, p. 509.

So in *Cooper v. Kynoch*, 41 L. J. Ch. 296; *L. R.*, 7 Ch. 398, land was conveyed to a trustee, his heirs and assigns, for a married woman for life, to her separate use, and from and after the

determination of that estate to stand seised to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of her heirs and assigns. It was held that the legal fee was vested in the trustee, that all subsequent limitations were merely equitable, and that, therefore, under the rule in Shelley's case, the wife took an equitable estate in fee, and could, with the concurrence of the trustee after her husband's death make a good title in fee to the property, and one which the court would compel an unwilling purchaser to accept.

4. *Devin v. Hendershott*, 32 Iowa 192.

5. *Spicer v. Spicer*, 21 Ga. 200; *Hawley v. James*, 5 Paige (N. Y.) 444; *Hawley v. James*, 16 Wend. (N. Y.) 61; *Belmont v. O'Brien*, 12 N. Y. 402; *Nearpass v. Newman*, 106 N. Y. 47; *Creighton v. Pringle*, 3 S. Car. 77.

A trustee cannot divest himself of his fiduciary character by converting the trust fund into money and the money into land. *Pierce v. McKeenan*, 3 W. & S. (Pa.) 280.

When real estate held in trust has been legally and regularly sold under the direction of the court, upon a petition to sell and reinvest the proceeds, the equitable title of the beneficiary is transferred from the land to its proceeds. *Cowman v. Colquhoun*, 60 Md. 127.

As to the right of the *cestui que trust* to follow the property after the trustee has confused it with his own, see *infra*, this title, *Possession and Safe Keeping—Confusion of Funds—Conversion*.

As to the *cestui's* right to follow the

**XV. POWERS, DUTIES, AND LIABILITIES OF THE TRUSTEE—1. Scope and Limitations—***a.* **IN GENERAL.**—The duties and powers of the trustee are, of course, limited and outlined by the instrument creating the trust. He assumes control of the property, subject to all of the conditions and limitations of the trust, and he may not alter nor dispense with any of them, nor impose new ones. If he violates his instructions or exceeds his authority, he does so at his peril.<sup>1</sup>

fund, see *infra*, this title, *Rights and Remedies of the Beneficiary*.

1. Perry on Trusts, § 475; Courcier v. Ritter, 4 Wash. (U. S.) 549; Wormley v. Wormley, 8 Wheat. (U. S.) 421; Beatty v. Clark, 20 Cal. 11; Nicoll v. Ogden, 29 Ill. 323; 81 Am. Dec. 311; Cassell v. Ross, 33 Ill. 245; 85 Am. Dec. 270; Equitable Trust Co. v. Fisher, 106 Ill. 189; Floyd v. Johnson, 2 Litt. (Ky.) 109; 13 Am. Dec. 255; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250; Hunt v. Townshend, 31 Md. 336; 100 Am. Dec. 63; Hammond v. Putnam, 110 Mass. 235; Coffin v. Bramlitt, 42 Miss. 194; 97 Am. Dec. 449; Williams v. Campbell, 46 Miss. 61; Vernon v. Board of Police, 47 Miss. 181; Clark v. Maguire, 16 Mo. 302; Powers v. Kueckhoff, 41 Mo. 425; 97 Am. Dec. 281; Eitelgeorge v. Mutual, etc., Bldg. Assoc., 69 Mo. 55; Crevelling v. Fritts, 34 N. J. Eq. 134; Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394; Bell v. Palmer, 6 Cow. (N. Y.) 128; Evans v. Root, 7 N. Y. 189; 57 Am. Dec. 512; Haack v. Weicken, 118 N. Y. 67; Booth v. Purser, 1 Ired. Eq. (N. Car.) 37; Price v. M. E. Church, 4 Ohio 515; Methodist Church v. Wood, 5 Ohio 283; Coonrod v. Coonrod, 6 Ohio 114; Anewalt's Appeal, 42 Pa. St. 416; Swift's Appeal, 87 Pa. St. 502; Peterson's Appeal, 88 Pa. St. 397; Jones v. Caldwell, 97 Pa. St. 42; Richardson v. Cole, 2 Swan (Tenn.) 100; Carter v. Rolland, 11 Humph. (Tenn.) 333; Bradshaw v. Cruise, 4 Heisk. (Tenn.) 260; Brown v. Lambert, 33 Gratt. (Va.) 256. Compare Clark v. Manning, 4 Ill. App. 649.

The intention of the instrument must guide his conduct and protect him in the performance of his duty. Hester v. Wilkinson, 6 Humph. (Tenn.) 215; 44 Am. Dec. 303; Carter v. Rolland, 11 Humph. (Tenn.) 333.

Where a trustee is appointed, under the statute of *Maryland*, to sell property directed by will to be sold for the payment of debts, etc., his proceedings may be controlled and limited by the

court; but his powers will not be extended beyond the authority given by the will. Deakin's Case, 2 Bland (Md.) 398.

A trustee can only charge the trust fund in the manner authorized by the instrument creating the trust. Heth v. Richmond, etc., R. Co., 4 Gratt. (Va.) 482; 50 Am. Dec. 88.

**Instances.**—Property given in trust to receive the rents and profits during the life of a person, must not be disposed of while the *cestui que trust* is living, and a provision authorizing a sale of the whole estate without providing for the preservation or reinvestment of the proceeds, is in conflict with the statute, and repugnant to all idea of a trust to receive the rents and profits, etc. Heermans v. Roberston, 5 Thomp. & C. (N. Y.) 596; 3 Hun 464.

A *feme covert* empowered, by deed of trust, to dispose of property by deed of gift or will, can dispose of it in no other way; and a disposition of it by bill of sale is void. Marshall v. Stephens, 8 Humph. (Tenn.) 159; 47 Am. Dec. 601.

Where the trust deed minutely prescribes the circumstances under which the trustee may dispose of the trust property, and the manner in which he is to do it, the trustee may not dispose of it in any other manner. Any act in contravention of the authority of the deed of trust will bind the trustee's individual estate, but will not affect the property held in trust. Hunt v. Townshend, 31 Md. 336; 100 Am. Dec. 63.

Where property is given for life with general power of disposition and appointment to be exercised in a particular way, that way must be followed. Marshall v. Stephens, 8 Humph. (Tenn.) 159; 47 Am. Dec. 601.

If the trustee has, by the terms of the trust, authority only to pay the income to his beneficiary as it accrues, and not by way of anticipation, he has no right to sell the trust property to reimburse himself for advances made to the bene-



fiary. *Loring v. Salisbury Mills*, 125 Mass. 138.

It is a breach of trust to apply property conveyed in trust, to support the preaching of a particular religious doctrine, to the support of the preaching of any other doctrine, though the difference between such doctrines is very slight. *Combe v. Brazier*, 2 Desaus. Eq. (S. Car.) 431. See *Feizel v. First German Soc.*, 9 Kan. 593.

In *Busby v. Mitchell*, 23 S. Car. 476, it was held that land originally conveyed in trust for a church or academy for Lutherans could not thereafter be conveyed to a town council, or to persons not Lutherans, for a school.

If the instrument creating the trust authorizes a sale only upon the written consent of the beneficiary, he must obtain this consent before the exercise of the power; and the disposition of one purchasing from the trustee without such consent will not be enjoined in order to decree specific performance of the contract. *Berrien v. Thomas*, 65 Ga. 61.

If a trustee has authority to sell personal property only with the consent of the *cestui que trust*, a married woman, and pledges a portion of the property without such consent, for his own debt, the invalidity of the transaction is not affected by the direction of the *cestui que trust* (not shown to have been acted on by the trustee), to pledge such portion for her benefit, or by the assent of the *cestui que trust* to a sale by the trustee of another portion of the trust property. *Loring v. Salisbury Mills*, 125 Mass. 138.

When the powers of a trustee are defined and limited by the terms of the trust, he can make no other disposition of the trust fund than such as is directed; and hence, if a debt which is intended to be secured by the creation of a trust fund for its payment, be extinguished without the use of the fund, the trustee holds the fund subject to the order of the bargainor in the trust deed, and cannot otherwise divest himself of the title with which he is clothed, than by a surrender to the bargainor, or, in case of his death, to his personal representative. If no administrator has been appointed, the title to the trust fund is in abeyance, and cannot be levied on by virtue of an execution, issued against the bargainor before his death, until the appointment of an administrator. *Richardson v. Cole*, 2 Swan (Tenn.) 100.

A trustee has no authority to pur-

chase lands for, or to bind, the trust estate; and where such purchase has been made, the court ordered the land to be sold, and an estimate to be made of the relative proportion of the sales, which may have arisen from improvements made thereon by the *cestui que trust*, the proceeds of the land to be applied first, to discharge the amount due for the purchase, with interest; the proceeds of the improvements to be applied first, to the extinguishment of the demand of the trustee on the trust estate, and the surplus to any demand against the *cestui que trust* for which he had no claim on the trust estate. *Morton v. Adams*, 1 Strobb. Eq. (S. Car.) 72.

Where a trustee, under a will, applies rents and profits, which should have been paid over to the *cestui que trust*, to the payment of the debts of the testator, the remedy of the beneficiary is against the trustee, and he cannot be substituted to the rights of the creditors whose debts were paid by the trustee, in the final distribution of the estate. *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

Where, under a will, a trustee was named to take charge of, manage, and lease out real estate devised to the testator's daughter until she should come of age, and two others were selected to receive and collect the income, it was held that the first trustee was to collect and pay over to the others the net rents and profits of the estate. *Devecmon v. Shaw*, 70 Md. 219.

Where land is devised to a trustee to be held during the life of a third person, with power to sell, a lease executed by the trustee, with power of renewal at the end of the term, cannot be renewed by the lessee after the death of such third person, as such an agreement in the lease cannot bind the remainder-men. *Bergengren v. Aldrich*, 139 Mass. 259.

A husband, who is trustee of his wife's separate estate, "to manage it for her sole use and benefit," cannot, against her consent, grant a license to cut and haul timber on the land, or submit the claim of a third party to cut timber, to arbitration. *Thomas v. James*, 82 Ala. 723.

A trustee, to whom property is devised in trust to pay so much of the net income to the testator's daughter as she "shall desire for her use," is held to the exercise of good faith and reasonable care in ascertaining that the amounts paid over to the daughter are

Nor may he in any way divert the property which he holds in trust from the use or purpose for which it was conveyed.<sup>1</sup>

If he sells in violation of the terms of the trust, his act is voidable and the sale may be set aside,<sup>2</sup> unless the rights of innocent third parties have intervened.<sup>3</sup>

A substantial execution of the powers conferred will be accepted, unless the mode of its performance is in plain conflict with the settlor's purpose.<sup>4</sup>

Any neglect to pursue the plain duties of the trust, or any variation from such duties, may be justified by proof that it is chargeable to the advice of one authorized to direct the trustee.

for her own use. *Greene v. Smith*, 17 R. I. 28.

Trustees directed "to pay from time to time such other and further sums from said income as may be required to give a good and sufficient education to the child or children of my said daughter," must make payments directly, when necessary, and not to the testator's daughter. *Greene v. Smith*, 17 R. I. 28.

A trustee who sells in violation of the conditions of his power, though with the best intention, must answer for any deficiency of the proceeds below the highest value the property can be shown to have had. *Melick v. Voorhees*, 24 N. J. Eq. 305. And see *Voorhees v. Melick*, 25 N. J. Eq. 523.

A trustee, appointed by the court to sell property and bring the proceeds into court for disposition, who disburses money without competent authority, will be chargeable as if he had the money still in hand. *Green v. Putney*, 1 Md. Ch. 262.

A trustee is liable to be surcharged who expends more money in the erection of a building than is authorized by order of the court; but if the increased expenditure is subsequently approved by the court, he will escape liability. *Patterson's Appeal*, 104 Pa. St. 369.

If the trustee fails to follow the directions given him by the instrument of trust, or disobeys the order of the court, he must answer for all loss resulting therefrom. *Tucker v. State*, 72 Ind. 242; *Gilbert v. Welsch*, 75 Ind. 557.

A guardian or executor lending trust money in violation of the requirements of the statute, does so at his own risk, and must make it good in case of loss. *Wadsworth v. Connell*, 104 Ill. 369.

Trustees to whom property is devised, with directions to receive and hold for a limited period, and then pay

it to persons named in the will, to be held by them during life, cannot require such persons to give bond for the preservation of the property for those in remainder, if no such requirement is in the will. *Waldo v. Cummings*, 45 Ill. 421.

1. *McBride v. Porter*, 17 Iowa 203.

He has no right to take any unusual risks in the care of trust property; he cannot use his trust to accommodate other parties, nor enter into a banking business with the funds thereof. *Loud v. Winchester*, 64 Mich. 23.

One appointed to sell slaves to pay debts, who puts them out as apprentices to learn trades, transcends his authority, and may be made responsible for their hire while apprentices. *Sparkes v. Kearney*, 2 Jones Eq. (N. Car.) 481.

By the terms of a will, a part of the testator's estate was to be placed in the hands of a trustee, to be held for the use of the testator's son, who was to receive the interest yearly, the principal being bequeathed after the death of such son to his heirs. In such a case it was held that the trustee must answer for the part of the principal which he had paid to the testator's son, although such payment was made with the consent of the son, as well as that of the remainder-men *in esse*, such payment being in violation of the terms of the trust, inasmuch as there may be different remainder-men upon the termination of the trust. *Grothe's Appeal*, 135 Pa. St. 585; 26 W. N. C. (Pa.) 265.

2. See *infra*, this title, *Sales by the Trustee*; *Hazeltine v. Fourney*, 120 Ill. 493.

3. See *infra*, this title, *Rights of Third Parties*.

4. Thus, a trust to receive rents and profits, and apply them to the payment of debts, may be satisfied by a sale of the premises for a term of years, taking

Thus, a neglect to sue, or a delay in the collection of a debt, which may have resulted in disaster, if properly chargeable to the parties beneficially interested, must not be imputed to the trustee. If the trustee is acting under instructions, the loss is not his.<sup>1</sup>

His duties, unlike those of an executor or administrator, are personal rather than official; and this is the essential distinction between the two, so that when discretionary powers are conferred upon an executor which cannot be delegated or transferred, he becomes in effect a trustee, and his duties are those of a trustee.<sup>2</sup>

**b. SPECIAL POWERS.**—In simple trusts, the authority of the trustee is very limited. Having no control over the property, and being no more than the nominal holder of the title, he has virtually no powers to exercise in reference thereto, and no duties to discharge. It is with special trusts that the courts have chiefly to deal, and it is to these that the powers and duties considered in this subdivision relate.<sup>3</sup>

The trustee's powers are such as are ordinarily incident to the proper execution of the trust and the care of property.<sup>4</sup> He is not limited to those expressly conferred; any acts done in good faith for the manifest good of the trust will be sustained; thus, he

the whole rent in advance and discharging the debts. *Rogers v. Tilley*, 20 Barb. (N. Y.) 639.

1. Upon the question of imputed negligence in not collecting a note, a trustee may show that before the plaintiff acquired an interest, the others beneficially interested directed him to pursue the course of delay which was attributed as negligence. *Johnson v. Kendall*, 20 N. H. 304.

There is no peremptory obligation imposed upon a trustee to sue upon a bond passed to him in that character the month or year it becomes due, especially when the larger portion of those interested in the trust approve of delay. *Waring v. Darnall*, 10 Gill & J. (Md.) 126.

2. See *infra*, this title, *Discretionary Powers*; *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400.

3. See *supra*, this title, *Kinds of Trusts—Simple and Special*; *Lewin on Trusts*, p. 572; *Perry on Trusts*, § 475; *Lincoln v. Purcell*, 2 Head (Tenn.) 143; 73 Am. Dec. 196.

**Repairs.**—See *infra*, this title, *Protection and Preservation*.

**To Erect Improvements.**—See *infra*, this title, *Accounting*.

**Power to Sell.**—See *infra*, this title, *Sales by the Trustee*.

**To Dedicate to Public Uses.**—Trustees who are legal owners of land in fee, may dedicate the land to public uses

not inconsistent with the trust. *Prudden v. Lindsley*, 29 N. J. Eq. 615.

**To Confess Judgment.**—A trustee cannot incur the trust estate by confession of judgment, as such, even for the purchase-money of the land, although the judgment note was given at the time of sale, and with the agreement that it should be a lien on the land. *Wilhelm v. Folmer*, 6 Pa. St. 206. But see *Dickerson's Appeal*, 7 Pa. St. 255; *Huntt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63.

The general power given to the trustee to sell and reinvest, does not carry with it the power to settle various ejectment suits pending against him, by agreeing to allow judgments to be taken for the plaintiff in some and against him in others. *Lemon v. Jennings*, 52 Ga. 452.

4. The trustees of a fund appointed for the support of a school, and, among other things, for hiring a teacher, may, when there is occasion for dismissing such teacher and retaining a new one to succeed him, agree with the incumbent, for an increased rate of compensation, to retain his office at the will of the trustee, and until such successor shall be appointed. *Hildreth v. Pinkerton Academy*, 29 N. H. 227.

One holding in trust a note and mortgage, may receive and receipt for interest either before or after it is due, and his receipt, although signed only

may compromise claims by or against the trust estate,<sup>1</sup> or submit a controversy to arbitration;<sup>2</sup> and may, in certain cases, borrow

in his own name, without mentioning the trust, will bind the beneficiaries, if the money was in fact received by him as trustee. *Thomassen v. Van Wyngaarden*, 65 Iowa 687.

**Power to Vote Stock.**—A trustee holding stock in an insurance company for the benefit of others, is entitled to vote in the choice of directors. *Matter of Barker*, 6 Wend. (N. Y.) 509. See *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291; *Hoppin v. Tobey*, 9 R. I. 42, and *Wilson v. Central Bridge*, 9 R. I. 590.

**Power to Manage Property.**—A farm and dwelling house were conveyed in trust for the wife of the grantor. Under the general powers necessarily incident to the trust, it was held that the trustee might purchase furniture, stock and farming utensils, and cultivate instead of renting the farm. *Mayfield v. Kilgour*, 31 Md. 241.

A court of chancery will give trustees appointed to sell under a decree, the same power to collect and account for rents due on the property, when sales are effected, as is given trustees to rent the property and receive the profits when it cannot be sold to advantage. *Clark v. Abbott*, 1 Md. Ch. 474.

1. **Power to Compromise.**—A compromise made by the trustee on his own responsibility will be sustained, if made for the best interest of the trust estate. *Mills County v. Burlington*, etc., R. Co., 47 Iowa 66; *Pool v. Dial*, 10 S. Car. 440; *Clarke v. Cordis*, 4 Allen (Mass.) 466; *Mayer v. Foulkrod*, 4 Wash. (U. S.) 349. See also *Blue v. Marshall*, 3 P. Wms. 381; *Ratcliff v. Winch*, 17 Beav. 216; *Forshaw v. Higginson*, 8 De G. M. & G. 827; *Jevon v. Bush*, 1 Vern. 342; *Georges v. Chancie*, 1 Ch. Cas. 125; *Wiles v. Gresham*, 5 De G. M. & G. 770; *In re Alexander*, 13 Ir. Ch. 137.

Where a creditor assigns the debt to trustees, in trust to pay debts due the trustees, and for other purposes, and to pay the surplus to the assignor, the trustee has power to compromise the debt, and execute a release. *Allen v. Randolph*, 4 Johns. Ch. (N. Y.) 693.

An assignee for the payment of debts, discharged a disputed debt, receiving thereon the amount admitted by the debtor to be due. It was held that, in the absence of proof to the con-

trary, the trustee must be presumed to have acted properly in settling the debt. *Meacham v. Sternes*, 9 Paige (N. Y.) 398.

A trustee may compromise a debt due to the trust estate, if he acts in good faith. And the question of good faith is for the jury. *Maynard v. Cleveland*, 76 Ga. 52.

Although, as a general rule, a trustee has no power to compromise a debt, yet, where he does so under such circumstances as would have obtained for it the sanction of the court, had a previous application been made, it will be sustained if afterward questioned. *Bacot v. Heyward*, 5 S. Car. 441.

And in many cases the power has been conferred by statute. See *Clarke v. Cordis*, 4 Allen (Mass.) 466; *Zambaco v. Cassavetti*, L. R., 11 Eq. 439.

"But if he releases or compromises a debt without sufficient reason or justification, or if he sells a debt for a grossly inadequate consideration, when by proper diligence more could have been realized, he will be answerable for it in his accounts." *Perry on Trusts*, § 482; *Jevon v. Bush*, 1 Vern. 342; *Gorges v. Chancie*, 1 Ch. Cas. 125; *Wiles v. Gresham*, 5 De G. M. & G. 770; *In re Alexander*, 13 Ir. Ch. 137.

If the deed confers no authority on the trustee to compromise the debts, he cannot compromise them without the consent of the beneficiaries. *Royall v. McKenzie*, 25 Ala. 363.

2. **To Arbitrate.**—See ARBITRATION, vol. 1, p. 646. It has been held that a trustee has power to submit controversies to arbitration and bind his trust thereby. *Davies v. Ridge*, 3 Esp. 101. See *Hutchins v. Johnson*, 12 Conn. 376; 30 Am. Dec. 622 and note.

But not against the will of the *cestui*. And the *cestui* is not bound. *Yard v. Eland*, 1 Ld. Raym. 369; *Crum v. Moore*, 14 N. J. Eq. 436; 82 Am. Dec. 262.

Nor to the manifest injury of the *cestui que trust*. Thus, where a deed conveyed to trustees for the use of a daughter an undivided half in real and personal estate, the grantor and trustee were not allowed to consent to a partition of it by arbitrators so as to prevent the creditors of the former from selling under execution his undivided

money for the use of the estate,<sup>1</sup> and execute a mortgage on the property.<sup>2</sup>

half of any part of the property. *Thomas v. Davis*, 6 Ala. 113.

An administrator or executor may bind his estate by a submission to arbitration. *Jones v. Deyer*, 16 Ala. 221; *Alling v. Munson*, 2 Conn. 691; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255; *Overly v. Metc.* (Ky.) 117; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Kendall v. Bates*, 35 Me. 357; *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173. See *Yarborough v. Leggett*, 14 Tex. 677. And so may a guardian. *Roberts v. Newbold*, Comb. 318; *Hutchins v. Johnson*, 12 Conn. 376; 30 Am. Dec. 622. And see *Strong v. Beronjon*, 18 Ala. 168; *Weston v. Stuart*, 11 Me. 326; *Goleman v. Turner*, 14 Smed. & M. (Miss.) 118; *McComb v. Turner*, 14 Smed. & M. (Miss.) 119.

1. **Power to Borrow.**—The power to borrow depends altogether upon the necessities of the trust. If the trust is involved in debts, or the estate is depreciated by neglect or waste, it may become necessary, in order to preserve it, that the trustee borrow money for that purpose. See *Perry on Trusts*, § 486; *Tramp's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225. The rule as stated by Perry is that, "If the trustees"—of a trading company or partnership—"incur expenses and debts within the scope of their authority and in the ordinary business of the company, or borrow money to pay for such expenses or debts, the company are in equity liable to pay or contribute to the payment of such debts." *Perry on Trusts*, § 486.

He may borrow money to pay off tax liens upon the estate and execute a mortgage to secure such loan. *U. S. Trust Co. v. Roche*, 116 N. Y. 120.

It is permissible to borrow money to carry out the purposes of the trust. *Burroughs v. Bunnell*, 70 Md. 18.

**When Trustee May Not Borrow.**—By the terms of a trust, the duties of the trustee were limited to the application of moneys coming into his hands from the sale of goods to the payment, first, of the cost of conducting the business, then, to the payment of A and B, who had advanced money to the settlor. It was held that the execution of any notes by the trustee, and particularly the execution of notes on which to bor-

row money to pay the settlor's debts, were acts altogether beyond the authority conferred upon him by the trust. *Storrs v. Flint*, 46 N. Y. Super. Ct. 498.

**Power to Borrow and Execute Notes.**—See *Gandy v. Babbitt*, 56 Ga. 640.

2. **Power to Mortgage.**—The power to mortgage is ordinarily incident to the execution of the trust by a trustee who possesses general authority, and it may be exercised by him unless forbidden by the instrument creating the trust or clearly foreign to the purposes of the trust. *McBrayer v. Cariker*, 64 Ala. 50; *Miller v. Redwine*, 75 Ga. 130; *Pike v. Baldwin*, 68 Iowa 263; *Dibrell v. Carlisle*, 51 Miss. 785; *Hamilton v. Mound City Mut. L. Ins. Co.*, 3 Tenn. Ch. 124. See *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289; *Weeks v. Cornwell*, 104 N. Y. 325; *Rogers v. Rogers*, 111 N. Y. 228.

The power to "sell and dispose of" trust property was held, in *Waterman v. Baldwin*, 68 Iowa 255, to be broad enough to authorize a mortgage.

Power may properly be granted at chambers to a trustee to mortgage the trust estate, on a proceeding instituted for that purpose. (*Overruling Iverson v. Saulsbury*, 68 Ga. 790.) *Weems v. Coker*, 70 Ga. 746.

One who holds lands in trust for a *feme covert* and the heirs of her body, with remainder in fee to her husband, contingent on the husband's survivorship and her death without issue, may mortgage such lands, if the beneficiary and husband join, and by such mortgage bind her life estate and the husband's contingent remainder, although such mortgage cannot affect the interests of the heirs of the *feme covert's* body. *Wood v. Kice*, 103 Mo. 329.

And a trustee for a married woman may mortgage the trust property to secure the unpaid balance of purchase-money, where the deed and mortgage are executed simultaneously and as part of the same transaction. *Mavrich v. Grier*, 3 Nev. 52; 93 Am. Dec. 373.

He may execute a mortgage to pay the debts of the trust. *Gilbert v. Gilbert*, 39 Iowa 657.

If he has authority to repair and improve and to borrow money, he has power to mortgage for that purpose.

Wetmore v. Holzman, 14 Abb. Pr. (N. Y.) 311; 23 How. Pr. (N. Y.) 202.

But a mortgage, by the trustees, of an estate held in trust to receive the rents and profits and pay them over to the *cestui que trust*, is void under the *New York* statute, and no sanction of the court prior to its execution can give it validity. *Cruger v. Jones*, 18 Barb. (N. Y.) 467.

Where a trustee has neglected to pay taxes and water-rates on the trust estate, and the court, on petition, grants leave to borrow sufficient money on mortgage to pay the same, in order to prevent the threatened sale of the property, a loan made by the trustee, secured by his mortgage on the trust properly, is permissible, and not void, under the *New York* Rev. St., p. 730, § 65, which provides that where the trust is expressed in the instrument creating the estate, every conveyance in contravention of the trust is void. *U. S. Trust Co. v. Roche*, 116 N. Y. 120.

Certain realty, on which were old buildings, was devised to the executors in trust for the testator's widow for life, with remainder to her children. The executors were given a discretionary power to sell. The cost of keeping the buildings in repair was very great; it was not advisable to sell, and it was desirable that the old buildings should be replaced by new ones. The remaindermen were infants. Under the circumstances, it was held that the court would permit the estate to be mortgaged to raise money to erect new buildings. *Schulting v. Schulting*, 41 N. J. Eq. 130.

A trustee of real estate, at law, has a right to execute a mortgage of such estate, which mortgage derives its force from his interest, and not from a mere power; but if the mortgage is improperly executed, the trustee will be liable in equity to his *cestuis que trust*; and their equity may, under certain circumstances, follow the legal estate into the hands of the mortgagee, or the purchaser, under proceedings to foreclose it. *Magraw v. Pennock*, 2 Grant Cas. (Pa.) 89.

Where a trustee and the *cestui que trust* mortgage the trust property in breach of the trust, they cannot set up such breach in defense of an action by the mortgagee on the mortgage. *Ryder v. Sisson*, 7 R. I. 341.

**When Trustee May Not Mortgage.**—*Compare Hewitt v. Phelps*, 105 U. S. 393; *Norton v. Phelps*, 54 Miss. 471;

*Clopton v. Gholson*, 53 Miss. 466; *Seborn v. Beckwith*, 30 W. Va. 774.

In the absence of authority, the trustee cannot incur land conveyed to him for the benefit of a married woman. *Seborn v. Beckwith*, 30 W. Va. 774.

The trustee of a naked trust cannot bind the trust estate by mortgage. *Griffin v. Blanchard*, 17 Cal. 70.

A trustee with authority to mortgage an estate, for the purpose of raising money to discharge a debt against it, cannot render the estate liable by executing a mortgage in his individual capacity; and such a mortgage cannot be enforced against the principal or his devisees. *Gilbert v. Gilbert*, 39 Iowa 657.

A trustee cannot mortgage the trust estate for a debt not reduced to a judgment, and the validity of which is denied by the beneficiaries. *Reilly's Estate*, 13 Phila. (Pa.) 201.

The rights of the *cestui que trust* are not affected by the execution of a mortgage on the premises by the holder of the legal title, without his consent. *Harris v. McIntyre*, 118 Ill. 275.

Where property is left in trust to the testator's daughter for life, with remainder to her children, the property cannot be mortgaged by order of the court to raise funds to improve the estate, unless the children are made parties. *Horspool v. Davis*, 6 Bosw. (N. Y.) 581.

In *Taylor v. Clark*, 56 Ga. 309, the court denied the trustee's authority to create a lien upon the property of the trust estate, or the crops to be made thereon, for supplies furnished with which to make such crops.

Under the *New York* Statute of 1886, which empowers the supreme court to authorize a trustee to sell the mortgaged lands, when it appears "that it is for the best interest of said estate so to do, and that it is necessary, and for the benefit of the estate to raise, by mortgage thereon, or by sales thereof, funds for the purpose of preserving or improving such estate;" no authority is thereby conferred to execute a mortgage for the purpose of paying an annuity given by a will by which the lands were devised, even if, under the will, the annuity is a charge on such lands; nor to execute a mortgage to obtain money to pay taxes or assessments, which are not liens on the property when the proceedings are commenced. *Matter of Clarke* (Su-

The power to lease may sometimes be implied.<sup>1</sup> When necessary for the protection and preservation of the trust estate, the trustee may sue in his own name,<sup>2</sup> and may also remove incumbrances from it.<sup>3</sup>

c. DISCRETIONARY POWERS.—The better opinion seems to be that the courts will refuse to control the exercise of discretionary powers by trustees, and that it is only when the confidence of the settlor is violated by a wanton disregard of the rights of the bene-

preme Ct.), 14 N. Y. Supp. 43; *aff'd* without opinion, 128 N. Y. 658. In the same case, a will which bequeathed to the widow certain property in lieu of a dower, also gave her the use of the testator's house and household goods for life, and provided an annuity for her. It was held that no such trust was created as could, under this same statute, authorize the mortgaging or selling of the real estate. *Matter of Clarke* (Supreme Ct.), 14 N. Y. Supp. 43; *aff'd* 128 N. Y. 658.

Where a trustee has the authority to make an expenditure, and has no trust funds, and such expenditure is required to protect the trust estate, he cannot make the expenditure a charge on the trust estate except by express agreement. *Johnson v. Leman*, 30 Ill. App. 370.

As to the power under a will to mortgage the estate, see *Weeks v. Cornwell*, 104 N. Y. 325; *Rogers v. Rogers*, 111 N. Y. 228.

**To Assign Mortgage.**—Where a trustee clothed with full power to manage and control the trust estate, assigns a mortgage impressed with the trust, to a *bona fide* purchaser or pledgee, the assignment cannot be impeached by the *cestui que trust*. *Dillaye v. Commercial Bank*, 51 N. Y. 345.

1. **Power to lease** is an implied power. See *Lewin on Trusts and Trustees*, p. 595; *Perry on Trusts*, § 484; *Naylor v. Arnitt*, 1 Russ. & M. 501; *Fitzpatrick v. Waring*, L. R., 11 Ir. Rep. 35; *Bowes v. East London Water Works Co.*, Jac. 324; *Drohan v. Drohan*, 1 B. & B. 185; *Middleton v. Dodswell*, 13 Ves. 268; *Atty. Gen'l v. Owen*, 10 Ves. 560.

Trustees with power to pay debts, etc., out of an estate, but not to sell, take by implication the power to lease the real estate on terms usual in the locality. *Matter of Odell's Estate*, 1 Conn. (N. Y.) 94. A trustee with power to lease for the best improved rent obtainable, must use reasonable

diligence as well as good faith, and if it is shown that due diligence would have secured a much higher rent at the time the lease was made, the lease will be held void. *Griffen v. Ford*, 1 Bosw. (N. Y.) 123.

A trustee cannot divest the title of the *cestui que trust*, or subject the trust property to the payment of his own debts or those of a third person, by permitting the property to be hired out by another, the donees being infants. *Easley v. Dye*, 14 Ala. 158.

Where the lease by the trustee contained a covenant to renew the lease or pay for certain erections which the lessee was to make, on the refusal of the trustee to renew at the termination of the lease, the trust estate is liable to pay for the erections. *Robinson v. Kettle-tas*, 4 Edw. Ch. (N. Y.) 67.

Where a will empowers a trustee to make a lease for "twenty-one years from the making thereof," he must lease in possession, and if there is a valid outstanding term at the time a new lease is made "for twenty-one years from date," the lessee can enter only at the expiration of the existing term, and the new lease, being the grant of a reversion, is void. *Griffen v. Ford*, 1 Bosw. (N. Y.) 123. In this case it was held that a lease for twenty-one years, with the right of renewal for two similar terms, made under a power to lease for twenty-one years only, was not void, but that equity would sustain it for twenty-one years and cut off the right of renewal.

2. **Power to sue.**—As to the power to sue, see *infra*, this title, *Procedure—Parties*. But compare *Nelson v. Eaton*, 7 Abb. Pr. (N. Y.) 305, where it was held that a trustee holding a chose in action in trust, with power to sell it, had no implied power to sue upon it.

3. **To Remove Incumbrances.**—He may pay off liens on the trust estate. *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Harrison v. Mock*, 10 Ala. 185; *Crutchfield v. Haynes*, 14 Ala. 49.

ficiary, or of the interests of the trust, that they will reject what the trustee has done. Some authorities, however, maintain a contrary view.<sup>1</sup>

In this last case it being said: "If this were not the law, a trustee could not protect the trust property for the benefit of the *cestui que trust*."

1. See POWERS, vol. 18, pp. 987-994. See also article on "Trustees' Discretion" from London Law Times, 17 Chic. L. Jour. 410; Markey v. Langley, 92 U. S. 142; Smith v. Wildman, 37 Conn. 384; Veazie v. Forsaith, 76 Me. 172; Morse v. Morrell, 82 Me. 80; National Exchange Bank v. Sutton, 147 Mass. 131; Ames v. Scudder, 11 Mo. App. 168; Adams Female Academy v. Adams, 65 N. H. 225; Read v. Patterson, 44 N. J. Eq. 211; 6 Am. St. Rep. 877 and note; Banning v. Gunn, 4 Dem. (N. Y.) 337; Naglee's Estate, 52 Pa. St. 154; Blaisdell v. Stevens, 16 Vt. 179; Cochran v. Paris, 11 Gratt. (Va.) 356; Cole v. Wade, 16 Ves. 47; Walker v. Walker, 5 Madd. 424; French v. Davidson, 3 Madd. 396; Breton v. Brereton, 2 Ves. 87 n.; Clarke v. Parker, 19 Ves. 11; Weller v. Ker, L. R., 1 Macq. H. L. Sc. Cas. 11; Tempest v. Camoys, 21 Ch. Div. 571; Gisborne v. Gisborne, L. R., 2 App. Cas. 300; 36 L. T. N. S. 564; Tabor v. Brooks, 10 Ch. Div. 273; *In re Eastwood* v. Clark, 48 L. T. 395; 23 Ch. Div. 134.

In *Nichols v. Rogers*, 139 Mass. 146, an instrument had been executed conferring upon Rogers "the sole, absolute and untrammelled control" of the grantors' respective interests, authorizing him to distribute them as he from time to time might think best, the several sums paid to him to be used as his best judgment might approve, he to employ his best energy, skill and judgment, and obtain for the grantors substantial and positive benefits from his labors in the premises. The property under his charge consisted of a mine located in *Arizona*. Less than six months after Rogers' trustee undertook the management of the trust, suit was brought in equity by one of the parties in interest to terminate the trust. It was held that this proceeding was premature, sufficient time not having elapsed for the proper closing up of the business.

Unless prohibited by statute, a trustee may execute the power as conferred, and in the manner designated in the

deed of trust, without the interposition of the chancellor. *O'Bannon v. Muselman*, 2 Duv. (Ky.) 523.

Where a testator, in giving land and negroes to the separate use of his married daughter, expressed a want of confidence in her husband, and forbade the trustee from letting him have possession of the slaves, but left it optional with him whether he would rent the land or permit the family to occupy it, it was held that the husband and wife had no equity to compel the trustee to give them possession of the property for a home. *Cox v. Williams*, 5 Jones Eq. (N. Car.) 150.

Where testamentary trustees have power to sell and invest the proceeds of the trust estate, and after the payment of debts, etc., to pay the income to the beneficiary for life, and at her death to divide it between the testator's children, the court will not restrain a sale by the trustees, although made before the time fixed for distribution, unless they were proceeding from improper motives. *Champlin v. Champlin*, 3 Edw. Ch. (N. Y.) 571.

Where certain real and personal property was devised to a trustee, to collect the rents and pay them to the testator's daughter until she should be twenty-five years of age, at which time it was to pass to her absolutely, with a proviso that the trustee, in his discretion, might transfer all of such property to her before attaining that age, with a remainder over to the testator's brother in case of her death without issue before the conveyance of the property to her, and the trustee transferred a portion thereof to her before she reached the specified age, it was held to be a lawful exercise of the discretion given him. *Sellew's Appeal*, 36 Conn. 196.

A testator bequeathed property to a trustee to be applied to the benefit of the *cestui que trust* as should, in the judgment of a judge of probate, be found necessary, and it was held that the trustee was accountable in a chancery court for the property received and not in the court of probate; that in the exercise of the "discretion" and "judgment" confided to him, the judge of probate acted personally and officially, and that no appeal lay from his



proceedings and doings. *Downer v. Downer*, 9 Vt. 231.

Where a trustee was authorized by a will to transfer the trust property to the *cestui que trust* absolutely, whenever he should become perfectly satisfied that it would be for his best interest, and by statute the jurisdiction of the supreme court in the case of testamentary trusts was made "subject to any provisions contained in the will," and the court was forbidden to "restrain the exercise of any powers given by the terms of the will," it was held that even if the court had power to overrule the discretion of the trustee and order him to transfer the property to the beneficiary, it should be exercised only upon the fullest and clearest proof. *Martin v. Southgate*, 28 Me. 41.

It is said, however, by Simonton, J., in *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 854: "There can be no doubt that, however large the discretion of trustees may be in the exercise and execution of their trusts, the court never loses its power to review the use of this discretion, and, if need be, to correct any abuse in its exercise," citing *Perry on Trusts*, § 511. See also *Cromie v. Bull*, 81 Ky. 646; *Ireland v. Ireland*, 84 N. Y. 321; *Bacon v. Bacon*, 55 Vt. 243; *Albright v. Albright*, 91 N. Car. 220; *In re Roper's Trusts*, 40 L. T. 97; 11 Ch. Div. 272; *In re Weaver*, 21 Ch. Div. 615; *Allen v. Harris*, 27 Ch. Div. 333.

The court will control the discretion of the trustee to the extent, and only to the extent, of compelling an honest and *bona fide* exercise thereof for the purposes designed in the creation of the trust. *Bacon v. Bacon*, 55 Vt. 243.

In *Tabor v. Brookes*, 10 Ch. Div. 273; 39 L. T. N. S. 528, where the trustees were to apply the income of a fund as they should in their uncontrolled and irresponsible discretion think proper, Vice Chancellor Malins held that, although in his opinion the trustees were not acting judiciously, yet he ought not to interfere as there was no proof of *mala fides*. See also *Camden v. Murray*, 16 Ch. Div. 161; 43 L. T. N. S. 661; *Tempest v. Camoys*, 21 Ch. Div. 571.

Of the nature of this discretion, Mr. Freeman, in his note to *Read v. Patterson*, 44 N. J. Eq. 211; 6 Am. St. Rep. 885, says: "Formerly courts of equity supervised and controlled an exercise of discretionary powers by trustees. At the present time this au-

thority is universally denied. But the discretion of trustees may, without impropriety, be likened to that of judges. It is not an arbitrary discretion. It does not include the unrestrained power to do what the trustee pleases. To extend it that far is to make it a means of destroying the trust which it was intended to aid and maintain. The trustee, instead of doing merely what, in his present circumstances, he chooses to do, in deference to his interests or inclinations, is to do that which his honest, disinterested judgment approves, or ought to approve." And this language is quoted with approval by Simonton, J., in *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 854.

Although a trustee has discretion as to the time and amount of payments to be made to a married woman out of a trust fund for her benefit, yet if he refuses to make any payment, he is guilty of a breach of trust against which a court of equity will relieve. *Collins v. Severson*, 2 Del. Ch. 324.

Where a deed of trust authorized a trustee of land to sell the same when "in his opinion the same could be sold and the proceeds invested in other lands advantageously to those concerned," it was held that this power, though great, was not unlimited; that he was to exercise his judgment, not his will, and could only sell and reinvest the proceeds when both of these acts would, in his opinion, be advantageous to the beneficiary. *Wormeley v. Wormeley*, 1 Brock. (U. S.) 230. A trustee with such power must exercise that opinion fairly and honestly, and if he appears to have been swayed by private interest and selfish ends, and that the price was utterly disproportionate to the real value of the estate, a court of equity will not sanction the act. *Wormely v. Wormely*, 8 Wheat. (U. S.) 421.

If trustees have discretionary power to execute a deed of the trust property, a court of equity may, in a proper case, compel them to execute a conveyance. *Saunders v. Schmaelzle*, 49 Conn. 59.

A testatrix left her property to her husband, in trust to hold and manage for his support during life and for the support and education of their children, with full power and authority to collect and dispose of the rents and profits "in such manner as he might think best" for the purposes of such trust, and to improve the real estate, and invest or reinvest the same at discretion,

It is not permissible to confer upon the trustee such broad powers and unlimited discretion that the purposes of the trust cannot be clearly determined, nor the identity of the *cestui que trust* established. Thus, in one instance, a power reposed in the discretion of the trustees to select the beneficiary was held to be invalid.<sup>1</sup>

**2. Delegation of Powers and Duties.**—Where the trustee's duties are personal and involve the exercise of discretion, they are not to be delegated.<sup>2</sup> It is only ministerial acts which he may intrust to an agent, and over these he must exercise a close supervision.<sup>3</sup>

and it was held that he was not vested with arbitrary power over the income and assets of the estate, but that he could be controlled by a court of equity in his disposition thereof. *McDonald v. McDonald*, 92 Ala. 537. Where the trust is for the common support of a father and his family, and the father grossly fails to discharge his duty in dispensing the income for the purposes for which it was given, although he is made sole judge of the necessities of his family by the instrument creating the trust, the court will assume the distribution of the income so as to secure a just and equitable participation therein by the beneficiaries. *Babbitt v. Babbitt*, 26 N. J. Eq. 44. See also *Oliver v. Oliver*, 3 N. J. Eq. 368; *Jacobus v. Jacobus*, 20 N. J. Eq. 49; *Hamley v. Gilbert*, 1 Jac. 354; *Foley v. Parry*, 5 Sim. 138; *Hadow v. Hadow*, 9 Sim. 438; *Jubber v. Jubber*, 9 Sim. 503; *Wardle v. Claxton*, 9 Sim. 524; *Wetherell v. Wilson*, 1 Keen 80; *Longmore v. Eleum*, 2 Y. & C. C. 363; *Raikes v. Ward*, 1 Hare 445; *Jodrell v. Jodrell*, 14 Beav. 413; *Castle v. Castle*, 1 De G. & J. 352; *Sparhawk v. Sparhawk*, 114 Mass. 356.

1. *Tilden v. Green*, 130 N. Y. 45.

2. See article by Arthur Biddle on "Delegation of Discretionary Powers by a Trustee," 12 Cent. L. Jour. 266, 290; *Lewin on Trusts* (1st Am. ed.) 252; *Perry on Trusts*, §§ 287, 401, 408, 775, 806; *In re Quong Woo*, 13 Fed. Rep. 229. See *Pearson v. Jamison*, 1 McLean (U. S.) 199; *Coquard v. Chariton County*, 14 Fed. Rep. 203; *Saunders v. Webber*, 39 Cal. 290; *Vose v. International Imp. Fund*, 2 Woods (U. S.) 647; *Winthrop v. Atty. Gen'l*, 128 Mass. 258; *Whittlesey v. Hughes*, 39 Mo. 13; *Bales v. Perry*, 51 Mo. 449; *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Howard v. Thornton*, 50 Mo. 291; *St. Louis v. Priest*, 88

Mo. 612; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368; *Niles v. Stevens*, 4 Den. (N. Y.) 399; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89; *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336; *Andrew v. New York Bible, etc., Soc.*, 4 Sandf. (N. Y.) 156; *Wilson v. Towle*, 36 N. H. 129; *McMurtrie v. Pennsylvania L. Ins. Co.*, 9 Phila. (Pa.) 529; *Fuller v. O'Neil*, 69 Tex. 349; 5 Am. St. Rep. 59; *Seely v. Hills*, 49 Wis. 473; *Trutch v. Samprell*, 20 Beav. 116; *Ingle v. Partridge*, 32 Beav. 661; *Chambers v. Minchin*, 7 Ves. 106; *Turner v. Corney*, 5 Beav. 517; *Wilkinson v. Parry*, 4 Russ. 272; *Bayley v. Mansell*, 4 Madd. 226; *Crewe v. Dicken*, 4 Ves. 97. If the trust is one of discretion, a delegation of it will be absolutely void. *Lewin on Trusts* 257; *Perry*, § 408; *Alexander v. Alexander*, 2 Ves. 643; *Bradford v. Belfield*, 2 Sim. 264; *Hitch v. Leworthy*, 2 Hare 200; *Atty. Gen'l v. Scott*, 1 Ves. 413; *Wilson v. Dennison*, Ambl. 82; *Singleton v. Scott*, 11 Iowa 589; *Doe v. Robinson*, 24 Miss. 688.

A trustee cannot give a general authority to an agent to exercise a delegated discretionary power unless given special authority to do so by the instrument creating the trust. *Hawley v. James*, 5 Paige (N. Y.) 318. See also *infra*, this title, *Co-Trustees*.

3. As to the fact that ministerial duties may be delegated, see *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Jones v. Sergeant*, 45 Miss. 332; *Tyler v. Herring*, 67 Miss. 169; 19 Am. St. Rep. 263.

This means that a trustee may employ agents, attorneys, brokers or servants with the same freedom that would be exercised by any ordinarily prudent man under the same circum-

If he acts through agents, or imposes upon anyone else the execution of the trust reposed in him, he does so at his peril,<sup>1</sup> unless

stances; and he is, of course, protected if the necessities of the case require the delegation of purely ministerial duties. Any losses resulting from the conduct of such agents fall upon the estate, unless the trustee can be shown to have been negligent in relation thereto, for the employment of agents or attorneys to perform such duties is not counted a delegation of the trust. See *Barings v. Willing*, 4 Wash. (U. S.) 251; *Connolly v. Belt*, 5 Cranch (C. C.) 405; *Kennedy v. Dunn*, 58 Cal. 339; *Mason v. Wait*, 5 Ill. 132; *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Lewis v. Reed*, 11 Ind. 239; *Telford v. Barney*, 1 Greene (Iowa) 575; *Gibson's Case*, 1 Bland (Md.) 138; 17 Am. Dec. 257; *McCready v. Lansdale*, 58 Miss. 877; *Johns v. Sergeant*, 45 Miss. 332; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Powell v. Tuttle*, 3 N. Y. 396; *Calhoun's Estate*, 6 Watts (Pa.) 185; *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716. *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 401; *Alexander v. Alexander*, 2 Ves. 643; *Crewe v. Dicken*, 4 Ves. 97; *Edmonds v. Peake*, 7 Beav. 239; *Belchier v. Parsons*, Amb. 219; *Bacon v. Bacon*, 5 Ves. 334; *Clough v. Bond*, 3 Myl. & C. 496; *In re Speight*, 22 Ch. Div. 727; *Stroud v. Gwyer*, 6 Jur. N. S. 719. See also *Cairns v. Chaubert*, 9 Paige (N. Y.) 164; *Van Buren v. Chenango County Mut. Ins. Co.*, 12 Barb. (N. Y.) 672; *Wilcox v. Smith*, 26 Barb. (N. Y.) 330.

A trustee in a deed of trust given to secure a debt, may employ a stranger to post the notices and conduct the sale provided for in the deed, provided he afterward ratifies these acts. And in such case it is sufficient, to make the sale valid, that the trustee retains a supervision and control over the person so employed. *Johns v. Sergeant*, 45 Miss. 332.

It has been held that a trustee's agents may sell, if the trustee afterward ratifies their act. *Singleton v. Scott*, 11 Iowa 589; *Tyler v. Herring*, 67 Miss. 169; 19 Am. St. Rep. 263. See *Hawley v. James*, 5 Paige (N. Y.) 487.

But this would seem to be an unsafe doctrine and is not sustained by the current of authority. See *infra*, this

title, *Sales by the Trustee—Power of Sale*.

If the instrument of trust specifies the mode of sale in such detail as to leave no discretion in the trustee, he may act through agents as freely as he might individually. *Pearson v. Jamison*, 1 McLean (U. S.) 197; *Singleton v. Scott*, 11 Iowa 589.

**Power to Appoint and Act Through Agents.**—An agent of a trustee, employed by him in the execution of the trust, and having thereby full knowledge of it, will be affected by the trust to the same extent as the trustee would, and his acts will be considered the acts of the trustee, and affected by the same considerations as if done by the trustee himself. *Oliver v. Piatt*, 3 How. (U. S.) 333.

A trustee may employ whatever assistants are necessary, and pay them out of the trust money. *Parker v. Johnson*, 37 N. J. Eq. 366.

1. *Sinclair v. Jackson*, 8 Cow. (N. Y.) 542; *Niles v. Stevens*, 4 Den. (N. Y.) 399; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368; *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89; *Hawley v. James*, 5 Paige (N. Y.) 487; *Taylor v. Hopkins*, 40 Ill. 442; *Whittlesey v. Hughes*, 39 Mo. 13; *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Howard v. Thornton*, 50 Mo. 291; *Bales v. Perry*, 51 Mo. 449; *Floyd v. Johnson*, 2 Litt. (Ky.) 109; 13 Am. Dec. 255; *Neal v. Patten*, 47 Ga. 73; *Williams v. Mattocks*, 3 Vt. 189; *Adams v. Clifton*, 1 Russ. 297; *Hardwick v. Mynd*, 1 Anstr. 109; *Charitable Corp. v. Sutton*, 2 Atk. 405; *Turner v. Carney*, 5 Beav. 515. Ordinary care will not protect him. *Bosstock v. Floyer*, L. R., 1 Eq. 26; *Comb's Case*, 9 Coke 75; *Ingham v. Ingram*, 2 Atk. 88; *Atty. Gen'l v. Scott*, 1 Ves. 417; *Hawkins v. Kemp*, 3 East 410.

The trustee for the mortgage bondholders of a railroad owes them a personal duty where he has accepted the trust, and is liable for all damages which may ensue, if he permits a majority of the bondholders to institute and carry on foreclosure proceedings without his personal supervision or control. *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 297.

this delegation of authority has received the sanction of the settlor,<sup>1</sup> or unless the duties delegated are purely ministerial, and due care is exercised in the employment of agents. For whatever loss ensues from this improper delegation of the trust, the trustee must answer in person. This rule, which is rigid, extends also to the acts of co-trustees. "For," says Chancellor Kent, "the testator intended that his representatives should have the benefit of the judgment of each of the executors applied to the given case."<sup>2</sup>

**3. The Duty of Diligence—***a.* IN GENERAL.—The same diligence is exacted of a trustee in the performance of his duties which a

It has been held that a sale made by a deputy will be set aside, although no objection to its regularity or fairness be raised. *Sebastian v. Johnson*, 72 Ill. 283; 22 Am. Rep. 144.

In *Hawley v. James*, 5 Paige (N. Y.) 318, the court, by Walworth, Chancellor, said: "A trustee who has only a delegated discretionary power cannot give general authority to another to execute the same, unless he is specially authorized so to do by the deed or will creating such power. A general authority to an agent to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, cannot, therefore, be given by the trustees. . . . The better course, in a case of this kind, therefore, is to intrust the agent with a discretionary power to contract, subject to the ratification of the trustees upon his report of the facts; and that they should themselves execute the conveyance, when the terms of the sale have been complied with, and transmit it, properly acknowledged, to the agent to be delivered to the purchaser." See *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89.

There must be some good reason for the employment of agents to perform the duties imposed upon the trustee. He may not put the property out of his own control nor delegate powers needlessly, or he will be held answerable for losses ensuing. *Pistor v. Dunbar*, 1 Anstr. 107; *Clough v. Bond*, 3 Myl. & C. 406; *Salway v. Salway*, 2 Russ. & M. 218; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Tebbs v. Carpenter*, 1 Madd. 290; *Kilbee v. Sneyd*, 2 Moll. 186; *Green v. Hanberry*, 2 Brock. (U. S.) 403; *Mathews v. Brice*, 6 Beav. 239.

**Instances.**—Where trustees in charge of certain corporate stock sold it and charged another with the investment of the proceeds, and the investor lost it,

the trustees were held responsible. *Rowland v. Witherden*, 3 M. & G. 568; *Hopgood v. Parkin*, L. R., 11 Eq. 74.

**Loss by Defalcation of Agents Employed.**—If he employs others to look after the investment of his trust funds in the ordinary and customary course of business, or from the necessities of the case, and is free from neglect or imprudence, he will not be compelled to make good any loss occurring through embezzlement of the funds by the agent so chosen. *Christy v. McBride*, 2 Ill. 75; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716; *Marshall v. Moore*, 2 T. B. Mon. (Ky.) 69; *In re Speight*, 22 Ch. Div. 727; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Stroud v. Gwyer*, 6 Jur. N. S. 719; *Clough v. Bond*, 3 Myl. & C. 406; *Belchier v. Parsons*, Ambl. 219; *Bacon v. Bacon*, 5 Ves. 334.

But the contrary rule is announced in *In re Litchfield*, 1 Atk. 87.

He must answer in person if he confides the application of the trust fund to his attorney or solicitor. *Chambers v. Minchin*, 7 Ves. 196; *Ex p. Townsend*, 1 Moll. 139; *Griffiths v. Porter*, 25 Beav. 236; *Ghost v. Waller*, 9 Beav. 497; *Bostock v. Floyer*, L. R., 1 Eq. 26; 35 Beav. 603; *Wood v. Weightman*, L. R., 13 Eq. 434; *Ingle v. Partridge*, 32 Beav. 661; 34 Beav. 411.

Or through the agent's failure pending a settlement. *Edmonds v. Peake*, 7 Beav. 239; *Calhoun's Estate*, 6 Watts (Pa.) 185.

1. *Doyle v. Blake*, 2 Sch. & Lef. 239; *Keane v. Roberts*, 4 Madd. 332; *Kilbee v. Sneyd*, 2 Mall. 199.

Delegation is permissible only by the authority or express consent of all the parties interested. *Seely v. Hills*, 49 Wis. 473.

2. *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368. See *Floyd v. Johnson*, 2 Litt. (Ky.) 109; 13 Am. Dec. 255; *infra*, this title, *Co-trustees*.

man of ordinary prudence would exercise in the care of his own property.<sup>1</sup>

1. See INVESTMENT, vol. 11, p. 813; *Barney v. Saunders*, 16 How. (U. S.) 535; *King v. King*, 37 Ga. 205; *Campbell v. Miller*, 38 Ga. 304; 95 Am. Dec. 389; *Christy v. McBride*, 2 Ill. 75; *Mattocks v. Moulton*, 84 Me. 545; *Gould v. Chappell*, 42 Md. 466; *State v. Meagher*, 44 Mo. 356; 100 Am. Dec. 298; *Fudge v. Durn*, 51 Mo. 266; *French v. Currier*, 47 N. H. 99; *Litchfield v. White*, 7 N. Y. 438; 57 Am. Dec. 534; *King v. Talbot*, 40 N. Y. 76; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *Matter of Dean*, 86 N. Y. 399; *Matter of Cornell*, 110 N. Y. 357; *McCabe v. Fowler*, 84 N. Y. 314; *Griffen v. Ford*, 1 Bosw. (N. Y.) 123; *Miller v. Proctor*, 20 Ohio St. 444; *Neff's Appeal*, 57 Pa. St. 91; *Jones' Appeal*, 8 W. & S. (Pa.) 142; 42 Am. Dec. 281; *Fesmire's Estate*, 34 Pa. St. 67; 19 Am. St. Rep. 676; *Fahnestock's Appeal*, 104 Pa. St. 46; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Dec. 716; *Mikel v. Mikel*, 5 Rich. Eq. (S. Car.) 220; *Spaulding v. Wakefield*, 53 Vt. 660; 38 Am. Rep. 708; *Barney v. Parsons*, 54 Vt. 623; 41 Am. Rep. 858; *McCloskey v. Gleason*, 56 Vt. 264; 48 Am. Rep. 770; *Davis v. Harman*, 21 Gratt. (Va.) 194; *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381; *In re Speight*, 22 Ch. Div. 727; *L. R.*, 9 App. Cas. 1; *Westmoreland v. Holland*, 19 W. R. 302; *Belchier v. Parsons*, Ambli. 219; *Massey v. Banner*, 1 Jac. & W. 241.

All that the court requires is common skill, common prudence and common caution. *Neff's Appeal*, 57 Pa. St. 96; *Taylor v. Hite*, 61 Mo. 142.

In *Mattocks v. Moulton*, 84 Me. 545, the court, by Emery, J., said: "It remains to be determined whether, in making the investments complained of in this case, the appellant exercised the sound discretion required of him by the law as above expounded, his good faith and integrity being unquestioned. In doing this, we must be scrupulous not to measure his discretion exercised before the event by our discretion called into action after the event."

In *Barney v. Parsons*, 54 Vt. 623; 41 Am. Rep. 858, the court, by Redfield, J., said: "No arbitrary rule can be made a substitute for strict fidelity, sound discretion, diligence, and care."

In *Taylor v. Hite*, 61 Mo. 142, the court, by Napton, J., said: "A trustee

must use the same care for the safety of the trust fund and for the interest of the *cestui que trust* that he uses for his own interests. He is bound to employ such diligence and such prudence in the care and management of a trust fund as in general prudent men of discretion and intelligence in such matters employ in their own like affairs."

In *Crabb v. Young*, 92 N. Y. 56, the court, by Cruger, C. J., said: "If the defendants"—the trustees—"acted in good faith in making these loans, subsequent events which they could not foresee, and over which they had no control, operating to depreciate the value of these securities, would not render them liable to make good such loss to the estate. Such a rule would require a trustee to forecast the future with infallible accuracy, and in case of failure to do so, make him responsible for the consequences, even though he exercised the greatest caution and prudence in making investments. Under such a rule no prudent man would or could safely undertake the management of a trust estate, and it would be difficult to obtain honest and reliable men to accept what is a very necessary, but is often a thankless and troublesome duty."

Trustees are expected to act on the same principles which govern cautious and prudent men in the transaction of their own affairs. *Higgins v. Whitson*, 20 Barb. (N. Y.) 141; *Litchfield v. White*, 7 N. Y. 438; 57 Am. Dec. 534; *Neff's Appeal*, 57 Pa. St. 91; *Jones' Appeal*, 8 W. & S. (Pa.) 143; 42 Am. Dec. 282; *Burr v. McEwen*, Baldw. (U. S.) 154. They are bound to use and manage the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner. *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381. Good faith and honest intention will not protect one in the execution of a trust, who departs from the rules of prudence which the experience of others has approved. *Bogart v. Van Velson*, 4 Edw. Ch. (N. Y.) 718. But where the trustee acts in good faith in the exercise of a fair discretion, and in the same manner he would ordinarily in regard to his own property, he will not be held to account for any loss accruing in the management of the trust estate. *Finlay v. Merriman*, 39 Tex. 56.

The rule that the bailee, misusing the

article bailed, thereby converting it to his own use, becomes liable for its value, whether any loss results from such misuser or not, has no application to the case of a trustee, who, in the absence of fraud, is only liable for the consequences resulting from culpable negligence. *State v. Foy*, 65 N. Car. 265.

Where one has two demands due to him from the same person, one personally, and the other as trustee, it is his duty upon receiving satisfaction of the first demand, to apply the proceeds to both demands, *pro rata*, as he is bound to take as good care of the trust property as of his own. *Scott v. Ray*, 18 Pick. (Mass.) 360.

"No man who takes upon himself an office of trust or confidence for another, contracts for anything more than a diligent attention to its concerns and a faithful discharge of the duty which it imposes. He is not supposed to have attained infallibility." *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

Acts of trustees, done in good faith, without selfish motives, and especially under the advice of counsel, are to be viewed indulgently by a court of equity. *Ellig v. Naglee*, 9 Cal. 683; *Harrison v. Mock*, 10 Ala. 185; *Perrine v. Vreeland*, 33 N. J. Eq. 102. But where they grossly violate their duty, betray their trust, or have been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict, if not rigorous, justice. *Diffenderfer v. Winder*, 3 Gill & J. (Md.) 311.

Where, by a marriage settlement, the property was to remain in the hands of the husband, with power in the trustees to take it out of his hands, if in their opinion it should become necessary, it is the duty of the trustees, when they find that the husband is wasting and disposing of the property, to resume possession, if it can be done by proper diligence, and they will be responsible for any loss that may ensue from their failure to exercise such diligence. *Freeman v. Cook*, 6 Ired. Eq. 373.

Where the beneficiaries are entitled to the possession of the fund in whatever form it may be, the better to enable them to have the use and benefit of it, and the trustee is invested with the legal title only, he should be bound only to good faith and reasonable diligence, and will be held only for gross

negligence. *Carter v. Rolland*, 11 Humph. (Tenn.) 333.

Where the trustee of property given to secure the payment of debts, is found guilty of gross negligence or fraud in the sale of the property, he will be adjudged liable for the reasonable value of the trust estate with interest. *Smith v. Vertrees*, 2 Bush (Ky.) 63.

Where A, with the knowledge of the trustees to whom his estate had been conveyed to secure the payment of certain creditors, made a lottery, setting up the estate as a prize, and the trustees did not prevent it, but two of them induced a creditor to suppress a publication of his claim and notice forbidding the lottery, the holder of the ticket drawing the estate could not be compelled to surrender it to the trustees, who were responsible for the loss, and the assignees of the trustees could not pass a better title than the trustees had. *White v. Prentiss*, 3 T. B. Mon. (Ky.) 449.

**Depreciated Currency.**—A trustee accepting Confederate currency in connection with the execution of his trust, was held liable only on proof of want of diligence and good faith. *Blount v. Moore*, 54 Ala. 360; *Ferguson v. Lowery*, 54 Ala. 510; 25 Am. Rep. 718; *Sudderth v. McCombs*, 79 N. Car. 398; *Furr v. Brower*, 79 N. Car. 408; *Williams v. Williams*, 79 N. Car. 411; 28 Am. Rep. 330; *Patton v. Farmer*, 87 N. Car. 337; *Campbell v. Miller*, 38 Ga. 304; 95 Am. Dec. 389; *Brown v. Wright*, 39 Ga. 96; *Jepson v. Patrick*, 39 Ga. 569; *Hathorn v. Maynard*, 54 Ga. 688; *Coffin v. Bramlitt*, 42 Miss. 194; 97 Am. Dec. 449; *Morris v. Morris*, 9 Heisk. (Tenn.) 815. And see *Dockery v. French*, 73 N. Car. 420; *State v. Simpson*, 65 N. Car. 497; *Schley v. Brown*, 70 Ga. 64; *Gibbs v. Guignard*, 1 S. Car. 359; *Mayer v. Mordecai*, 1 S. Car. 383; 7 Am. Rep. 26; *Fitzsimons v. Fitzsimons*, 1 S. Car. 400; 7 Am. Rep. 26; *Sanders v. Rogers*, 1 S. Car. 452.

A trustee is not responsible for money collected by him in Confederate money during the civil war, which perished on his hands, without fault on his part, when the war terminated. *Foscoe v. Lyon*, 55 Ala. 440; *Crane v. Moses*, 13 S. Car. 561.

And the same rule was announced in *State v. Engelhard*, 70 N. Car. 377, where a master, acting under an order of the court to collect, invested the funds in Confederate bonds, in good faith.

But he is not an insurer. All that is required of him is that he "exercise such care and diligence in respect to the discharge of the trust as, under all the circumstances, having regard to the magnitude of the trust and the interests involved and the consequences of mistake, would be reasonable."<sup>1</sup>

A trustee received Confederate money during the war in discharge of his legal duty at a time when it was the common currency of the country, and when prudent business men were receiving it. It was held that he was to be protected, but the facts and circumstances under which it was received, must be clearly and satisfactorily shown as evidence of the good faith and fairness of the transaction. *Westbrook v. Davis*, 48 Ga. 471.

One holding in trust a fund alleged by him to have been collected in currency since depreciated, but kept separate from his own funds, may discharge his liability by delivering the same without interest. *Saunders v. Gregory*, 3 Heisk. (Tenn.) 567.

A Tennessee trustee who, in 1863, in good faith collected a trust fund in Tennessee bank notes, was held to be liable for no more than the value of the funds when received. *State v. McAuley*, 4 Heisk. (Tenn.) 424.

A trustee who, in good faith, received Confederate treasury notes in payment of a note held in trust, under the Georgia Act of April 18th, 1863, acted under color of law, and is protected by the act of 1866, and the ordinances of the conventions of 1865 and 1868, and if he invested said treasury notes without proper authority, or lost them by negligence, he will be liable only for their value when received, allowing him a reasonable time to reinvest. *Campbell v. Miller*, 38 Ga. 304; 95 Am. Dec. 389.

A trustee is relieved from liability if he shows that he received Confederate money at a time when it was the common and only currency, and when prudent business men were receiving it, and that it became worthless in his hands. But the burden is on him to make clear and satisfactory proof of the facts and circumstances under which it was received, as evidence of good faith. *Venable v. Cody*, 68 Ga. 171.

But it was held, in *Bell v. King*, 70 N. Car. 330, that an executor who collected good notes belonging to the estate, and invested the proceeds in Confederate bonds, was liable for the loss

ensuing from the investment. See *Coltrane v. Worrell*, 30 Gratt. (Va.) 434.

And so in the case of a trustee for the benefit of creditors, who, under an order of the court made on his own motion, invested the fund in Confederate securities. *Kirkby v. Goodkoontz*, 26 Gratt. (Va.) 298.

Where money had been safely invested and secured on land, and the trustees collected it in largely depreciated Confederate notes and reinvested in Confederate bonds, which became valueless, the trustees were held liable for the depreciation. *Knight v. Watts*, 26 W. Va. 175.

The United States Supreme Court held in *Mitchell v. Moore*, 95 U. S. 587, that a trustee who had invested the trust funds in his own name, and afterward sustained losses through payments made to him in Confederate money could not charge the losses to the estate.

And in *Bedinger v. Wharton*, 27 Gratt. (Va.) 857, it was held that a trustee selling the farm which he held in trust, and accepting depreciated Confederate money therefor, was guilty of a breach of trust in the absence of an evident necessity for the sale, and the sale was set aside. See *Coltrane v. Worrell*, 30 Gratt. (Va.) 434; *Singleton v. Lowndes*, 9 S. Car. 465; *Moore v. Mitchell*, 2 Woods (U. S.) 483.

A trustee is bound to know that the duties of his position require care and fidelity, and he cannot be heard to claim that he did not know, what by the exercise of ordinary diligence, he might have known. What is sufficient to put him on inquiry is notice of what inquiry would have developed. *Fast v. McPherson*, 98 Ill. 406.

1. *Campbell v. Miller*, 38 Ga. 304; 95 Am. Dec. 389. See *Morrow v. Saline County*, 21 Kan. 484; *Bowker v. Pierce*, 130 Mass. 262; *Williams v. Campbell*, 46 Miss. 61; *Rogers v. Tullos*, 51 Miss. 691; *McCabe v. Fowler*, 84 N. Y. 314; *Wilmerding v. McKesson*, 103 N. Y. 339; *Miller v. Proctor*, 20 Ohio St. 442; *Fesmire's Estate*, 134 Pa. St. 67; 19 Am. St. Rep. 676; *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676; *Carter v. Rol-*

land, 11 Humph. (Tenn.) 333; Perkins v. McGavock, 3 Hayw. (Tenn.) 265; Mountcastle v. Mills, 11 Heisk. (Tenn.) 267; Moses v. Ocoee Bank, 1 Lea (Tenn.) 398; State v. McAuley, 4 Heisk. (Tenn.) 424; Rockhold v. Blevins, 6 Baxt. (Tenn.) 115; Robertson v. Sublett, 6 Humph. (Tenn.) 313.

Applied to the selection of fire insurance companies for the insurance of the trust property. Gettins v. Scudder, 71 Ill. 86.

Thus, a trust deed conferring power to select the company in which to insure the trust property, does not relieve the trustee from the exercise of due care, although he will not be deemed to be a guarantor of their solvency. Gettins v. Scudder, 71 Ill. 86.

However fully a discretionary power of management may have been given, yet if the trustee omit to do what would be plainly beneficial, he will be responsible. Robertson v. Sublett, 6 Humph. (Tenn.) 313; Morgan v. Elam, 4 Yerg. (Tenn.) 375; State v. Union Bank, 9 Yerg. (Tenn.) 119.

A creditor bidding in the debtor's farm at a foreclosure sale, who, against the debtor's protest as to price, sells it for a fair price, the debtor not offering to redeem or producing anyone who will give more, is chargeable only with the price received. Childs v. Jones, 41 N. J. Eq. 74.

A trustee with discretionary powers as to investments is not liable for a loss when he has not been guilty of neglect, and has exercised a sound discretion in good faith. Cromie v. Bull, 81 Ky. 646. He is not responsible for wrongs to the trust estate in which he has no agency. Hester v. Wilkinson, 6 Humph. (Tenn.) 215; 44 Am. Rep. 303. And cannot be held liable for losses occurring without his own fault or neglect. Knowlton v. Bradley, 17 N. H. 458; 43 Am. Dec. 609. He will not be responsible for the escape of a slave, part of the subject of the trust, unless negligence is shown. Chaplin v. Givens, Rice Eq. (S. Car.) 132. The trustee will, where the creator of a trust fails to point out the mode for its execution, discharge himself by the exercise of a reasonable diligence and discretion. Hester v. Hester, 1 Dev. Eq. (N. Car.) 328.

The mortgagee, under a deed, conveyed the property at the mortgagor's request, receiving the purchase-money notes therefor, and held that he was not to be charged, upon a subsequent ac-

counting with the mortgagor, with the amount of the notes where the notes proved worthless, he, himself, being without fault. Turman v. Forrester, 55 Ark. 336.

So in Zimmermann v. Fraley, 70 Md. 561, it was held that a trustee was not to be charged with the loss of the amount of a promissory note, which belonged to his beneficiary, and which had been barred by the statute of limitations when it came into the trustee's possession, and which the maker, upon the trustee's demand, refused either to pay or renew.

The sale at full price by a trustee under a will, of a farm, not deriving its value from any quality or incident which can be entirely destroyed or materially impaired by such a contingency as the construction or non-construction of a public improvement, and only liable to be affected in price by events which operate on the agricultural prosperity of the whole country, where one-sixth of the purchase-money is paid before the delivery of possession, and the lien on the land retained as security for the balance, to be paid in six annual installments, with interest on the whole sum, payable annually, cannot be considered such willful negligence as to subject the trustee to responsibility for subsequent loss. Waring v. Darnall, 10 Gill & J. (Md.) 126.

It has been held that the trustee is morally and legally bound to take greater care of trust funds than he takes of his own. He has no right to speculate with trust funds, and every investment in stocks of a railroad, mining, banking, or other private corporation, must be looked upon as an adventure. Nor should railroad bonds, though nominally secured by mortgage on the track and rolling stock, be regarded as real security within any rule adopted or to be adopted. King v. Talbot, 50 Barb. (N. Y.) 453.

And a trustee, who wrongfully, or by mistake, pays money to a third person, in the belief that he is thereby relieving the trust property from an incumbrance, will not thereby escape responsibility, in the matter of his trust, to the beneficiaries under the deed; and the *cestuis que trustent*, in the absence of fraud, are entitled to no relief against the party wrongfully receiving the money. Wasson v. Garrett, 2 Baxt. (Tenn.) 477.

It is the duty of the trustee to keep regular and correct accounts, and if he



He is liable to the estate for any damage which his neglect of duty has caused, whether he has profited by his misconduct or not.<sup>1</sup>

**b. MISTAKE.**—The trustee is not liable for loss resulting from an honest mistake, unless it be such a mistake as no man of ordinary intelligence under like circumstances could make;<sup>2</sup> and if, acting under legal advice, he has made an innocent mistake in a doubtful point of law, he will not be held accountable.<sup>3</sup>

**4. Duty to Execute the Trust**—*a. IN GENERAL.*—If the trustee has once accepted the obligation and entered upon the execution of the trust, he cannot rightfully lay it down, but may be compelled to proceed and carry out the trust, in accordance with the requirements of the instrument creating it.<sup>4</sup>

fails to do so, every presumption of fact is against him and he assumes the burden of repelling all presumptions that he received all he might have received, and what it was his duty to endeavor to obtain. *Landis v. Scott*, 32 Pa. St. 495.

**What is Neglect?—Failure to Sue.**—A trustee is not chargeable with negligence in failing to sue his predecessor for loss resulting from non-payment of taxes, when, at the time he first learned of such non-payment, both the trustee and his surety were insolvent. *Peake v. Jamison*, 82 Mo. 552. But he must answer for failure to sue whenever the collection of debts of the estate is lost by such neglect. *Perry v. Wooton*, 5 Humph. (Tenn.) 524; *Morris v. Morris*, 9 Heisk. (Tenn.) 815.

**Failure to Record.**—A trustee accepting and acting under the trust, is chargeable with any loss resulting from his neglect to record the trust deed. *Cooper v. Day*, 1 Rich. Eq. (S. Car.) 26; *Cogbell v. Boyd*, 77 Va. 450.

**Employment of Incompetent and Ignorant Attorney to Foreclose.**—*Wakeman v. Hazleton*, 3 Barb. Ch. (N. Y.) 148. Or the employment of a dishonest solicitor under circumstances indicating carelessness. *Sutton v. Wilders*, L. R., 12 Eq. 373; 41 L. J. Ch. 30.

**Failure to Pay Costs.**—Pending an action brought by him, a trustee disbursed the funds of the estate, so as to leave nothing in his hands from which to pay a judgment for costs obtained against him. It was held that a judgment might with propriety be rendered against him personally for the amount. *Butler v. Boston*, etc., R. Co., 24 Hun (N. Y.) 99.

**Depositing in a Bank of Known Insolvency.**—If, from his own connection with a bank, he is bound to know of

its insolvency, and nevertheless, puts trust funds on deposit there, he must answer for loss if the bank fails. *Whitehead v. Whitehead*, 85 Va. 870.

**Failure to Take Security.**—A trustee who sells the trust property and fails to take security for the payment of the purchase-money, is liable for any loss resulting. *Hurt v. Fisher*, 1 Har. & G. (Md.) 88.

**Delay in Settling Estate.**—Where an administrator has inexcusably delayed a final settlement, and the funds of the estate are meanwhile lost through the failure of the broker with whom they have been deposited, he is chargeable with the loss. *Wood v. Myrick*, 17 Minn. 408.

A trustee who on demand, wrongfully refuses to deliver the trust property, is liable for a loss afterward resulting to it while in his hands. *Horry v. Glover*, 2 Hill Eq. (S. Car.) 515.

**Failure to Promptly Collect Claims.**—See *Westmoreland v. Holland*, 19 W. R. 302; *Simpson v. Gowdy*, 19 Ind. 292; *Cross v. Petree*, 10 B. Mon. (Ky.) 413; *Neff's Appeal*, 57 Pa. St. 91; *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215; 44 Am. Dec. 303.

1. *Taylor v. Benham*, 5 How. (U. S.) 433.

Damages cannot be recovered from a trust estate for personal injuries sustained through the negligence of the trustee in relation thereto. *Norling v. Allee* (B'klyn City Ct.), 13 N. Y. Supp. 791.

2. *Gilbert v. Sutliff*, 3 Ohio St. 129; *Hext v. Porcher*, 1 Strobb. Eq. (S. Car.) 170.

3. *Vez v. Emery*, 5 Ves. 142. See *Kimball v. Reding*, 31 N. H. 352; 64 Am. Dec. 333; *Miller v. Proctor*, 20 Ohio St. 442.

4. *Sharpe v. San Paulo R. Co.*, L.

If he holds his position by appointment of a court of chancery, he is subject to the orders of the court appointing him, so long as he retains his office.<sup>1</sup>

If he desires to resign and escape further responsibility, and divest himself of the legal estate, he may do so only by virtue of some provision in the instrument of trust, by an order of a court of chancery, or with the consent of all persons interested in the execution of the trust.<sup>2</sup> He must carry out all the requirements of the instrument under which he acts, unless expressly relieved therefrom by the parties in interest.<sup>3</sup>

**b. APPLICATION FOR INSTRUCTIONS FROM THE COURT AS TO THE CONDUCT OF THE TRUST.**—It is always the trustee's privilege to ask and receive of the court having proper jurisdiction, directions as to the policy he shall pursue in the conduct of the trust, and as to the construction to be placed upon the instrument of trust, under which he acts, and it may be added, that in all questions of doubt it is his duty to make this application to the court.<sup>4</sup>

Such a proceeding is not to be instituted prematurely or need-

R., 8 Ch. 597; *Armstrong v. Morrill*, 14 Wall. (U. S.) 138; *Drane v. Gunter*, 19 Ala. 731; *MacGregor v. MacGregor*, 9 Iowa 65; *Jones v. Stockett*, 2 Bland. (Md.) 409; *Shepherd v. McEvers*, 4 Johns. Ch. (N. Y.) 136; 8 Am. Dec. 561; *Wood v. Wood*, 5 Paige (N. Y.) 596; 28 Am. Dec. 451; *Cruger v. Halliday*, 11 Paige (N. Y.) 314; *Robertson v. Bullions*, 9 Barb. (N. Y.) 117; *Reed v. Allerton*, 3 Robt. (N. Y.) 567; *Thatcher v. Candee*, 33 How. Pr. (N. Y. Ct. App.) 149; *Brennan v. Wilson*, 71 N. Y. 506; *Strong v. Willis*, 3 Fla. 124; 52 Am. Dec. 364; *Perkins v. McGavock*, 3 Hayw. (Tenn.) 265.

Even though no provision is made for his compensation. *Switzer v. Skiles*, 8 Ill. 529; 44 Am. Dec. 723.

And though the property is situated outside the state. *Campbell's Case*, 2 Bland (Md.) 209; 20 Am. Dec. 360.

Although personal trusts were confided by a will to two executors in such manner, that one alone should not have exercised them, yet if one attempts to do so, he will render himself liable to be brought to account as a trustee. *Werborn v. Austin*, 77 Ala. 381.

A trustee must faithfully discharge all the duties imposed upon him. *Presley v. Ellis*, 48 Miss. 574.

1. *Latimer v. Hanson*, 1 Bland. (Md.) 51.

2. See *supra*, this title, *Resignation and Removal of Trustee*.

*Walworth, Chancellor*, in *Cruger v.*

*Halliday*, 11 Paige (N. Y.) 314. See *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527; *Atty. Gen'l v. Christ's Hospital*, 3 Bro. C. C. 165; *Henderson v. Sherman*, 47 Mich. 274; *Matter of Bernstein*, 3 Redf. (N. Y.) 20; *Diefendorf v. Spraker*, 10 N. Y. 246.

3. *Wood v. Wood*, 5 Paige (N. Y.) 596; 28 Am. Dec. 451.

4. *Fraser v. Page*, 82 Ky. 73; *Trap-hagen v. Levy*, 45 N. J. Eq. 448; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Winthrop v. Atty. Gen'l*, 128 Mass. 258.

Where he has a reasonable doubt as to the disposition of the funds, he may apply to the court for directions, making the persons interested parties to the proceeding. *Hayden v. Marmaduke*, 19 Mo. 403; *Wheeler v. Perry*, 18 N. H. 307; *Vanness v. Jacobus*, 17 N. J. Eq. 153.

If a will is so ambiguous that a trustee appointed under it is unwilling to take the responsibility of acting, the proper course for him to pursue is to seek the instruction of the court by a suit in equity, and not to render a fictitious account in the probate court for purposes of settling the rights of the parties interested. *Lincoln v. Aldrich*, 141 Mass. 342.

On such a bill the court will pass upon the validity of a trust in the will for the accumulation of rents and profits. *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Hawley v. James*, 5 Paige (N. Y.) 318.

lessly. It is only in emergencies where the direction of the court is actually needed that it will assume jurisdiction over this class of proceedings. Thus, it has been held that while the beneficiary of a trust fund is still alive, the court will not instruct the trustees as to what disposition they shall make of the funds upon the termination of the life interest of such beneficiary,<sup>1</sup> and that trustees cannot maintain a bill for instructions in regard to their administration of the fund before they shall have received such fund.<sup>2</sup>

It has been held, in a recent *Massachusetts* case, that where the settlor (in this case a testator) left the conduct of the trust entirely to the discretion of the trustees, the court would refuse to instruct them in their conduct of the trust, in the absence of any suggestions that they were liable to abuse the trust, or exercise authority in an arbitrary and capricious manner, and the court

The supreme court has jurisdiction of a bill filed by the executors to obtain the direction of the court in the execution of trusts arising under the will, when the same property is claimed under the will by different parties. *Treadwell v. Cordis*, 5 Gray (Mass.) 341.

On a bill filed to define the powers of a trustee, the court will define only the trusts and will not order a sale of the property where no adverse right is asserted. *Wiswell v. First Cong. Church*, 14 Ohio St. 31.

In *Reynolds v. Brandon*, 3 Heisk. (Tenn.) 593, a trustee for infants was permitted to seek the direction of the court in reference to a compromise, which called for the raising of funds not provided for in the trust deed.

Where a dispute arises as to whether a deed of trust has ever become operative, a trustee is justified in seeking instructions from the court of equity as to his rights and duties, as between the settlor and the *cestui que trust*. *Fraser v. Davie*, 11 S. Car. 56.

Wherever there is a *bona fide* doubt as to the true meaning of the instrument creating the trust, and as to the course which the trustee ought to pursue, he may always maintain a suit in equity, at the expense of the trust estate, to obtain a judicial construction of the trust instrument, and directions as to his conduct, and if he faithfully obeys such instructions, he will be relieved of all responsibility therefor. *State v. Netherton*, 26 Mo. App. 414.

The trustee may wait until a bill is brought against him, or may bring a bill asking the direction of the court. *Dimmock v. Bixby*, 20 Pick. (Mass.) 368.

Where a will, under which the trustee is appointed, directs him to make investments upon trusts and limitations of doubtful validity, and ambiguous in their terms as to the rights of the parties, he may appeal for direction to the court of equity. *Heald v. Heald*, 56 Md. 300.

A trustee appointed to sell property, cannot make application of the proceeds without the direction of the court. *Tilly v. Tilly*, 2 Bland (Md.) 436.

Where a dispute has arisen as to whether a trust deed has ever become operative, the trustee may properly apply to the court of equity for instructions as to his duties as between the settlor and the *cestui que trust* under the deed. *Fraser v. Davie*, 11 S. Car. 56.

Chancery will assist and protect trustees in the performance of trusts committed to them, whenever they seek the aid and direction of the court as to the establishment, management, or execution of them. *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Jones v. Stockett*, 2 Bland (Md.) 409.

1. *Bullard v. Chandler*, 149 Mass. 532.  
2. *Bullard v. Atty. Gen'l*, 153 Mass. 249.

A trustee cannot maintain a bill in equity to obtain the instructions of the court, as to what will be his powers and duties in case a corporation, in the stock of which the trust fund is invested, shall carry out a contemplated sale of all their property to a new corporation, taking payment in shares of the new corporation, to be distributed among the old stockholders, and to

adds: "The judgment of this court cannot be substituted for the discretion of the trustee, reasonably and fairly exercised."<sup>1</sup>

The trustee will not be permitted to seek advice of the court upon a mere question of law about which he should have consulted an attorney, or, if necessary, tested the question by an action at law.<sup>2</sup>

**5. Duty to Care for the Trust Property—*a.* POSSESSION AND SAFE KEEPING.**—Upon accepting the trust, it becomes at once incumbent on the trustee, wherever his duties in any sense involve the custody of the estate or responsibility for it, to enter into possession. The moment his responsibility for its safe keeping begins, he should assume control, for he will not be heard thereafter to say in his defense that he has not yet entered into possession.<sup>3</sup>

restrain the corporation from making such sale. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393; 66 Am. Dec. 490.

A proceeding in equity to obtain the direction of the court, will not be entertained if needlessly or prematurely instituted. *Dodge v. Morse*, 129 Mass. 423.

1. *Proctor v. Heyer*, 122 Mass. 525, citing *Amory v. Greene*, 13 Allen (Mass.) 413, and *Walker v. Shore*, 19 Ves. 392.

2. *Greene v. Mumford*, 4 R. I. 313.

3. *Perry on Trusts*, § 438; *Flint on Trusts and Trustees*, § 163; *Lewin on Trusts and Trustees*, p. 674 *et seq.*; *Young v. Miles*, 10 B. Mon. (Ky.) 290; *Mayfield v. Kilgour*, 31 Md. 241; *Speakman v. Tatem*, 48 N. J. Eq. 136; *Mosely v. Marshall*, 22 N. Y. 200; *Matthews v. McPherson*, 65 N. Car. 189; *Hall's Appeal*, 133 Pa. St. 351; *Campbell v. Prestons*, 22 Gratt. (Va.) 396.

Particularly if the beneficiary be a woman. *Wickham v. Berry*, 55 Pa. St. 70.

Where, from the nature of the trust, the ownership of the *cestui que trust* is not immediate and absolute, and it would defeat, or put in his power to defeat or endanger, a legitimate ulterior limitation of the trust, he is not entitled to call for the legal estate. *Battle v. Petway*, 5 Ired. (N. Car.) 576; 44 Am. Dec. 59.

Provided he commits no breach of the peace, a trustee may lawfully take the property of his *cestui que trust* wherever he can find it, and it is immaterial that its form has been changed. *Brush v. Blanchard*, 19 Ill. 31.

He takes possession of personalty at once. If there are notes or choses in

action, it is his duty to give immediate notice of his possession to all parties in interest. *Judson v. Corcoran*, 17 How. (U. S.) 614; *Stewart v. Kirkland*, 19 Ala. 162; *Foster v. Mix*, 20 Conn. 395; *Presley v. Stribling*, 24 Miss. 527; *Murdoch v. Finney*, 21 Mo. 138; *Pace v. Pierce*, 49 Mo. 393; *Matter of Barker*, 6 Wend. (N. Y.) 509; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Northampton Banks v. Balliet*, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297; *Fisher v. Knox*, 13 Pa. St. 622; 53 Am. Dec. 503; *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204; *Barney v. Douglass*, 19 Vt. 98. See also *Parsons v. Boyd*, 20 Ala. 112; *Schley v. Lyon*, 6 Ga. 530; *Thompson v. Ford*, 7 Ired. (N. Car.) 418; *Murphy v. Moore*, 4 Ired. Eq. (N. Car.) 118.

A trustee of chattels is entitled to the possession after sale for the purpose of delivering them to the purchaser, and may bring an action, either of replevin or trover, when the possession is withheld. *Pace v. Pierce*, 49 Mo. 393.

If a fund is placed in trust for the sole and separate use of A, with power of disposition by will or deed to take effect at his death, he cannot recover the fund from the trustee. *Barkley v. Dosser*, 15 Lea (Tenn.) 529.

Where slaves are conveyed by deed of trust to a trustee "or his legal representative," for the sole use and benefit of the grantor's unmarried daughter and her children forever, the legal title of the trustee does not cease at the death of the daughter leaving children, and if the original trustee resigns and another trustee is appointed by the court in his stead, the death of the substituted trustee does not invest the

His ownership of the legal title enables him to maintain the right to possession in any court of law, and he may recover in ejectment even against his *cestui que trust*, for a court of law will not go behind the legal title to inquire into the equities.<sup>1</sup> And unless forbidden by the instrument of trust, it is his duty to bring suit to recover the possession of the property, if possession is denied him.<sup>2</sup>

So it is his duty to retain his control of the trust property. He may not part with it needlessly, nor yield control of it, and for doing so he must answer out of his own estate.<sup>3</sup> He must guard

children with a legal title. *Williams v. McConico*, 36 Ala. 22.

Where slaves are conveyed to trustees for the use of a *feme covert*, the title does not pass to the beneficiary on possession being surrendered, but remains in the trustee, and detainee for the slaves should be in his name. *Martin v. Poague*, 4 B. Mon. (Ky.) 524.

Where a person holds personal property in trust for A, during her life, and after her death for her children, and the property is delivered into A's possession, the trust is not so executed that the trustee cannot maintain an action in his own name against a stranger, for the property. *Wynn v. Lee*, 5 Ga. 217. But compare *Cook v. Kennerly*, 12 Ala. 42, in which it was held that where slaves are conveyed in trust for the use of a person, the beneficiary is entitled to the possession to make the use effectual, unless the deed expressly declares him to be entitled only to the profits, and the trustees are not justified in withholding possession from him by the fact that the deed purports to convey the slaves to them "in their actual possession."

1. *Sedgwick & Wait on Trial of Title to Land*, § 222; *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336; *Kirkland v. Cox*, 94 Ill. 400; *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531; *Essex County v. Durant*, 14 Gray (Mass.) 447; *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204; *Roe v. Reade*, 8 T. R. 118.

A trustee can be only divested of the right of possession of the trust property by a decree of a court of equity, or with his own consent. *Guphill v. Isbell*, 1 Bailey (S. Car.) 230; 19 Am. Dec. 675.

It was held in *Tyler v. Herring*, 67 Miss. 169; 19 Am. St. Rep. 263, that where the trust deed provided that "upon default of payment of the debt secured, the trustee shall immediately take possession, and having given

notice, sell the land conveyed," this language was intended to give the trustee the right of possession, but did not make such taking possession a condition precedent to the power of sale. See also *Vaughn v. Powell*, 65 Miss. 402.

2. See *Huckabee v. Billingsley*, 16 Ala. 414; 50 Am. Dec. 183; *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204.

The trustee may recover in ejectment lands affected by the trust, even as against his beneficiary. *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531. See also *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204; *Cearnes v. Irving*, 31 Vt. 606.

Where it was stipulated in a deed that a slave was to be thereafter conveyed in writing to a trustee, to the separate use of a married woman, and was put into the possession of the trustee for another purpose, but afterward it was formally agreed, by the seller and the trustee, that the latter was thenceforth to be invested with the title to the negro (he not being present, however, at the time), it was held that the trustee was at least the bailee of the former owner, and as such was entitled to recover the possession against one wrongfully withholding him. *Thompson v. Bryan, & Jones* (N. Car.) 340.

Under a deed conveying certain lots to trustees "for the use of the neighborhood in general for an English Protestant school, and for no other use or uses whatsoever," the trustees are the proper parties to preserve the trust; and it was held to be error to award to the city of Philadelphia any portion of the fund, because a portion of the space embraced in "the neighborhood in general" had been afterward incorporated within the city limits. *Stallman's Appeal*, 38 Pa. St. 200.

3. See *supra*, this title, *Delegation of*

the property intrusted to him with the same jealous care which a prudent man bestows upon his own.<sup>1</sup>

(1) *Protection and Preservation*—(a) *In General*.—If the funds of the trust estate are lost by theft, robbery, accident, or default of agents and employes engaged in the performance of purely ministerial duties, the trustee is exonerated if he be able to show that he has exercised the same care which men of prudence ordinarily use in their own business.<sup>2</sup>

If the title to the property in his keeping is assailed, he must

*Powers and Duties*, and *infra*, this title, *Co-trustees*; *Harrison v. Mock*, 10 Ala. 185; *Kinloch v. O'On*, 1 Hill Eq. (S. Car.) 190; 26 Am. Dec. 196; *White v. Baugh*, 2 Russ. & M. 215; 9 Bligh 181; 3 Cl. & F. 44; *Salway v. Salway*, 2 Russ. & M. 218; *Clough v. Bond*, 3 Myl. & C. 496; *Matthews v. Brice*, 6 Beav. 239.

Neither the attorney for trustees charged with a public trust, nor one of the trustees acting as attorney for the others, may consent, in the absence of express authority, to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands. *Vose v. Trustees, etc.*, 2 Woods (U. S.) 647.

A trustee holding an insurance policy as security for a debt, is bound to hold the money received on the policy until the debt is due. *Fergus v. Wilmarth*, 17 Ill. App. 98.

Although the terms of a trust may seem to contain an unqualified direction to the trustee to pay over the money to the *cestui que trust*, yet the trustee is to exercise discretion on that subject, and he is not to place money, or whatever he may furnish, directly in the hands of a beneficiary, who is incapable of using it for himself. *Mason v. Jones*, 2 Barb. (N. Y.) 229.

In *Ingle v. Partridge*, 32 Beav. 661, a trustee who authorized his solicitors to withdraw trust funds from the bank, was held liable for the loss resulting from the solicitors' misapplication of the money. See also *Rowland v. Witherden*, 3 M. & G. 568; *Ghost v. Waller*, 9 Beav. 497.

One to whom, in common with others, a deed is made as a trustee of a religious society, is seised to the use of the society, and has not such an interest in the land as would authorize him to withhold the deed from those from whom he had received it. *Stoker v. Yerby*, 11 Ala. 322. But compare

*McKnight v. McKnight*, 10 Rich. Eq. (S. Car.) 157. In this case, A conveyed negroes to trustees to hold in trust for the use of his wife and children. It was held that the mere fact that the trustees permitted the property to remain in the possession of A, for the benefit and support of his wife and children, whereby it was lost, did not show such a breach of trust as would render the trustees responsible for the loss.

1. See *supra*, this title, *The Duty of Diligence*.

2. See INVESTMENT, vol. 11, p. 813 *et seq.* As to default of agents employed, see *supra*, this title, *Delegation of Powers and Duties*.

**Loss by Theft.**—Thus, Hill says: "Where from necessity or convenience a trustee is justified in keeping any part of the trust property in his possession, and without any negligence on his part it is lost by robbery, he will not be held responsible for the loss, but will be allowed the amount in passing his accounts, and this amount may be proved by the trustee's own affidavit, for it would frequently be difficult to obtain any other proof." Hill on Trustees, p. 573. And this *dictum* is approved in *Seawell v. Greenway*, 22 Tex. 691; 75 Am. Dec. 794. See *Flint on Trusts*, § 339.

Freedom from negligence or fault will exonerate him from blame for loss by theft. *Campbell v. Miller*, 38 Ga. 304; 95 Am. Dec. 389; *State v. Meagher*, 44 Mo. 356; 100 Am. Dec. 298; *Foster v. Davis*, 46 Mo. 268; *Fudge v. Durn*, 51 Mo. 266; *Stevens v. Gage*, 55 N. H. 175; 20 Am. Rep. 191; *Furman v. Coe*, 1 Cal. Cas. (N. Y.) 96; *Litchfield v. White*, 7 N. Y. 438; 57 Am. Dec. 534; *Neff's Appeal*, 57 Pa. St. 91; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 721; *Jones v. Lewis*, 2 Ves. 240; *Morley v. Morley*, 3 Ch. Cas. 2.

In *Jones v. Lewis*, 2 Ves. 240, the

defend it in court and out, as though it were his own. He may expend the trust funds in the employment of counsel for this purpose,<sup>1</sup> as well as for legal advice generally.<sup>2</sup> If this property is levied on, or suit is brought against it, he must be diligent in the assertion of his beneficiaries' rights, and in making all necessary claims of exemption on their behalf.<sup>3</sup> And when the trustee is

trust funds were stolen from the solicitor into whose hands the trustee had put them, and the trustee was released.

The case of *Morley v. Morley*, 3 Ch. Cas. 2, was one where the trustee was held not responsible for a loss of trust funds from robbery by his servant.

The loss in *Stevens v. Gage*, 55 N. H. 175; 20 Am. Rep. 191, occurred from the burglary of an executor's safe, and the trustee was exonerated.

So held in *Carpenter v. Carpenter*, 12 R. I. 544, where bonds belonging to an estate were stolen from the vault of the bank where the trustees had deposited them.

And in *Christy v. McBride*, 2 Ill. 75, the loss occurred through the dishonesty of a collector appointed by the administrator.

In *Wilkinson v. Dodd*, 40 N. J. Eq. 123, it appeared that the managers of a certain savings bank had been directed, by a court of chancery, to invest certain funds on deposit in the bank in government bonds and other specified securities. They made the investments as ordered, and delivered the securities to certain *New York* bankers, who converted them into money, and afterward failed. The receiver of the savings bank obtained from the *New York* bankers a sum of money, in consideration for which he released them from further liability, and then brought suit in equity against the managers of the savings bank for the loss growing out of the difference in value between the money so obtained, and the securities that had been misapplied. It was held that the managers were guilty of a breach of trust, and that the release of the *New York* bankers did not affect the liability of the savings-bank managers, except as to the amount which the *New York* bankers refunded. See also *Dodd v. Wilkinson*, 41 N. J. Eq. 566.

**Loss by Unavoidable Accident.**—If the casualty is such a one as ordinary prudence and caution could not have foreseen, or ordinary diligence prevented, the trustee will be held free from blame for the loss resulting there-

from to his estate. *State v. Meagher*, 44 Mo. 359; 100 Am. Dec. 298; *Mikel v. Mikel*, 5 Rich. Eq. (S. Car.) 220; *Jenkins v. Plombe*, 6 Mod. 181; *Wightwick v. Lord*, 6 H. L. Cas. 234.

**Runaway Slaves.**—In *Mikel v. Mikel*, 5 Rich. Eq. (S. Car.) 220, and *Chaplin v. Givens*, Rice Eq. (S. Car.) 132, the trustee was held to be free from responsibility where he had used due care to prevent their escape.

**Loss by Fire.**—The loss by fire resulting from no fault on the part of the trustee, he will be held blameless. *Croft v. Lyndsey*, 2 Freem. Ch. 1.

**Loss by Forgery.**—It has been held that a trustee is bound to pay to the right person, and that if he is deceived by a forgery he must make good the loss. *Eaves v. Hickson*, 30 Beav. 136.

**By Unforeseen Casualty.**—In *Bosio's Estate*, 2 Ashm. (Pa.) 437, the decedent left an ostrich which died while in the charge of the administrator. The administrator was exonerated, although he suffered four months to elapse without offering the bird for sale, it appearing that the bird could have been sold meanwhile only at a sacrifice, and that the delay was apparently to the advantage of the estate.

1. *Gooding v. Gibbes*, 17 How. (U. S.) 274; *Matter of Autenreith*, 3 Dem. (N. Y.) 200; *Wood v. Burnham*, 6 Paige (N. Y.) 513; *Western R. Co. v. Nolan*, 48 N. Y. 513.

2. *Burr v. McEwen*, Baldw. (U. S.) 154. See *infra*, this title, *Accounting*.

On being informed of proceedings affecting their title to the trust estate, it is the right and the duty of trustees to interpose, and on failure to do so, they are concluded by the determination made in such proceedings, although they may not have been parties to the record. *Burr v. Bigler*, 16 Abb. Pr. (N. Y.) 177.

3. *Parker v. Portis*, 14 Tex. 166.

Where suit has been brought against the trust property, it is the trustee's duty to either defend it or give notice to the *cestui que trust*, and if the *cestui que trust* is a married woman, he

exempt from attachment or garnishee process,<sup>1</sup> he is bound to claim such exemption by way of defense, or failing so to do, suffer judgment to pass against himself personally.<sup>2</sup>

Where it is in his power, by the expenditure of trust funds, to prevent a foreclosure and sale of the lands held in trust, and he allows the sale to be made and the land to be sacrificed, he is guilty of a breach of trust, and will be held accountable for the loss.<sup>3</sup>

(b) **Repairs—Waste.**—The trustee must not suffer the estate to waste or diminish,<sup>4</sup> or fall out of repair, and while he will not be allowed, upon his own responsibility, to erect costly improvements,

must notify her husband also. *Dozier v. Freeman*, 47 Miss. 647.

A trustee who is sued on a title hostile to his *cestui que trust*, must show that he acted in good faith, and that the *cestui que trust* knew of the suit, in order to protect himself by the recovery against him. *Mackey v. Coates*, 70 Pa. St. 351.

1. See GARNISHMENT, vol. 8, p. 1147; *Cockey v. Leister*, 12 Md. 124; 71 Am. Dec. 588; *Bentley v. Shrieve*, 4 Md. Ch. 412; *Farmers' Bank v. Beaton*, 7 Gill & J. (Md.) 421; 28 Am. Dec. 226; *Hinckley v. Williams*, 1 Cush. (Mass.) 490; 48 Am. Dec. 642; *Hoyt v. Swift*, 13 Vt. 129; 37 Am. Dec. 586.

2. These are purely matters of defense, of which the trustee should avail himself by motion, pleadings, or proof, at some stage of the attachment proceeding before the final judgment. *Groome v. Lewis*, 23 Md. 137; 87 Am. Dec. 563.

3. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27; 7 Am. Dec. 475.

4. *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 310.

**Duty to Prevent Waste.**—In general, the trustee must keep the principal intact, and not pay over to his *cestui que trust*, or for his use, any but the income of the fund, until properly authorized so to do. *Cornwise v. Bourgum*, 2 Ga. Dec. 15; *Arthur v. Master in Equity*, 1 Harp. Eq. (S. Car.) 47; *Haigood v. Wells*, 1 Hill Eq. (S. Car.) 59; *Carter v. Rolland*, 11 Humph. (Tenn.) 333.

But if the property in trust is chargeable with the support of the *cestui que trust*, and produces income insufficient therefor, or to pay the taxes and necessary charges, it may be sold by order of the court. *In re Herring*, 35 N. J. Eq. 359.

The trustee should obtain the approval of the court before incurring ex-

penses impairing the principal of the trust fund; but where a court can clearly see that the expenses incurred were necessary, they will be allowed just as if leave had been granted on application before incurring them. *Hatton v. Weems*, 12 Gill & J. (Md.) 83; *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215; 44 Am. Dec. 303.

A trustee will be chargeable with the amount of the capital disposed of by him under an order directing him to pay over the income of the fund, but in no case to diminish the principal. *Arthur v. Master*, Harp. Eq. (S. Car.) 47. The trustee of the legal estate in fee may maintain an action of waste against an equitable tenant for life, and in such suit need not name himself trustee. *Woodman v. Good*, 6 W. & S. (Pa.) 169.

**Anticipation of Income.**—Where property is devised in trust for the support of the children of the testator out of the principal and income, with remainder over at their death, the trustee cannot anticipate the principal or income. In such case, the trustee may expend the money in their support, or pay it over to them to be applied by themselves. *Van Vechten v. Van Veghten*, 8 Paige (N. Y.) 104.

A trustee, though restricted in the expenditure of the income of the trust money, may, in an emergency, be justified in expending more than the profits of the current year, as where there is a drought and consequent failure of crops, or unusual sickness, making it necessary to incur heavy medical bills; yet in such case he must aver and prove the evidence of the emergency, and render a full account. *Downey v. Bullock*, 7 Ired. Eq. (N. Car.) 102.

A trustee justified by the urgency of the case in encroaching upon the principal of the trust, is entitled to



he may, if in the possession of general powers, expend upon repairs whatever is reasonably necessary to the preservation of the trust property.<sup>1</sup> When, however, the nature of the trust does not involve the trustee's custody of the estate, he cannot be held for its waste or destruction. Responsibility cannot be thrust upon him where it was evidently not contemplated in the creation of the trust. A mere repository of the title, having no right of possession, is not subject to the liabilities incident to possession and control.<sup>2</sup>

Where the intermediate estate has terminated and the need of his custody as trustee no longer continues, he must at once surrender his possession to the one entitled thereto under the terms of the trust.

(2) *Depositing Funds in Bank*.—The depositing of funds in bank is a natural and often a necessary incident to the care of a trust estate. The rule that whatever diligence is customary, in the care of funds, by a man of ordinary prudence, will be required of

have it replaced out of the first accruing income. *Morton v. Adams*, 1 Strobh. Eq. (S. Car.) 72.

A trustee is justified in using the interest, or even a portion of the principal of the fund placed in his hands for accumulation, in trust for a minor until he arrives at full age, for the maintenance and education of the child, where there is no other property adequate for these purposes, and the minor is an orphan of tender age and there is no devise over, and no third person interested in the fund. *In re Potts*, 1 Ashm. (Pa.) 340.

1. See Lewin on Trusts, pp. 574, 575, 576; Perry on Trusts, § 477 *et seq.*

As to the power and duty to make repairs, see *Woodard v. Wright*, 82 Cal. 202; *Parsons v. Winslow*, 16 Mass. 361; *Watts v. Howard*, 7 Met. (Mass.) 478; *Sohier v. Eldredge*, 103 Mass. 351; *Mayfield v. Kilgour*, 31 Md. 241; *Smith v. Gibson*, 15 Minn. 66; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26; 7 Am. Dec. 475; *Herbert v. Herbert*, 57 How. Pr. (N. Y. C. Pl.) 333; *Matter of Odell*, 1 Conn. (N. Y.) 94; *Randall v. Dusenbury*, 63 N. Y. 645; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Downey v. Bullock*, 7 Ired. Eq. (N. Car.) 102; *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562; *Williams v. Smith*, 10 R. I. 280; *Fontaine v. Pellet*, 1 Ves. Jr. 337; *Atty. Gen'l v. Geary*, 3 Mer. 513; *Bridge v. Brown*, 2 Y. & Coll. C. C. 181; *Gilliland v. Crawford*, 4 Ir. Eq. 35.

Where a trustee materially improves

the estate, under the honest belief, with reasonable grounds for that belief, that it is his own property, and the amount received from the sale of the land is increased in consequence of such improvements, he is entitled to the excess, but no more. *Pratt v. Thornton*, 28 Me. 355.

If a trustee deems that the interest of his *cestui que trust* requires repairs to the estate before he comes of age, the trustee will be authorized to repair, *Kearney v. Kearney*, 17 N. J. Eq. 59; and a trustee with full power to manage the trust estate, which consists of realty, may so contract for repairs that the one furnishing them may acquire and enforce a mechanic's lien. *Cheat-ham v. Rowland*, 92 N. Car. 340.

It was held in *Parsons v. Winslow*, 16 Mass. 361, that the expense of putting in tenantable repair an estate purchased by the trustee, must be charged on the principal fund; while that of keeping it in repair is to be deducted from the income.

It was held, however, in *Busse v. Schenck*, 12 Daly (N. Y.) 12, that unless authorized or impelled by pressing necessity, the trustee could not bind the estate by a contract for repairs.

As to the power to erect improvements, see *infra*, this title, *Accounting*.

2. Unless he has received the trust property, he is not liable to account for the profits and hire thereof while in possession of one of the *cestuis que trust*. *Tucker v. Cocke*, 32 Miss. 184.

If the owner of an estate, as well as the trustee, is in fault, the latter is not

a trustee, extends to the depositing of the funds in bank. In the absence of negligence on his part, the trustee will be shielded from liability for losses growing out of the failure of the bankers.<sup>1</sup>

Indeed, it has been held to be a neglect of duty on the part of the custodian of trust funds, to fail to deposit them in bank.<sup>2</sup> But funds are not to be kept in bank for an unreasonable period of time.<sup>3</sup>

This doctrine is by no means universal, the decisions in some instances going so far as to make the fiduciary an insurer of the funds in his hands, and holding him to a strict accountability for all that are lost in banks and in investments.<sup>4</sup>

Of course the consent of the settlor to this disposition of the fund, will relieve the trustee from responsibility.<sup>5</sup> And there is no culpable negligence in leaving the funds in the bank selected

chargeable with the utmost that might have been made out of the estate. *Miller v. Whittier*, 31 Me. 577.

Where a trust is created for life with remainder over, the trustee must deliver to the remainder-men. *Haddock v. Perham*, 70 Ga. 572.

1. 2 Story Eq. Jur., § 1269; Hill on Trustees 573; Lewin on Trusts 295; *Barney v. Saunders*, 16 How. (U. S.) 535. See Perry on Trusts, § 443; *Atterberry v. McDuffee*, 31 Mo. App. 603; *State v. Greensdale*, 106 Ind. 364; 55 Am. Rep. 753; *Naltner v. Dolan*, 108 Ind. 500; 58 Am. Rep. 61; *Norwood v. Harness*, 98 Ind. 134; 49 Am. Rep. 739; *McCabe v. Fowler*, 84 N. Y. 314; *France v. Woods*, Tamil. 172; *Wilks v. Groome*, 3 Dr. 584; *Horsley v. Chaloner*, 2 Ves. 85; *Clough v. Bond*, 3 Myl. & C. 490; *Rowth v. Howell*, 3 Ves. 564; *Adams v. Claxton*, 6 Ves. 226; *Jones v. Lewis*, 2 Ves. 241; *Belchier v. Parsons*, Ambl. 219; *Massey v. Banner*, 1 Jac. & W. 248; *Swinfen v. Swinfen*, 29 Beav. 211; *Churchill v. Hobson*, 1 P. Wms. 243; *Fenwick v. Clarke*, 31 L. J. Ch. 728; *Knight v. Earl of Plymouth*, 3 Atk. 480.

Where there was no necessity for placing the funds in the banker's hands, the trustee must answer for his failure. *Darke v. Martyn*, 1 Beav. 525; *Macdonnell v. Harding*, 7 Sim. 178; *Lowry v. Fulton*, 9 Sim. 115; *Moyle v. Moyle*, 2 Russ. & M. 710; *Gibbins v. Taylor*, 22 Beav. 344.

**Failure of Bank on Account of War.**—In *Crane v. Moses*, 13 S. Car. 561, the court held a trustee exempt from liability, where the funds had been deposited before the war in a bank of high standing, and the bank failed on account of the losses resulting from the

civil war. See also *Parsley v. Martin*, 77 Va. 376; 46 Am. Rep. 733.

But if he place the trust-money in a bank which he knows to be insolvent, he is responsible for such gross negligence. *Whitehead v. Whitehead*, 85 Va. 870.

Money deposited at a small rate of interest, under a restriction against withdrawal except on two weeks' notice, is a deposit nevertheless, and if lost the trustee is not liable in the absence of negligence in choosing the bank. *Saw's Estate*, 144 Pa. St. 499; 14 L. R. A. 103. And if free from negligence, the trustee will not be held liable, although the money was deposited on time upon a certificate of deposit. *In re Hunt*, 141 Mass. 515.

2. *Dalrymple v. Gamble*, 68 Md. 156; *Baskin v. Baskin*, 4 Lans. (N. Y.) 94; *Johnston's Appeal*, 115 Pa. St. 129.

3. *Horsley v. Chaloner*, 2 Ves. 84; *Barney v. Saunders*, 16 How. (U. S.) 535; *Cann v. Cann*, 51 L. T. N. S. 770; *Moyle v. Moyle*, 2 Russ. & M. 710.

4. See INVESTMENT, vol. 11, p. 813.

For example, a trustee, who was charged to see that the funds "be securely invested," and who allowed them to remain for two years as an investment in the bank where they were when he was made trustee, was held accountable for the loss when the bank failed. *Matter of Knight's Estate* (Supreme Ct.), 4 N. Y. Supp. 412; 21 Abb. N. Cas. (N. Y.) 388.

5. An assignee having deposited to his own account, in a bank then in good credit, a balance decreed payable to his assignor, notified him to come and receive it; but the latter, without communicating with the assignee, directed the bank to retain the balance on in-

and used by the settlor, unless the trustee has reason to doubt its solvency.<sup>1</sup>

(3) *Confusion of Funds—Conversion.*<sup>2</sup>—The trustee may not deposit the funds in his own name,<sup>3</sup> nor put them beyond his control.<sup>4</sup> If he does either of these things any loss that accrues therefrom must be borne by him.

If he deposits trust funds in his own name and confuses them with his own deposits, a presumption arises in reference to the withdrawal of moneys by check, whereby he will be deemed to have drawn out his own in preference to the trust money. The

terest without change of account. He received interest on it for some time, when the bank failed. It was held that the assignee was not responsible for the loss. *Heckert's Appeal*, 69 Pa. St. 264.

1. *Hanbest's Appeal*, 92 Pa. St. 482; *Dorchester v. Effingham*, 1 Tam. 279; *Rowth v. Howell*, 3 Ves. 565.

2. See INVESTMENT, vol. 11, p. 835. See also, *infra*, this title, *The Duty of Good Faith—Using the Trust for Personal Gain—Rights and Remedies of the Beneficiary—Following the Trust Property*.

3. The deposit of trust funds should be made in bank to the credit of the fund. If the trustee deposits them in his own name and loss occurs, he is liable. *Phillips v. Lamar*, 27 Ga. 227; 73 Am. Dec. 731; *Gilbert v. Welsch*, 75 Ind. 557; 2 Lead. Cas. in Eq. 1085; *Naltner v. Dolan*, 108 Ind. 500; 58 Am. Rep. 61; *Norris v. Hero*, 22 La. Ann. 605; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218; 29 Am. Dec. 539; *School Dist. v. First Nat. Bank*, 102 Mass. 174; *Coffin v. Bramlitt*, 42 Miss. 194; 97 Am. Dec. 449; *Atterbury v. McDuffee*, 31 Mo. App. 603; *Matter of Stafford*, 11 Barb. (N. Y.) 353; *Brown v. Ricketts*, 4 Johns. Ch. (N. Y.) 303; 8 Am. Dec. 567; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Summers v. Reynolds*, 95 N. Car. 404; *Shaw v. Bauman*, 34 Ohio St. 25; *McAllister v. Com.*, 30 Pa. St. 536; *Law's Estate*, 144 Pa. St. 499; *Mason v. Whitthorne*, 2 Coldw. (Tenn.) 242; *Williams v. Williams*, 55 Wis. 300; 42 Am. Rep. 708; *Massey v. Banner*, 1 Jac. & W. 241; *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Madd. 73; *Robinson v. Ward*, 2 Car. & P. 59; 12 E. C. L. 28; *Macdonnell v. Harding*, 7 Sim. 178.

4. See *Perry on Trusts*, §§ 443, 445; *White v. Baugh*, 2 Russ. & M. 215; 9 Bligh 181; 3 Cl. & F. 44; *Salway v. Salway*, 2 Russ. & M. 215.

Thus, the deposit must be in the ordinary course of business, subject to withdrawal on demand and free from the control of any other person. *Perry on Trusts*, § 443; *Salway v. Salway*, *alias White v. Baugh*, 2 Russ. & M. 215; 9 Bligh 181; 3 Cl. & Fin. 44.

If the deposit is made under an agreement that it is to be repaid at a future day, and is not to be subject to call meanwhile, it is at the trustee's risk. *Baskin v. Baskin*, 4 Lans. (N. Y.) 94.

But where the deposit is made, rather as an investment than as a deposit proper, as upon a time certificate of deposit, he has been held exempt from liability for loss, in the absence of negligence. *In re Hunt*, 141 Mass. 515.

So in *Law's Estate*, 144 Pa. St. 499, where money was deposited at interest under a stipulation against withdrawal except upon two weeks' notice, it was held that the trustee was not liable unless he was negligent in the selection of a bank.

It is a breach of duty for a trustee to surrender securities after accepting the trust, without the consent of the *cestui que trust*. *Jacques v. Fackney*, 64 Ill. 87. Compare *Wilkinson v. Stewart*, 30 Ill. 48.

The administrator who permits a business firm of which he is a member to have control of the funds of the estate, is guilty of a gross breach of trust. *Forsyth v. Woods*, 11 Wall. (U. S.) 484.

If the trustee lends money to a bank on interest upon personal security, it has been held that he will be held liable, that being a security disapproved by the court. *Darke v. Martyn*, 1 Beav. 525.

It has been held that where a trustee deposits trust funds with a banker merely on personal security, while he exacts a bond for his own money, he is guilty of gross negligence and liable

trust fund will thus be preserved intact so far as possible. The rule charging the money first drawn out against the money first deposited, has no application to such a case.<sup>1</sup>

Funds deposited to the trustee's individual account remain subject to the trust, and are not liable to appropriation by the trustee's personal creditors, in the event of his failure,<sup>2</sup> unless the bank or bailee be shown to have had notice of the fiduciary character of the deposit.<sup>3</sup>

The deposit when made must be identified and kept clear of all other funds.<sup>4</sup> The confusion of property is held to be conversion,

for losses resulting from the banker's failure. Anonymous, Loft 492.

1. See *infra*, this title, *Rights and Remedies of the Beneficiary—Following the Trust Property*; Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54; Englar v. Offutt, 70 Md. 78; 14 Am. St. Rep. 332; Baker v. New York Nat. Exch. Bank, 100 N. Y. 31; 53 Am. Rep. 150; Importers, etc., Nat. Bank v. Peters, 123 N. Y. 272; North Dakota Elevator Co. v. Clark (N. Dak. 1892), 53 N. W. Rep. 175; Continental Nat. Bank v. Weems, 69 Tex. 489; 5 Am. St. Rep. 85; *In re Hallett's Estate*, 13 Ch. Div. 696.

2. Jenkins v. Walter, 8 Gill & J. (Md.) 218; 29 Am. Dec. 539.

3. *Ex p.* Cooke, 4 Ch. Div. 123.

In *School Dist. v. First Nat. Bank*, 102 Mass. 174, it was held that a bank having received trust funds without notice of the existence of the trust, could apply such deposits to the payment of the trustee's personal debts. And see Thacher v. Pray, 113 Mass. 291; Lime Rock Bank v. Plimpton, 17 Pick. (Mass.) 159; 28 Am. Dec. 286.

4. Coffin v. Bramlitt, 42 Miss. 104; 97 Am. Dec. 449; *In re Stafford*, 11 Barb. (N. Y.) 53; Case v. Abeel, 1 Paige (N. Y.) 393; Kellett v. Rathbun, 4 Paige (N. Y.) 102; Hooley v. Gieve, 9 Abb. N. Cas. (N. Y.) 8; 9 Daly (N. Y.) 104; Gunter v. Jones, 9 Cal. 643; Harrison v. Smith, 83 Mo. 210; 53 Am. Rep. 571; Sanders v. Forgasson, 3 Baxt. (Tenn.) 249; Draper v. Joiner, 9 Humph. (Tenn.) 612; 49 Am. Dec. 719; Freeman v. Fairlie, 3 Mer. 29. See also *California Code*, § 7236; *Dakota Civ. Code* 1306.

If he has deposited trust funds in his own name, he is liable if the bank fails. Lunham v. Blundell, 4 Jur. N. S. 3; Wren v. Kirton, 11 Ves. 377; Fletcher v. Walker, 3 Madd. 73; Wilkinson v. Bewick, 4 Jur. N. S. 1010; Massey v. Banner, 1 Jac. & W. 241; Pennell v.

Deffell, 4 De G. M. & G. 386; *In re Speight*, 22 Ch. Div. 727; Freeman v. Fairlie, 3 Mer. 29; Jenkins v. Walter, 8 Gill & J. (Md.) 218; 29 Am. Dec. 539; Com. v. McAlister, 28 Pa. St. 480; 30 Pa. St. 536; Matter of Stafford, 11 Barb. (N. Y.) 353. But see Crane v. Moses, 13 S. Car. 561.

**Liability of Trustee for Conversion.**—

In a suit by a beneficiary against his trustee for conversion, the beneficiary is entitled to recover the value of his property at the time of the conversion, and not merely the present value of the property for which the trust property was exchanged. Cushman v. Bonfield, 139 Ill. 219, *affirming* 36 Ill. App. 436.

It has been held that where the trustee has confused trust and personal property, the *cestui que trust* may claim all that the trustee cannot positively identify. Morrison v. Kinstra, 55 Miss. 71; Lewin on Trusts 297.

Where a trustee takes an outstanding title in his own name and employs in part funds of his own, the burden is on him to show the amount, and if he fails, the *cestui que trust* will take the entire estate. Ward v. Armstrong, 84 Ill. 151.

In Englar v. Offutt, 70 Md. 78; 14 Am. St. Rep. 332, the court, by Alvey, C. J., said: "So long as a trust fund can be traced, the court will always attribute the ownership thereof to the *cestui que trust*, and will not allow the right to be defeated by the wrongful act of the trustee in confusing the trust fund with funds of his own or even those of a third party. The true owner of a fund traced to the possession of another, has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him. And it can make no manner of difference whether the fund be traced into a bank account, the possession of an individual, or into the

and the trustee who converts the estate to his own use must answer for every dollar of loss, and both funds will be treated as trust property, except so far as the trustee may be able clearly to distinguish his own.<sup>1</sup> Interest will be exacted of him<sup>2</sup> in case of loss, and, if there be any profits, whatever profits he realizes out of the investment belong to the trust estate.<sup>3</sup>

Where he has converted the trust funds to his own use by investing them in his own name, he will be held to a strict accountability for the conversion, and the trust will follow the investment.<sup>4</sup>

For any irregular or improper purpose to which he may have

hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established and no superior rights of innocent third parties have intervened."

**Costs.**—A trustee who has mingled the trust fund with his own property, and in rendering his account has neglected to charge himself with the full amount due from him, is not entitled to have the costs of a bill in equity, instituted by him for the purpose of obtaining a discharge from the further execution of the trust, allowed out of the fund; but will be charged with the payment of the expenses of taking the account. *Bogle v. Bogle*, 3 Allen (Mass.) 158.

1. *Snorgrass v. Moore*, 30 Mo. App. 232.

An administrator who is guilty of a tortious conversion to his personal use of the property of an estate intrusted to his care as an administrator, is chargeable with the highest value of the property so taken by him. *Irby v. Kitchell*, 42 Ala. 438.

2. *Mitchell v. Moore*, 95 U. S. 587; *Gordon v. West*, 8 N. H. 455; *Knowlton v. Bradley*, 17 N. H. 458; 43 Am. Dec. 609. See *infra*, this title, *Interest*.

He will be charged at least the highest legal rate of interest, even though their safety has not been endangered. *Morgan v. Morgan*, 4 Dem. (N. Y.) 353.

3. See *infra*, this title, *Profits and Losses*.

4. See *infra*, this title, *Rights and Remedies of the Beneficiary—Following the Trust Property*.

*Dejarnette v. Dejarnette*, 41 Ala. 708; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571, *overruling* *Mills v. Post*, 76 Mo. 426; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642; *Stanley's Appeal*, 8 Pa. St. 431; 49

Am. Dec. 530; *McAllister v. Com.*, 30 Pa. St. 536.

So held where the loss finally occurred through payments made to him in Confederate money. *Mitchell v. Moore*, 95 U. S. 587.

Where a trustee deposits the trust funds in a bank and takes a certificate of deposit therefor, payable to himself, he will be held responsible for loss caused by the bank's failure, although the instrument creating the trust directed the deposit of the money in that bank. *Corya v. Corya*, 119 Ind. 593.

Where chattels are conveyed in trust to secure the payment of a note, and the trustee sells the property and mingles the proceeds with his own funds, he may be compelled to pay the trust fund to the holder of the note. *National Park Bank v. Halle*, 30 Ill. App. 17; *aff'd* in 140 Ill. 413.

The rule that property purchased with the trust funds will, at the option of the beneficiaries, be declared to be held in trust for them, although the trustee may have taken title in his own name, and intended the purchase for his own benefit, is applicable to a purchase by a father, appointed guardian of his infant child, made with funds belonging to the estate of the child. *Durling v. Hammer*, 20 N. J. Eq. 220.

If a trustee wrongfully converts a trust fund into another species of property, the *cestui que trust* will be entitled to it. But otherwise, where such conversion is made by the creator of the trust, who himself stands in no fiduciary relation. In this case the title to the property thus wrongfully purchased with the trust fund, is in the purchaser. *Hawthorne v. Brown*, 3 Sneed (Tenn.) 462.

Where a trustee buys land in his own name and pays for it out of trust money in his hands, a court of equity will fasten a trust upon the land in favor of the persons beneficially entitled to the

put the funds, he must answer as though he had appropriated them to his personal use, and a strict accounting will be exacted of him.<sup>1</sup> Such misfeasance is ground for his removal, no matter what may be the terms of his appointment or the extent of the discretion granted him in the instrument of trust,<sup>2</sup> and he may be prosecuted for embezzlement for fraudulently appropriating trust property to his own use.<sup>3</sup>

(4) *Insurance*.—Failure to keep the property insured in a responsible company is not consistent with ordinary care in the management of the trust estate; the trustee is bound to take this precaution against loss.<sup>4</sup>

money, and the *cestuis que trustent* have a right to the estate. *Pugh v. Pugh*, 9 Ind. 132.

Where a trustee purchases an estate partly with his own and partly with the trust money, the *cestui que trust*, on establishing the fact, will have a lien on the whole estate for the whole amount of the trust funds thus misapplied. *Munro v. Collins*, 95 Mo. 33.

1. A trustee who has made an improper use of trust funds may be forced to bring them into court at an earlier date than, under other circumstances, he would be obliged to pay them to the *cestui que trust*. *Clagett v. Hall*, 9 Gill & J. (Md.) 80.

A trustee who assigns a bond belonging to the trust estate as security for his private debt, commits a breach of trust, and the trustee will be responsible for the value of the bond at the time of the assignment with interest, though the obligor has since become insolvent. *Van Rensselaer v. Morris*, 1 Paige (N. Y.) 13.

The rule that a trustee will not be permitted to claim that trust property purchased by him was so purchased for his individual benefit, applies to property which, though purchased as trust property, was bought for the purpose of performing the trust. The presumptions are against a trustee who mingles any such property with his own. *Woodruff v. Boyden*, 3 Abb. N. Cas. (N. Y.) 29.

If he speculates with the trust funds, he must account for the profits, if successful, and for interest, if the speculation fails. *Norris' Appeal*, 71 Pa. St. 106.

If a person who has the management of the property of another, so confounds it with his own that it cannot be distinguished, all the inconvenience from the confusion must be borne by him, and if it is a case of dam-

ages, they will be given to the utmost value of the property. *Brackinridge v. Holland*, 2 Blackf. (Ind.) 377; 20 Am. Dec. 123.

Where a trustee of slaves mingles them with his own, and has them work on his own plantation, the *cestui que trust* is entitled to a fair hire for their services, and is not bound to receive for their services the profits which accrued from the plantation by their labor. *Johnson v. Richey*, 4 How. (Miss.) 233.

A trustee who has confounded trust money with other funds, does not become a mere debtor, but by his wrongful conduct consents to be treated as a debtor or trespasser, at the option of the *cestui que trust*. *Gunter v. Janes*, 9 Cal. 643.

A trustee lending the funds of the trust, on a note and mortgage, executed to himself individually, is guilty of a *devastavit*, at the election of the *cestui que trust*. *DeJarnette v. DeJarnette*, 41 Ala. 708.

An executor cannot use the trust funds to purchase property in his own name. The property so purchased belongs to the trust estate. *Paschall v. Hinderer*, 28 Ohio St. 568. And the trust follows the property into the hands of the purchasers with notice. *Morgan v. Fisher*, 82 Va. 417.

2. See *supra*, this title, *Resignation and Removal of Trustee*.

A testamentary trustee who deliberately mingles the trust funds with his own, and withholds from his beneficiaries information as to the investment of them, will be removed, though he is the testator's son and the father of the *cestuis que trustent*, and though the will directs him to pay to them the income, from time to time, as he thinks best, and exempts him from giving bonds. *Sparhawk v. Sparhawk*, 114 Mass. 356.

3. See EMBEZZLEMENT, vol. 6, p. 482.

4. *Burr v. McEwen*, Baldw. (U. S.)

(5) *Taxes*.—And so with the taxes. Ordinary diligence requires the payment of all legal taxes assessed against the property in trust,<sup>1</sup> and the redemption from tax sale, as well as resistance of all suits to enforce taxes illegally assessed. Taxes are chargeable to income rather than to capital.<sup>2</sup>

*b. INVESTMENT*.—(See INVESTMENT, vol. 11, p. 813.)

*c. PROFITS AND LOSSES*.—Under the rule requiring diligence in the custody of the trust estate, the trustee must use all ordinary care to make the trust remunerative to his *cestui que trust*. He must not allow the property to lie idle, nor make reckless investments of the fund. But he is not an insurer as to the rents and profits, and, in the absence of neglect, will be held blameless if the estate fails to produce the income of which it is capable, and will be held only for sums actually received.<sup>3</sup>

154; *Howard F. Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Garvey v. Owens*, 12 N. Y. Supp. 349.

But the following English cases fail to sustain this proposition: *Bailey v. Gould*, 4 Y. & C. 221; *Ex p. Andrews*, 2 Rose 410; *Dobson v. Land*, 8 Hare 216; *Fry v. Fry*, 27 Beav. 146.

Touching the power and duty to insure, Perry says: "A trustee would probably be justified in insuring the property, and, in case of loss, the insurance money would belong to the *cestui que trust*." Perry on Trusts, § 487. See *Lerow v. Wilmarth*, 9 Allen (Mass.) 382.

And Lewin says: "A trustee would, it is conceived, under special circumstances and in due course of management, be justified in insuring the property." Lewin on Trusts and Trustees, p. 580.

In the following cases it is held that a trustee has the right to procure insurance and is justified in doing so, although there is no obligation on him, in the absence of express directions, to insure at all. *Columbia Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Howard F. Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Page v. Western M. & F. Ins. Co.*, 19 La. 49; *Putnam v. Mercantile Marine Ins. Co.*, 5 Met. (Mass.) 386; *Goodall v. New England Ins. Co.*, 25 N. H. 186; *Swift v. Vermont Mut. F. Ins. Co.*, 18 Vt. 313; *Craufurd v. Hunter*, 8 T. R. 13.

Where a trustee has full power to select the company or companies in which to insure the trust property, he is to be held merely to the exercise of due care to select solvent companies or those generally so considered, not as a

guarantor of their solvency. *Gettins v. Scudder*, 71 Ill. 86.

1. See *infra*, this title, *Accounting*; *Burr v. McEwen*, Baldw. (U. S.) 154.

2. See *infra*, this title, *Accounting—Capital and Income*.

All gains made by the trustee by a wrongful appropriation of the trust funds go to the beneficiary, while all losses are borne by the trustee. *Oliver v. Piatt*, 3 How. (U. S.) 401.

3. See article by Russell Duane in 30 Am. Law Reg. 569, on "Liabilities Arising out of Employment of Trust funds in Partnerships." Profits belong to the trust. *Brown v. Ricketts*, 4 Johns. Ch. (N. Y.) 303; 8 Am. Dec. 567; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Sharp's Estate*, 2 Phila. (Pa.) 280; *Wasson v. English*, 13 Mo. 176; *Stidger v. Reynolds*, 10 Ohio 351; *Hill v. Cooper*, 8 Oregon 254. See also *California Code* 7237; *Dakota Civ. Code* 1307; *Georgia Code* 2332.

Appreciation of currency in the trustee's hands or while loaned out by him, inures to the benefit of the *cestui que trust*. *Clarke v. Anderson*, 10 Bush (Ky.) 99.

Where the taking of an account of the profits of certain slaves held in trust was referred to a master, and the trustee, having admitted the character of the slaves, brought forward no evidence of the actual value of their labor, he was charged with the usual rate of hire. *Stroman v. Rottenburg*, 4 Desaus. Eq. (S. Car.) 288.

A trustee is chargeable with all the rents and profits which by reasonable effort he could have received. *Mansfield v. Alwood*, 84 Ill. 497.

Where an agent or trustee makes no

d. ACCOUNTING—(1) *In General*.—The trustee is bound to

effort to secure a tenant for land of his principal, but occupies it himself, he will be chargeable with the highest rent which could have been obtained. *Landis v. Scott*, 33 Pa. St. 495.

Where a trustee is required to invest the trust fund in *United States* bonds, or on real-estate security, his liability for the failure to invest the fund is measured by the interest he might have obtained on real-estate security of the proper character. *Andrews v. Schmitt*, 64 Wis. 644. See also *Williams v. Williams*, 35 N. J. Eq. 100; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

Where an administrator purchasing land or other property with the money of the estate, afterward resells it at a profit, the benefit of the purchase inures to the estate, and not to himself individually. *Mosley v. Lane*, 27 Ala. 62; 62 Am. Dec. 752.

In *Williams v. Williams*, 35 N. J. Eq. 100, a testator gave \$55,000 out of his bonds and mortgages for the support of his daughter, and directed the trustee, his son, to keep the money invested, and pay her the interest and so much of the principal as might be needed for her support. The trustee bought a house with the money, and accounted only for the rents derived therefrom, which were less than the fund would have produced if invested at the legal rate of interest. It was held that he must also account for the difference between the rents received by him from the house, and the legal interest on \$55,000. This, on the authority of *Eckford v. DeKay*, 8 Paige (N. Y.) 89.

A trustee who has trust funds in his hands sufficient to purchase at a sheriff's sale for the estate, especially if such funds are mixed with his own, and which, in the exercise of an honest discretion, he would be justified in so applying, and who does so purchase, is liable to account to the *cestui que trust* for any profit made on the transaction, the same as if he had bought as trustee. *Frank's Appeal*, 59 Pa. St. 190.

A trustee is bound to exercise only ordinary care over the property of the *cestui que trust* in his possession, and he is not chargeable with rents and profits which he did not and could not receive. *Bath Paper Co. v. Langley*, 23 S. Car. 148.

Trustees for creditors cannot be held responsible as tenants for more than

the profits afterward received, there being no pretense of negligence, malversation, or fraud. *Hamburg Mfg. Co. v. Edsall*, 7 N. J. Eq. 298. See also *Wilcox v. Bates*, 45 Wis. 138; *Hoyle v. Bailey*, 58 Wis. 435.

One coming wrongfully into possession of an estate ought not to be spared, and ought to be charged to the extent of what it was capable of producing; but if he enters rightfully, his actual income, if he can show what it is, will determine the extent of his liability. The same principle applies where the party in possession, under circumstances which are held to convert him into a trustee, believes that the right of property is in himself, and has been misled by the belief that he was not liable to account, and consequently has kept no account. *Johnson v. Lewis*, 2 Strobb. Eq. (S. Car.) 157.

A bond was executed by the trustee to appropriate a bond and mortgage held by him in an official capacity for certain purposes. It was held that he was accountable for only such money as he might receive and collect thereon without default on his part, and not for the whole amount mentioned in the bond and mortgage. *Staats v. Burden*, 30 N. J. L. 131.

A trustee who was unable to find a purchaser for trust property and received no rents for it, was held not to be liable for estimated rents. *Griffin v. Macaulay*, 7 Gratt. (Va.) 476.

A trustee of land, on a purchaser's abandonment and rescission of the contract of the sale thereof, is not to be required, under a decree, to convey the land to a *cestui que trust*, and pay over to him likewise the purchase-money received. This is not a part of the rents and profits. *Mansfield v. Alwood*, 84 Ill. 497.

One who, being chargeable as trustee, sells land, may be held for its real value, although selling for less. *Hardin v. Eames*, 5 Ill. App. 153.

Where a trustee has wrongfully transferred property, he is liable to the *cestui que trust* for the profits realized by him, even though such profits are in excess of the actual value of the property. *Parker v. Straat*, 29 Mo. 616.

It was held in *Darling v. Harmon*, 47 Minn. 166, that if a mortgagee, under an absolute deed with an unrecorded defeasance, should exchange the mortgaged premises for other land which he



render an account to his *cestui que trust* at all reasonable times upon demand.<sup>1</sup> He must show actual receipts and expenditures.

The fact that the management of the funds has been left by the terms of the trust to the discretion of the trustee, will not exempt him from accounting for his conduct of it.<sup>2</sup> He must account for all money and property which he has received, or with due dili-

afterward sells, he is chargeable on accounting with the mortgagor for the full value of the land received in exchange, even though he did not realize that value upon selling it.

When a trustee confessedly has received property and has sold it and received the proceeds, he is accountable for those proceeds. He should show what the property brought, and if he fails to do this, he will be charged with the highest value that a jury can put upon the property under the evidence. *Morton's Estate*, 7 Phila. (Pa.) 484.

1. In general, see *supra*, this title, *Possession and Safe Keeping—Protection and Preservation*. See also *infra*, this title, *Insurance; Profits and Losses; Interest*; *Perry on Trusts*, § 821; *Green v. Brooks*, 81 Cal. 328; *Hottel v. Mason*, 16 Colo. 43; *Dill v. McGehee*, 34 Ga. 438; *Poullain v. Poullain*, 76 Ga. 421; *Dole v. Olmstead*, 36 Ill. 150; 85 Am. Dec. 397; *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637; *Blauvelt v. Ackerman*, 23 N. J. Eq. 493; *Geisse v. Beall*, 3 Wis. 367.

The principles upon which trustees and other fiduciaries will be held to account for the trust fund, are stated in *Davis v. Harman*, 21 Gratt. (Va.) 194; *Myers v. Zetelle*, 21 Gratt. (Va.) 733.

The burden of proof is upon him to make out with reasonable certainty any defense for failure to account which he may have. So held in *Montgomery v. Coldwell*, 14 Lea (Tenn.) 29, where the defense set up was a loss by fire twelve years before.

Equity has jurisdiction to enforce an accounting and a surrender of trust property, where the time for an accounting and surrender by the trustee has arrived, and he refuses. *Weaver v. Fisher*, 110 Ill. 146.

The removal of a trustee, under a power reserved in the deed of trust, will not, *per se*, operate to release such discharged trustee from liability to account. *Clarke v. Deveau*, 1 S. Car. 172.

Where a decedent's estate is seriously involved, and one of his sons, who was also his partner in business, undertakes the management of the

estate, at the request of the other heirs, without any formal administration or settlement in court, because that course was thought to be best for the credit of all parties; and where the various transactions of the estate were undertaken with the advice and consent of the other heirs, and all his dealings have been in the best faith, he will not be required, upon final settlement of his trust in court, to produce formal vouchers of all his transactions. *Groom v. Thompson* (Ky.), 16 S. W. Rep. 369.

A, a *feme covert*, applied to the superior court to have B appointed trustee of certain slaves, claimed as her separate estate. B assented to the order, and accepted the trust, taking possession of the property. In a suit at the instance of A, the *cestui que trust*, it was held that B could not deny the trust, and set up title in the husband of A to the negroes, in order to secure himself from accounting. *Duncan v. Bryan*, 11 Ga. 63.

It has been held in *Maine*, that where rent is paid in repairs, the trustee may omit it from his account. *Veazie v. Forsaith*, 76 Me. 172.

M, as trustee, had possession for several years of the property of the complainants without any general accounting. It was held that they could maintain a bill against him, praying for a detailed account, and for the delivery of the property, the trust having terminated. *Dill v. McGehee*, 34 Ga. 438. But a stranger cannot compel an accounting. *McCabe's Appeal*, 22 Pa. St. 427.

Though the sale of certain real estate was unnecessary, yet, the trustee in his management of the estate having procured it, must account, as trustee, for the purchase-money he received. *Loveman v. Taylor*, 85 Tenn. 1.

It is every trustee's duty, who submits his readiness to account, to file with his answer a statement of his account. *Booth v. Sineath*, 2 Strobb. Eq. (S. Car.) 31.

2. *Libbett v. Maultsby*, 71 N. Car. 345.

gence might have received.<sup>1</sup> His accounts must be accurate and complete, for all points of doubt and uncertainty will be construed against him.<sup>2</sup> And he cannot, by delaying or attempting to defer a settlement, keep the *cestui que trust* out of the enjoyment of the property to which he is entitled.<sup>3</sup> If the accounts of

1. B conveyed certain real estate to C, to be sold by him for not less than \$800, to pay a debt which B owed him. C sold the property without the consent of B for \$400. It was held that he had violated the trust and was liable to the extent of \$800, the limited price. *Cadwell v. Brown*, 36 Ill. 103.

A mortgagee under a deed absolute on its face, with an unrecorded defeasance, who exchanges the mortgaged premises for other lands, which he then sells, is chargeable, on accounting with the mortgagor, for the full value of the land received in exchange, though he did not realize that amount on selling it. *Darling v. Harmon*, 47 Minn. 166.

For personal property which has come to the hands of a testamentary trustee, where it does not appear how he disposed of it, he must account or be charged with the appraised value thereof. *Boyer's Appeal*, 125 Pa. St. 164.

Trustees with power to sell real estate must account for the deposit forfeited by the purchaser who fails to complete his purchase. *Campbell v. Johnson*, 1 Sandf. (N. Y.) 148.

The rules which control a court of equity in compelling a trustee to account in cases where he has used the fund for his own advantage are discussed in *McKnight v. Walsh*, 23 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

For all assets coming into his hands wrongfully and retained by him, he is accountable, as well as for profits thereon. *Farmers', etc., Bank v. Kimball Milling Co.*, 1 S. Dak. 388; *Wasson v. English*, 13 Mo. 176.

2. *Hottel v. Mason*, 16 Colo. 43; *In re Gaston's Trust*, 35 N. J. Eq. 60; *Elmer v. Loper*, 25 N. J. Eq. 482; *Veghte v. Steele*, 35 N. J. Eq. 348; *Dufford v. Smith*, 46 N. J. Eq. 216; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; 16 Am. Dec. 648; *Pearse v. Green*, 1 Jac. & W. 135; *Freeman v. Fairlie*, 3 Mer. 40; *White v. Lincoln*, 8 Ves. 363; *Chedworth v. Edwards*, 8 Ves. 46; *Lupton v. White*, 15 Ves. Jr. 432; *Oltley v. Gilby*, 8 Beav. 602; *Horton v. Brocklehurst*, 29 Beav. 504;

*Cramer v. Bird*, L. R., 6 Eq. 143; *Talbot v. Marshfield*, L. R., 3 Ch. 622.

When a testamentary trustee has made certain accountings to the legatees, with the knowledge and approval of the legatees, if he has proceeded on an erroneous basis, and yet has funds enough to correct the errors of distribution, the legatees are not estopped to demand such correction, but the trustee cannot be held personally liable for any loss. *Bowditch v. Ayrault* (Sup. Ct.), 17 N. Y. Supp. 281.

Where one, standing in possession as trustee, neglects to keep proper accounts of his expenditures, the remuneration will be made according to the lowest estimate. *McDowell v. Caldwell*, 2 McCord Eq. (S. Car.) 43; 16 Am. Dec. 635.

Where the trustee states no account before the masters, refuses to produce his books of accounts before them, except such as he is compelled by the court to produce, and renders no aid to the masters in stating the accounts, he cannot afterward show error in their finding on certain items, which there is evidence to justify, by producing other of his books. *Ahl's Appeal*, 129 Pa. St. 26.

A trustee who keeps no separate account of the trust fund, but mixes it with his own money, is liable to account for it in case of loss. *Moore v. Mitchell*, 2 Woods (U. S.) 483.

If a person who is in possession of an estate and claiming to be the agent of the owner, neglects to keep a proper account of the income and expenditure thereof, the master, in stating an account, may reject that presented by the trustee, and, taking into consideration the whole evidence, exercise a sound discretion, in charging and allowing him what shall appear to be reasonable. *Miller v. Whittier*, 36 Me. 577.

A trustee must keep and render accurate accounts, and omissions therefrom, inimical to the interest of his *cestui que trust*, give rise to presumptions against him which are decisive, unless overcome by collateral proofs establishing his perfect fairness. *Hottel v. Mason*, 16 Colo. 43.

3. See *Collins v. Covington*, 84 Ga. 129.

the trust become lost through his carelessness, he should be compelled to bear any injuries consequent upon such loss.<sup>1</sup>

While it is true, however, that all doubts are decided against him in case of deficient accounting, he will be held for no more than actual receipts and profits where, in neglect of his duty, he has failed to render a complete and accurate report of his trust.<sup>2</sup>

If he has made legitimate expenditures upon the request of the *cestui que trust*, he will be permitted to show the payments so made by him and have his accounts credited to that extent.<sup>3</sup>

(2) *Settlement and Release*.—A settlement with the *cestui que trust*, fairly made, will relieve the trustee from liability upon an accounting, or for any breach of trust of which he may have been guilty.<sup>4</sup> Such a settlement cannot be made with a beneficiary who is not *sui juris*, nor with one who acts in ignorance of any material fact.<sup>5</sup> By whomsoever made, it will be scrutinized with great care by the courts, and, if any unfair dealing is apparent, will not stand, but the trustee will be required to render a true and complete account of his trust.<sup>6</sup>

1. *In re Gaston's Trust*, 35 N. J. Eq. 60; *Elmer v. Loper*, 25 N. J. Eq. 482.

2. *Hoile v. Bailey*, 58 Wis. 434. A trustee in the possession of slaves, the trust property, and managing them in good faith, will be charged with the actual profits only, though he has neglected to render annual accounts. *Rainsford v. Rainsford*, McMull. Eq. (S. Car.) 16.

3. *Lowe v. Morris*, 13 Ga. 165.

4. See *infra*, this title, *Waiver and Estoppel*; *Pope v. Farnsworth*, 146 Mass. 344; *Clark v. Law*, 22 How. Pr. (N. Y. C. Pl.) 426; *Anderson v. Simms*, 29 S. Car. 247; 13 Am. St. Rep. 711; *Blackwood v. Borrowes*, 2 Con. & L. 459; *French v. Hobson*, 9 Ves. 103; *Wilkinson v. Parry*, 4 Russ. 272; *Small v. Attwood*, 2 Y. & J. 517; *Cresswell v. Dewell*, 4 Giff. 465.

A *cestui que trust* may, by a formal release, discharge any of the trustees from liability for a violation of the trust. *Cocks v. Barlow*, 5 Redf. (N. Y.) 406.

A resulting trust in land purchased with the wife's money in the husband's name, is discharged by her general release, executed to him after their separation, in consideration of \$800 and certain furniture. *Moss v. Moss*, 95 Ill. 449.

A release to an executor of all claims for the releasor's portion of the testator's personal estate, will not discharge the executor's liability for a fund which the former holds as trustee testamentary, and to which the releasor has become entitled by the terms of the

trust. *Hanson v. Worthington*, 12 Md. 418.

An agent of the *cestui que trust* has no power to release a trustee from his duty; and where such agent, without authority, surrenders to the trustee the declaration of trust and procures a conveyance of the trust estate, the equity of the *cestui que trust* is not thereby affected. *Fast v. McPherson*, 98 Ill. 496.

5. See 2 Perry on Trusts (4th ed.), § 851; *Briers v. Hackney*, 6 Ga. 419; *Jones v. Lloyd*, 117 Ill. 597; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250; *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Shortell's Appeal*, 64 Pa. St. 25.

6. 2 Perry on Trusts (4th ed.), § 851; *Matter of Taggard's Estate*, 16 N. Y. Supp. 629; 62 Hun (N. Y.) 618; *Schoch's Appeal*, 33 Pa. St. 351; *Stewart's Estate*, 140 Pa. St. 124; *Alexander v. Solomon* (Tex. 1891), 15 S. W. Rep. 906. See also *Johnson v. Johnson*, 5 Ala. 90; *Crocker v. Pierce*, 61 Me. 58.

A settlement with a *feme covert* is *prima facie* evidence of its own accuracy and only liable to overthrow by proof of errors. Similar settlements with a person *sui juris* are conclusive. *Smith v. Thomas*, 4 Heisk. (Tenn.) 116.

Where a trustee sets up a release from his *cestui que trust*, he has the burden of showing that the transaction is perfectly fair in every respect and clear from all suspicion. *Jones v. Lloyd*, 117 Ill. 597.

The trustee may not impeach his own settlement.<sup>1</sup> The burden of proving a settlement and discharge is on the trustee.<sup>2</sup>

(3) *Capital and Income*.—In the rendition of accounts, it is often necessary to see that income accounts are kept separate from principal or capital accounts. This is true where the trust is of a dual nature, and the principal is to be kept intact for the use of the remainder-man, while the income must be devoted to the use of the immediate beneficiary. Instances illustrating the rules governing the apportionment of funds as capital and income are cited in the notes.<sup>3</sup>

A settlement between a trustee and the beneficiary will not estop the beneficiary from impugning a prior sale of an estate in the purchase whereof the trustee had become interested; the beneficiary not being then aware of such interest. *Pearson v. Taylor*, 37 Iowa 331.

No settlement is binding until the *cestui que trust* has been put in full possession of all facts affecting the state of the trust and the trustee's accounts. *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177.

A release and discharge of the trustee, executed by all parties in interest and fairly and justly obtained, will operate to discharge him from all parties interested who are *sui juris*, and as to them, the Statute of Limitations begins to run from the date of the release. *Anderson v. Simms*, 29 S. Car. 247; 13 Am. St. Rep. 711.

Trustees cannot be excused from rendering an account of the income to the executors of the beneficiary, on the ground of an alleged settlement with the beneficiary, during her life, although such a settlement might exonerate them from vouching the items of an old and long standing account. *Rieben v. Hicks*, 4 Bradf. (N. Y.) 136. But compare *Ferguson v. Lowery*, 54 Ala. 510; 25 Am. Rep. 718, where it was held that where no fraud appears, the courts will be slow to disturb settlements voluntarily made without litigation, although the parties to the settlement stand in the confidential relation of guardian and ward, or trustee and *cestui*, where the controversies adjusted grew out of transactions during the late civil war.

A bill by the infants attacking the settlements of the trustee on the ground that certain improper allowances had been made to him, and asking to have his accounts reopened and examined, can only be treated as an original bill to falsify and surcharge the accounts,

and cannot be entertained in the absence of any allegation or proof of fraud in obtaining the decrees of confirmation. *Vaccaro v. Cicalla*, 89 Tenn. 63.

Where a *cestui que trust*, in negotiating with her trustees for a settlement, renounces all confidence in them, and acts exclusively on the advice of personal friends and advisers, specially chosen by her to make investigations, and counsel her, a compromise entered into between her and the trustees, who during the investigation acted in good faith, and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skillful search. *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137.

1. *Jones v. Butler*, 30 Barb. (N. Y.) 641.

2. *Dufford v. Smith*, 46 N. J. Eq. 216.

3. In general, see *Merritt v. Jenkins*, 17 Fla. 593; *Veazie v. Forsaith*, 76 Me. 172.

*Capital and Income*.—Thus, in *Matter of Lawrence's Estate* (Surr. Ct.), 7 N. Y. Supp. 332, where the interest of a trust fund was payable as income to a life beneficiary, and the securities in which the fund had been invested had sold at a profit, it was deemed error to credit the profit to the income account, as it was a gain to the principal, to which it should be added, to go eventually to the one entitled to receive the *corpus*.

A testamentary trustee who is directed to pay the entire income of a fund to A for life, with an annuity to B, during the continuance of the trust, and who, after the death of B, pays the annuity to his legal representatives, by the direction of A, out of the income, is entitled to credit for it in his account, although, by the true construction of the will, the annuity

terminated on the death of B. Weston *v. Jenkins*, 128 Mass. 562.

Where a part of a trust fund consisted of notes of an insolvent estate, a part of which estate was applied in settlement of the notes, it was held that the loss should be ratably apportioned between principal and income. *Veazie v. Forsaith*, 76 Me. 172.

Where a fund or estate is given in trust for infants, with a valid limitation over at the decease of such infants, the court has no authority to break in on the *corpus* of the gift for the infant's support, maintenance, or advancement. *Deen v. Cozzens*, 7 Robt. (N. Y.) 178.

Where a trustee is appointed for the education and maintenance of children, his right over the property extends only to the income of the funds, it being the executor's right to retain the funds. *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Longley v. Hall*, 11 Pick. (Mass.) 124.

F. conveyed property to a trustee in trust to pay her the income annually for life, and at her death to convey the estate to her heirs. It was held that the court would not, on her application, empower the trustee to apply a part of the principal to her use, unless her necessity was fully shown. *Matter of Fero*, 9 How. Pr. (N. Y. Supreme Ct.) 85.

*Cestuis que trustent* who are life tenants may claim the whole income, unless needed for the payment of debts. The executors may properly retain the accruing income until the settlement of the estate, and when they pay over to the trustees, their account should distinguish between the capital and income. Taxes and interest on debts remaining unpaid after a year from the granting of letters testamentary are properly chargeable to the income. *Ex p. Bailey*, 13 R. I. 543; *Dufford v. Smith*, 46 N. J. Eq. 216; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129.

In *Van Blarcom v. Dager*, 31 N. J. Eq. 783, it was held, as between the life tenant and the remainder-man, that the premium upon certain gold coin belonging to the testator's estate was part of the *corpus*, and not of the income.

No expense incurred by a *cestui que trust* of a fund for life, nor debts contracted by him, nor penalties resulting from his acts, can be paid out of the income after his death, even though the

persons upon whom the trust estate devolved were his own children, claiming not through him, but under the provisions of the trust. *Buckingham's Estate*, 12 Phila. (Pa.) 105.

Where the declarant of a trust for the life of the beneficiary fails to apply the rents and profits to the use of the beneficiary as provided in the declaration, his liability incurred thereby is personal, and is not a lien on the remainder held by the declarant in the property, to take effect on the death of the beneficiary, though the declaration provides that in case of a sale there shall be an equitable lien on the proceeds. *MacArthur v. Gordon*, 5 N. Y. Supp. 513; 52 Hun (N. Y.) 615.

Upon a bill in equity brought by a residuary legatee to enjoin a testamentary from defraying certain expenses for repairs, etc., out of the residuary fund, and to recover his alleged share of such expenditure so made by the trustee for twenty-three years, and annually attested and "approved" by the legatee, the bill alleging that the complainant had given his approval of such previous accounts under a mistake as to his rights, but not suggesting that he was misled by any conduct on the part of the trustee, or that he labored under any mistake of fact, it was held that, although the will could not properly be construed to charge such expenses upon the residuary fund, the accounts were not open to revision in that regard. *Amory v. Lowell*, 104 Mass. 265.

Where the trustee of an estate held in trust has been obliged to pay taxes upon an unproductive investment received by him from his predecessor, this expense is not to be deducted from the income of other and productive investments, but may be regarded as a charge upon the principal of the unproductive investment. *Stone v. Littlefield*, 151 Mass. 485.

**Net and Gross Income.**—A testator by his will gave to his wife "the use and income" of all the residue of his estate "during her natural life," at her death "all my said estate then remaining to be divided equally between my two sisters," and appointed a trustee to hold and manage the estate during the life of his wife, "collecting the income for her so far as may be necessary to secure the same to her sole and separate use, and pay the same to her upon her sole receipt." This was held to entitle the wife to the net income only,

of the estate. *Stone v. Littlefield*, 151 Mass. 485.

Where a manufacturing establishment was held in trust, the person entitled to the present income was held to be exclusively liable for debts contracted in conducting the establishment, the estates in remainder deriving no advantage from such expenditures. *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9.

A trustee must pay assessments, interest on incumbrances, and repairs out of the income. *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

Commissions due on a trust fund should be paid out of the income, and are not chargeable on the general estate. *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129.

The person entitled to the annual income of an estate held in trust, should bear the expenditures necessary for the clothing and food of the negroes, overseer's wages, and other annual expenses of the plantation held in trust, and they are not a charge on the *corpus* of the trust estate. *Tupper v. Fuller*, 7 Rich. Eq. (S. Car.) 170.

Where trust funds of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested, either by the trustees, or at the death of the testator, in stock or shares of an incorporated company, the value of which is made up in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital, and this, as well as the par value of the shares, must be kept by the trustee untouched for the benefit of the remainder-man; but the earnings on such capital, as well as upon the par value of the shares, belong to the life tenant. And when there is a declaration of an extra dividend out of the earnings or profits of the company, such extra dividend belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the testator's death, or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital. *VanDoren v. Olden*, 19 N. J. Eq. 176; 97 Am. Dec. 650.

When funds are held in trust for the use of one person for life and to go to another in remainder, and a loss of a part of the fund occurs, arising out of the insufficient security of a particular

investment, the life tenant and remainder-man bear such loss in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it, at the time when the security is realized upon, and the amount of the loss determined. *Hagen v. Platt*, 48 N. J. Eq. 206.

Whereshares of stock are bequeathed in trust for a life tenant with remainder over, new shares and the profits thereof received by the trustees for the shares bequeathed, upon the stock of the corporation being increased, are treated as principal, not as income passing to the life tenant. *Greene v. Smith*, 17 R. I. 28.

Where a part of the original franchise and property of a corporation is sold, and the proceeds distributed among its stockholders as a dividend, this dividend, as between life tenant and remainder-man, is capital, and not income. *Vinton's Appeal*, 99 Pa. St. 434; 44 Am. Rep. 116.

The holder of the life estate may claim so much of such new stock and proceeds as represents the surplus earnings between the testator's death and the offer of new stock, but no more than the dividends duly declare. *Greene v. Smith*, 17 R. I. 28.

Certain shares of corporate stock were bequeathed in trust, to pay over the dividends of said stock to another during her life, the remainder to the trustee absolutely. Thereafter the corporation increased its capital stock to represent profits actually invested in extending and perfecting its plant, and distributed the new shares ratably among the holders of the old. It was held that the new shares represented capital, and not income; and therefore the trustee was entitled, as against the life tenant, to hold the new shares received by her, subject to the same trust as the old, and with the same right of remainder. *Gibbons v. Mahon*, 136 U. S. 549, *affirming* 4 Mackey (D. C.) 130.

The property of a corporation consisted altogether of realty; a part of it was taken by eminent domain. It was held that the compensation therefor, if distributed as a dividend to stockholders, should be chargeable as capital, not income, of a trust fund invested in the shares. *Heard v. Eldredge*, 109 Mass. 258; 12 Am. Rep. 687.

Cash dividends and all earnings are to be treated as income, not capital. *Reed v. Head*, 6 Allen (Mass.) 174; *Rand v. Hubbell*, 115 Mass. 461; 15

Am. Rep. 121; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *Ware v. McCandlish*, 11 Leigh (Va.) 623.

The rule is that corporate dividends paid out of earnings and profits, are treated as income, while what are termed stock dividends are deemed to be capital. See extended note to *Moss' Appeal*, 83 Pa. St. 264, in 24 Am. Rep. 169-172, citing *Balch v. Hallet*, 10 Gray (Mass.) 402; *Minot v. Paine*, 99 Mass. 101; 96 Am. Dec. 705; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646; *Simpson v. Moore*, 30 Barb. (N. Y.) 637; *Lord v. Brooks*, 52 N. H. 72; *Earp's Appeal*, 28 Pa. St. 368; *Hooper v. Rossiter*, 1 McClel. 527; *In re Barton's Trust*, L. R., 5 Eq. 238.

In *Rand v. Hubbell*, 115 Mass. 461; 15 Am. Rep. 121, the court, by Gray, C. J., said: "Money earned by a corporation is corporate property, and not the separate property of the stockholders, unless and until distributed among them by the corporation. In the absence of any restraining statute, the corporation may treat it and deal with it, either as an increase of its business, or as profits of its business. So long as the corporation holds it as part of the corporate property, it is capital of the corporation, and the interest therein, represented by each share, is capital and not income of that share, as between the tenant for life and remainder-man, legal or equitable, thereof. When a distribution of such earnings is made by the corporation among its shareholders, the question whether such distribution is an apportionment of additional stock, or a division of profits, depends upon the substance and intent of the action of the corporation, as shown by its votes."

Money paid to compensate a corporation, whose property consisted of a wharf and dock, for part of its real estate taken by right of eminent domain, if distributed as dividend to the shareholders, belongs to the capital, and not to the income of the trust funds invested in the shares. *Heard v. Eldredge*, 109 Mass. 258; 12 Am. Rep. 687.

In *Van Doren v. Olden*, 19 N. J. Eq. 176; 97 Am. Dec. 650, the court, by *Zabriskie, Ch.*, after discussing a number of authorities in point, announced the rule to be, that, "Where trust funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon

the death of the life tenant, are invested either by the trustee, or at the death of the testator, in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital; that this, as well as the par value of the shares, must be kept by the trustee intact for the benefit of the remainder-man; but the earnings on such capital, as well as on the par value of the shares, belongs to the life tenant. When an extra dividend is declared out of the earnings or profits of such company, such extra dividend belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator, or at the time of the investment if made since his death; in which case, so much must be considered as part of the capital."

In *Hartley v. Allen*, 4 Jur. N. S. 500, a large sum of money, the proceeds which a corporation had derived from the sale of new shares of stock issued by it, was ordered to be divided ratably among the stockholders. It was held that the life tenant of certain of the old shares was not entitled to any part thereof. And in *Brander v. Brander*, 4 Ves. 800, a dividend of the surplus capital or reserve profit of the bank, ordered by the company to be divided ratably among the stockholders, was not treated as a part of the *corpus* in which the life tenant took no interest.

See also *Hooper v. Rossiter*, 13 Price 774; *Maclaren v. Stainton*, 3 De G. F. & J. 202; *Nicholson v. Nicholson*, 9 W. R. 676; *Woodruff's Case*, 1 Tuck. (N. Y.) 58; *Atkins v. Albree*, 12 Allen (Mass.) 359; *Emery v. Wason*, 107 Mass. 507; *Billings v. Billings*, 110 Mass. 225.

In *Balch v. Hallet*, 10 Gray (Mass.) 402, the court, by *Bigelow, J.*, said: "There can be no doubt of the general rule of law, applicable to trust estates, that when a dividend is declared and paid to trustees on funds in their hands derived from the sale of trust property, by which the principal fund is impaired or diminished, or where moneys are received as the proceeds of what are termed wasting securities, such as leasehold estates, which in progress of time will expire or perish or become of greatly diminished value, if the funds are held on a trust by which

(4) *Disbursements and Allowances*.—All reasonable and necessary expenses and disbursements, and advancements to the *cestui*

the income is to be paid for life to certain persons, and on their deaths the remainder is given to other persons, it will be the duty of the trustees to add such dividends or moneys to the principal fund so as to preserve it unimpaired for those entitled to the remainder."

*Citing Paris v. Paris*, 10 Ves. 185; *Howe v. Dartmouth*, 7 Ves. 151; *Mills v. Mills*, 7 Sim. 509; *Hill on Trustees* (3d Am. ed.) 386, 432. And further, in the same opinion, the court says: "In the absence of any facts showing that the dividends in question were a part of the capital of the corporation, or that the payment of them essentially impaired or diminished the value of the shares, they are to be taken as part of the revenue or profits to which the *cestuis que trustent* for life are entitled."

An extra dividend of an accumulated surplus in a bank was declared payable either in money or new stock; a testamentary, having invested in the stock of the bank, took the stock. It was held that the payment was a dividend and belonged to the life interest in the trust fund, but that so much should be retained out of the dividend and added to the fund as would make the market value of the stock equal to its market value at the time of the original investment by the trustee, so that there should be no diminution in the amount invested. *Simpson v. Moore*, 30 Barb. (N. Y.) 637.

In *Wiltbank's Appeal*, 64 Pa. St. 256; 3 Am. Rep. 585, the will created a trust, the capital consisting of stock in two corporations. These corporations thereafter issued new stock to be taken by the stockholders, and the testamentary trustees sold the right to subscribe for stock in one company, and bought stock with their own money in the other company, selling it afterwards at an advance. It was held that the profits belonged to the income, and not to the capital of the trust. See also *Moss' Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164, and note on page 169.

It becomes the trustee's duty, immediately upon the death of a life tenant, to file an account, the expense to be paid out of the *corpus* of the estate, and not from the income. *Peterson's Estate*, 14 Phila. (Pa.) 268.

The cost of administering a trust is properly charged to the *corpus* of the

estate, instead of to the life interest, where the expense is incurred in ascertaining the amount of the *corpus*. *Matter of Reynolds*, 3 Dem. (N. Y.) 82.

Where a trustee, during the lifetime of the *cestui*, has neglected to deduct from the income of the fund, for his services, and for counsel fees, incurred when he was appointed trustee, he cannot, after the termination of the trust, charge the remainder-man therefor. *Parker v. Ames*, 121 Mass. 220.

Commissions paid to brokers for bonds as an investment of a fund held in trust to pay over the income, after deducting all proper expenses, by trustees authorized to make and change the investments, will be charged to the income of the fund. *Heard v. Eldredge*, 109 Mass. 258; 12 Am. Rep. 687.

Circumstances sufficient to render legacy taxes, also costs of a suit brought to affirm a compromise between legatees and an executor, and of a suit by trustees for instructions, chargeable to the capital of the trust fund and not to the income were considered in *Howland v. Green*, 108 Mass. 283.

Certain property was devised in trust for the benefit of H., and, in the event of his death during minority, for the heirs of N., the will directing that "such portion of the estate as may be necessary shall be expended in the education and support of H." It was held that H. should not be permitted to be deprived of a proper allowance for maintenance and education, in order to enhance the contingent estate for the benefit of the heirs of N.; nor would it permit the property to be wasted on H., without regard to the contingent rights of the heirs of N. *Curtis v. Smith*, 6 Blatchf. (U. S.) 537.

A conveyed land and slaves in trust for the support of himself and wife, and their children and family, during the lives of A and his wife, and the life of the survivor, with full power to the trustee to control the estate, and sell any part thereof to pay the debts of A, due at the date of the conveyance. Within seven months A incurred a debt for goods equal in amount to the whole annual value of the trust estate. It was held that such debt was not chargeable by a court of chancery on the prospective profits of the estate, so as to deprive A's wife and children of their support;



*que trust*, will be allowed the trustee,<sup>1</sup> such as expenses incurred

and that the trustee could not pledge such profits, necessary for the current support of the beneficiaries, for a debt, even if contracted by himself for their past support, and much less for a debt contracted by one of the *cestuis que trustent* without his knowledge or approval. *Markham v. Guérant*, 4 Leigh (Va.) 279.

1. Flint on Trusts, §§ 338, 339. See *Wade v. Pope*, 44 Ala. 690; *Cleveland v. Pollard*, 37 Ala. 556; *Merritt v. Jenkins*, 17 Fla. 593; *Leonard v. Powell*, 41 Ga. 598; *Wyllie v. Collins*, 9 Ga. 223; *Norton v. Phelps*, 54 Miss. 467; *Constant v. Matteson*, 22 Ill. 546; *Higgins v. Rider*, 77 Ill. 360; *Cook v. Gillmore*, 33 Ill. App. 532; *Kingsbury v. Powers*, 131 Ill. 182; *Chapman v. Loveland*, 11 Ohio St. 214; *Clark v. Hoyt*, 8 Ired. Eq. (N. Car.) 222; *Kennedy's Appeal*, 4 Pa. St. 150; *Berryhill's Appeal*, 35 Pa. St. 245; *Rensselaer, etc., R. Co. v. Miller*, 47 Vt. 146; *Miller v. Beverleys*, 4 Hen. & M. (Va.) 415; *Balsh v. Hyham*, 2 P. Wms. 453; *Jervis v. Wolferstan*, L. R., 18 Eq. 18; *Webb v. Shaftesbury*, 7 Ves. 480; *Turner v. Corney*, 5 Beav. 515.

Where an assignee of a certificate of purchase of land from the state has been decreed to hold the patent in trust for the grantees of his assignor, and ordered to convey to them, he may properly be reimbursed for whatever expense he has been put to in procuring the patent. *Jackson v. Hyde*, 91 Cal. 463.

A trustee held a mine in trust to operate and apply the profits to his expenses and the payment of certain debts, and then reconvey to the defendant. After he had mined some \$20,000, the vein, which up to that time had been producing abundantly, suddenly ceased to yield, and in his fruitless efforts to discover the lost vein, he created an indebtedness of \$52,000. These efforts met the defendant's approval, and it was held that this expense could properly be charged upon the property, and that the defendant, having approved of the expenditure, would not be heard to complain. *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326.

Upon this subject, Pomeroy says: "The trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments

expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions, all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust." 2 Pom. Eq. Jur., § 1085, quoted in *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326. See also *Rahway Sav. Inst. v. Drake*, 25 N. J. Eq. 220.

All reasonable expenses incurred in protecting the property committed to his care, will be allowed. *Gooding v. Gibbes*, 17 How. (U. S.) 274; *Perry on Trusts*, § 478; *Williams v. Gibbes*, 20 How. (U. S.) 535.

"So they have a right to protect it from indirect and probable injuries." *Perry on Trusts*, § 478, citing *Bright v. North*, 2 Phill. 220; *Queen v. Norfolk Com'rs*, 15 Q. B. 549; *Atty. Gen'l v. Andrews*, 2 Mac. & G. 225; *Atty. Gen'l v. Eastlake*, 11 Hare 205.

Necessaries furnished for the support of minor *cestuis que trustent* will be allowed him. *Burroughs v. Bunnell*, 70 Md. 18.

A direction to board and educate minor children authorizes disbursements for their clothing where no other provision has been made for their support. *Hardy v. Park*, 28 Ga. 369.

Where a will conferred upon trustees a discretion in applying money to the support of the testator's children, the trustees may be compelled to pay for the necessary medical services rendered to one of the children, if their refusal has not been actuated by a fair and proper exercise of their discretion. *Pole v. Pietsch*, 61 Md. 570.

**Compensation for Services of a Third Person.**—The supreme court has power, independent of statutory provisions, to award compensation out of a trust fund for services resulting in advantage to the trust estate, even though they were not rendered at the instance of the trustee. *Matter of Holden*, 12 N. Y. Supp. 842; 58 Hun (N. Y.) 611.

As to an allowance for the services of an auctioneer, the trustee must pay for such services, unless the necessity for the employment is established. *Ingham v. Lindemann*, 37 Ohio St. 218.

**Purchase of Outstanding Title.**—Money advanced to buy in an outstanding title for the benefit of the trust will

by him in the acquisition of trust property,<sup>1</sup> counsel fees,<sup>2</sup> court costs, and expenses in all suits and proceedings properly brought by

be refunded. *King v. Cushman*, 41 Ill. 31; 89 Am. Dec. 366; *Wagenseller v. Prettyman*, 7 Ill. App. 192.

**Removal of Incumbrances.**—See *Harrison v. Mock*, 16 Ala. 616; *Freeman v. Tompkins*, 1 Strobb. Eq. (S. Car.) 53.

**Interest on Moneys Advanced.**—Interest will be allowed or withheld in the discretion of the court. *Turner v. Turner*, 44 Ark. 25. Interest allowable, *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488; 2 Am. Dec. 469.

**But Not if Unauthorized.**—See *Tracy v. Gravois R. Co.*, 84 Mo. 210. Trustees of an unincorporated land company cannot be allowed for expenditures made by them without authority from the company, although the value of the land has been greatly enhanced thereby. *McKinley v. Irvine*, 13 Ala. 681.

One who holds real estate in trust for a man and his wife and children has no lien thereon as against the wife for the husband's liabilities, which the trustee had assumed without the consent of the wife. *Raybold v. Raybold*, 20 Pa. St. 308.

Where the trustee expends without authority, the *cestui que trust* has the option of taking or refusing the benefit or loss of the trustee's unauthorized act. *Harrison v. Harrison*, 2 Atk. 120; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27; 7 Am. Dec. 475.

**Or Unnecessary.**—Where a trustee of property to secure a debt has, at the creditor's request, made a sale of the property, and gone to expenses therein, when in fact the debt was promptly paid, and such proceedings were wholly needless, he must look for reimbursement to the creditor. *Wetmore v. Brown*, 37 Barb. (N. Y.) 133.

1. *Jackson v. Hyde*, 91 Cal. 463; *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362; 43 Am. Dec. 132.

Where a suit was instituted for the enforcement of a trust arising upon a sale of distillery property to one of the sureties upon the owner's government bonds, and for a division of the proceeds alleged to be in the hands of the trustee, it was held that from the amount charged him he was entitled to deduct what he had paid out to procure the title to the trust property. *Wagenseller v. Prettyman*, 7 Ill. App. 192.

2. **Counsel Fees.**—*Burr v. McEwen*,

(U. S.) 154; *Dow v. Memphis*, etc., R. Co., 23 Blatchf. (U. S.) 84; *Grimball v. Cruse*, 70 Ala. 534; *Clark v. Anderson*, 13 Bush (Ky.) 111; *Brady v. Dilley*, 27 Md. 570; *Downing v. Marshall*, 37 N. Y. 380; *Wetmore v. Parker*, 52 N. Y. 450; *Cherry v. Jarratt*, 25 Miss. 221; *Shirley v. Shattuck*, 28 Miss. 26; *Perrine v. Newell*, 49 N. J. Eq. 57; *Woodruff v. New York*, etc., R. Co., 129 N. Y. 27; *Heckert's Appeal*, 24 Pa. St. 482; *Biddle's Appeal*, 83 Pa. St. 340; 24 Am. Rep. 183; *Ingham v. Lindemann*, 37 Ohio St. 218; *Wilson's Appeal*, 41 Pa. St. 94; *McElhenny's Appeal*, 46 Pa. St. 347; *Perkins' Appeal*, 108 Pa. St. 314; 56 Am. Rep. 208; *Walker's Appeal*, 140 Pa. St. 124; *Williams v. Smith*, 10 R. I. 280; *Towle v. Mack*, 2 Vt. 19; *Vaccaro v. Cecalla*, 89 Tenn. 63; *Chamberlin v. Estey*, 55 Vt. 378. Compare *Chemical Co. v. Johnson*, 101 N. Car. 223.

A trustee may be allowed counsel fees to defend the suit brought against him by the *cestui que trust* to have the settlements surcharged and corrected, even though his accounts are to some extent successfully attacked, and this, though the *cestui que trust* employed counsel to represent the whole interest. *Clark v. Anderson*, 13 Bush (Ky.) 111.

Where a trustee makes a proper and reasonable expenditure for counsel in the execution of his trust, he should be allowed therefor. *Jones v. Stockett*, 2 Bland (Md.) 409; *Green v. Putney*, 1 Md. Ch. 262.

A reasonable amount will be allowed by the court for solicitor's fees, due for services in a proceeding against the administrator of the old trustee, made necessary by the omission of their intestate; but such fee will not be deducted from the commissions allowed to the old trustee. *Bentley v. Shreve*, 2 Md. Ch. 215.

Trustees are allowed counsel fees, but counsel fees will not be allowed a stakeholder out of the funds in his hands. *Ohio Co. v. Winn*, 4 Md. Ch. 253. A trustee was allowed attorney's fees of \$20 and \$150, upon the existence of evidence that they were fair and reasonable and that they were necessary to the proper discharge of the trust, and where there was an express provision in the trust to allow the trustee all just and

the trustee, or the defense of which was required by the best interests of the trust,<sup>1</sup> commissions paid to rental agents for the collec-

reasonable expenses. *Brady v. Dilley*, 27 Md. 570.

In *Randall v. Dasenbury*, 79 N. Y. Super. Ct. 174, the trustee had no funds on hand, and services had to be performed either for obtaining possession, or for the preservation of the trust property, and it was held that he might enter into a contract for the performance of these services, not on his personal responsibility, but solely on the faith and credit of the trust property, so that the payment thereof should be contingent on success and be made out of the trust property.

Whether he will be allowed for his own services rendered to the trust as attorney is a question. Such an allowance was made in the following cases: *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373; *Perkins' Appeal*, 108 Pa. St. 314; 56 Am. Rep. 208; *Babcock v. Hubbard*, 56 Conn. 284. And denied in *Perry on Trusts*, § 904. See *Mayer v. Galluchat*, 6 Rich. Eq. (S. Car.) 1; *Binsse v. Paige*, 1 Abb. App. Dec. (N. Y.) 138; *Cook v. Gilmore*, 133 Ill. 139; *Jenkins v. Fickling*, 4 Desaus. Eq. (S. Car.) 369; *Edmonds v. Crenshaw*, Harp. Eq. (S. Car.) 232; *New v. Jones*, 1 H. & Tw. 632; *Broughton v. Broughton*, 2 S. & G. 422; *Lincoln v. Winsor*, 9 Hare 158; *Collins v. Carey*, 2 Beav. 129; *Bainbridge v. Blair*, 8 Beav. 588; *Todd v. Wilson*, 9 Beav. 486; *Christophers v. White*, 10 Beav. 523; *Selatter v. Cottam*, 3 Jur. N. S. 630; *Mathison v. Clarke*, 3 Drew. 3; *In re Taylor*, 18 Beav. 165.

It has even been held that counsel fees will not be allowed to the partner of the trustee or to his legal firm unless the trustee be expressly excluded from participation in the compensation. *Collins v. Carey*, 2 Beav. 128; *Lincoln v. Winsor*, 9 Hare 158; *Christophers v. White*, 10 Beav. 523; *Lyon v. Baker*, 5 De G. & S. 622; *Clack v. Carlon*, 7 Jur. N. S. 441; *Burge v. Brutton*, 2 Hare 373.

A person to whom a mortgage has been made as trustee for another person has no right, on the distribution of the proceeds on foreclosure, to be paid out of such proceeds any sum as counsel fees for services rendered in resisting the exceptions to the sale. *Mahoney v. Mackubin*, 54 Md. 268.

But he will not be allowed for serv-

ices rendered in a suit which might have been avoided. *Page v. Boynton*, 63 N. H. 190; *Beatty v. Clark*, 20 Cal. 11; *Holcombe v. Holcombe*, 13 N. J. Eq. 415. Nor for attorney's fees needlessly incurred.

A trustee will not be allowed for compensation paid to an attorney out of the trust fund, for services which the trustee should have performed himself; nor for services rendered in a suit brought by the trustee improvidently, or for his own protection. *Vaccaro v. Cicalla*, 89 Tenn. 63.

In *Holcombe v. Holcombe*, 13 N. J. Eq. 415, the court, by Green, Ch., said: "There is nothing in the account to require or justify the services of counsel or attorney. A trustee has no right to subject the trust fund unnecessarily to charges for counsel and attorney's fees. Where the services of counsel are required, some discretion must be allowed the trustee as to the amount of compensation; but the mere fact that a trustee has paid fees to an attorney or counsel will not of itself be a warrant for the allowance, especially where it is obvious that there could be no occasion for their services."

1. **Costs and Expenses.**—Trustees, etc., *v. Greenough*, 105 U. S. 527; *Fleming v. Wilson*, 6 Bush (Ky.) 610; *Lape v. Jones* (Ky. 1891), 15 S. W. Rep. 658; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *Parsons v. Winslow*, 16 Mass. 361; *Woodruff v. New York, etc., R. Co.*, 129 N. Y. 27; *Chamberlin v. Estey*, 55 Vt. 378.

A trustee is to be allowed costs and expenses of suits and arbitrations, expended in good faith in the concern of the trust, but not those incurred after the surrender of the trust has been called for by the *cestui que trust* and he has refused. *Towle v. Mack*, 2 Vt. 19.

Where the trustee appeals from the decree in a suit brought by him to construe the trust, he cannot charge his expenses in the transaction of such appeal to the trust fund. *Sherman v. Leman*, 137 Ill. 94. His own carelessness or neglect in the institution of needless litigation in the defense of valid suits against the trust will throw on him the penalty of personal liability for the costs incurred. *Caffrey v. Darby*, 6 Ves. 497; *Peers v. Ceeley*, 15

tion of rents of the trust estate,<sup>1</sup> whatever expense he has been put to to protect the property from liens,<sup>2</sup> waste, or destruction,<sup>3</sup> and the cost of preparing the account, where the services of an accountant were required.<sup>4</sup> If he has to advance money to the estate to pay its debts, or to meet its necessary expenses, he is entitled to reimbursement<sup>5</sup> with interest.<sup>6</sup> Ordinarily, he will be allowed nothing for improvements, unless the power to make improvements be clearly conferred by the trust instrument, and the

Beav. 209; *Leedham v. Chawner*, 1 K. & J. 458.

1. *Garvey v. Owens*, 12 N. Y. Supp. 349; 58 Hun (N. Y.) 609.

2. See *supra*, this title, *Possession and Safe Keeping—Protection and Preservation*; *Babcock v. Hubbard*, 56 Conn. 284.

Money advanced by a trustee for the purchase in of an outstanding title, would be, independent of any covenant, considered by a court of equity as an advance for the benefit of the *cestui que trust*, and not for his own use, giving him a lien on the property, until he has reimbursed the advancement. *King v. Cushman*, 41 Ill. 31; 89 Am. Dec. 366.

A trustee who, after accepting the trust in good faith, pays off executions which create a lien on the trust estate, should be reimbursed the full amount of such payments, but he cannot be allowed to avail himself of executions thus purchased to sell the trust effects. *Harrison v. Mock*, 16 Ala. 616.

Where the record title of land is in one who holds merely as a trustee, and his personal representatives pay off a mortgage on the land in ignorance of the trust deed and in order to protect the property, the amount of such payment is properly deducted from the amount of rents and profits due the beneficiary. *Garvey v. New York L. Ins., etc., Co.*, 7 N. Y. Supp. 818; 54 Hun (N. Y.) 637.

**Such as Tax Liens.**—*Garvey v. Owens*, 12 N. Y. Supp. 349; 58 Hun (N. Y.) 609; *Merritt v. Jenkins*, 17 Fla. 593; *Ex p. Bailey*, 13 R. I. 543; *Fischbeck v. Gross*, 112 Ill. 208. See also *Fisk v. Brunette*, 30 Wis. 102; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74. *Compare Smith v. Thomas*, 8 Baxt. (Tenn.) 417. And he may even pay taxes out of the corpus of the fund where it has not yielded income sufficient to do so. *Patterson v. Johnson*, 113 Ill. 559. But *compare Booth v. Ammerman*, 4 Bradf. (N. Y.) 129.

If he holds the legal title to land for

another and as security for money advanced, and buys in tax certificates, which he may purchase against the land, he holds these also in trust, and as against the beneficiary he is entitled to nothing more than the legal rate of interest on what he has expended; the excess of interest goes to the beneficiary as part of the trust fund. *Fisk v. Brunette*, 30 Wis. 102.

3. *Constant v. Matteson*, 22 Ill. 546; *Cook v. Gilmore*, 133 Ill. 139; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Perrine v. Newell*, 49 N. J. Eq. 57. In the first case, the court said: "It is his duty to take all reasonable care of the property, and, when necessary for its preservation, he may expend reasonable sums of money, or employ agents for the purpose, and so far as such outlays are necessary, he is entitled to have them refunded. But even in this, courts will guard the fund with jealous care and be vigilant to prevent the fund from being wasted."

On a decree for an accounting of rents, expenses incurred for repairs are a proper allowance where the repairs were necessary to the full enjoyment of the premises, and without them it would have been impossible to rent the same. *Garvey v. Owens*, 12 N. Y. Supp. 349; 58 Hun (N. Y.) 609.

It was held in *Perrine v. Newell*, 49 N. J. Eq. 57, that the trustees were entitled to reimbursement for all proper expenditures made for taxes, insurance, repairs, seed, fertilizers, expense of accounting, counsel fees, and interest upon all advances made.

See *supra*, this title, *Protection and Preservation—Repairs—Waste*.

4. *Kingsbury v. Powers*, 131 Ill. 182; *Perrine v. Newell*, 49 N. J. Eq. 57; *Yoder's Appeal*, 45 Pa. St. 394.

5. *Carpenter's Appeal*, 2 Grant Cas. (Pa.) 381; *Altimus v. Elliott*, 2 Pa. St. 62.

6. *Perrine v. Newell*, 49 N. J. Eq. 57; *Cook v. Lowry*, 29 Hun (N. Y.) 20; *Carpenter's Appeal*, 2 Grant Cas. (Pa.)

improvements charged for be made in good faith, and for the best interest of the estate.<sup>1</sup>

(5) *Lien for Reimbursement*.—For all proper disbursements and advancements made, the trustee holds a lien upon the trust property for his reimbursement,<sup>2</sup> as also, no doubt, for his own com-

381; *Ditwarth v. Sinderling*, 1 Binn. (Pa.) 488; 2 Am. Dec. 469; *Jenckes v. Cook*, 10 R. I. 215.

1. *Improvements*.—*Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. (N. Y.) 34; *Ames v. Downing*, 1 Bradf. (N. Y.) 321; *Wykoff v. Wykoff*, 3 W. & S. (Pa.) 481.

A trustee will not be reimbursed for improvements on land of which he has tortiously retained possession; but he is not to be charged an increased rent because of them. *Tatum v. McLellan*, 56 Miss. 352.

A trustee is not entitled to be allowed for improvements upon the trust estate, as in building, etc., though made in good faith, if such expenses are not within the purview of the trust. Only reasonable expenditures for repairs can be recovered by him. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27; 7 Am. Dec. 475.

The testator's widow, a testamentary trustee, who is authorized and directed to keep his estate together in her possession, and to apply the rents and profits to the support of herself and her children, until the youngest shall attain its majority, with the power to sell and reinvest in other property, cannot erect permanent improvements on a vacant lot, to the extent of four times its value. *Dickinson v. Conniff*, 65 Ala. 581.

A guardian who has erected buildings on his ward's land, without authority, will not be reimbursed. *Payne v. Stone*, 7 Smed. & M. (Miss.) 367; *Haggerty v. McCanna*, 25 N. J. Eq. 51; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293; *Hassard v. Rowe*, 11 Barb. (N. Y.) 24.

The cost of improvements intended partly as a gift and partly in return for the trustee's other obligations to his beneficiary, will not be repaid. *Thompson v. Thompson*, 16 Wis. 91.

Where a party tortiously retains the title to property which he knows he ought to convey to another, he is not to be compensated for improvements made thereon while he so retains the title; but those who improve in good

faith, believing that their title is good, may enforce such claims for improvements. *Thompson v. Thompson*, 16 Wis. 91.

In *Williams v. Smith*, 10 R. I. 280, Smith held certain real estate in trust to pay rents and profits to Williams for life, and on his death to convey the fee to Williams' children. Williams assigned to Smith for the benefit of his creditors, a building erected thereon which was free from the trust, and upon its destruction, Smith rebuilt. It was held that Smith could not charge the trust estate with the expense of rebuilding, but might remove the building therefrom before conveying the estate to Williams' children.

*Exceptions*.—But compare *Spindler v. Atkinson*, 3 Md. 409; 56 Am. Dec. 755.

A trustee to whom there was a devise in trust for his children, was allowed the value of all his valuable and necessary improvements upon the premises, to the extent of the money, or value of the labor, actually used in the improvements. *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; 16 Am. Dec. 648.

The cost of improvements erected on a trust estate, in reliance on the estate, and followed by a promise of the trustee to pay for them, is properly chargeable against the trust property. *Field v. Wilbur*, 49 Vt. 157.

A mine was conveyed to a trustee to operate, and apply the profits to its expenses and the payment of certain debts, and then to reconvey to the defendant. After the trustee had mined some \$20,000, the vein, which had been yielding abundantly, suddenly failed, and in fruitless efforts to find the lost vein, \$52,000 indebtedness was incurred. These efforts were all approved by the defendant. It was held that it was proper to charge these expenses upon the property, under the terms of the declaration of trust, and that the defendant, having approved of such expenditures, could not complain. *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326.

2. *Hewitt v. Phelps*, 105 U. S. 393; *Jones v. Dawson*, 19 Ala. 672; *Dickinson*

pensation. And he may retain out of the income sufficient money to reimburse himself, or he may hold possession of the estate until he is reimbursed.<sup>1</sup> Where he has paid off outstanding incumbrances, he will be subrogated to the rights of the holders thereof, and may retain incumbrance, as, for example, a mortgage, to secure his advancements,<sup>2</sup> or he may retain possession of the *corpus* until he has been repaid.<sup>3</sup>

As between himself and a purchaser of the trust property, the trustee may forfeit his lien by voluntarily yielding possession of the property.<sup>4</sup>

(6) *Interest*.—A trustee who exercises diligence and good faith in the custody of the trust funds, is not chargeable with interest unless he has used them for his own profit,<sup>5</sup> or has invested them

son v. Conniff, 65 Ala. 581; Bradbury v. Birchmore, 117 Mass. 569; Johnston v. Fletcher, 32 Ill. App. 589; King v. Cushman, 41 Ill. 31; 89 Am. Dec. 366; Johnson v. Leman, 131 Ill. 609; 19 Am. St. Rep. 63; Smith v. Walker, 49 Iowa 293; Fearn v. Mayers, 53 Miss. 458; Mulford v. Minch, 11 N. J. Eq. 16; 64 Am. Dec. 472; Ferry v. Laible, 27 N. J. Eq. 146; Green v. Winter, 1 Johns. Ch. (N. Y.) 27; 7 Am. Dec. 475; Murray v. DeRottenham, 6 Johns. Ch. (N. Y.) 52; Noyes v. Blakeman, 6 N. Y. 567; Randall v. Dusenbury, 39 N. Y. Super. Ct. 174; 63 N. Y. 645; Stanton v. King, 8 Hun (N. Y.) 4; New v. Nicoll, 73 N. Y. 127; 29 Am. Rep. 111; Williams v. Smith, 10 R. I. 280; Myers v. Myers, 2 McCord Eq. (S. Car.) 214; 16 Am. Dec. 648; Rensselaer, etc., R. Co. v. Miller, 47 Vt. 146; Morison v. Morison, 7 De G. M. & G. 226; *In re* Norwich Yarn Co., 22 Beav. 143. Compare Ward v. Armstrong, 84 Ill. 151.

**Allowances Refused.**—A trustee should not be allowed for traveling expenses incurred in order to make payments to his *cestui que trust* in a neighboring city against her express remonstrances. Berryhill's Appeal, 35 Pa. St. 245.

A trust fund is not liable for services rendered in the defense of one of the trustees, against a proceeding to declare him a lunatic. Bickham v. Smith, 55 Pa. St. 335.

1. Lewin on Trusts and Trustees 640; Jones v. Dawson, 19 Ala. 672; Askew v. Myrick, 54 Ala. 31; Woodard v. Wright, 82 Cal. 202; Waters v. Waters, 1 Md. Ch. 196; *Ex p.* James, 1 D. & C. 272; Hill v. Magan, 2 Moll. 460; *Ex p.* Chippendale, 4 De G. M. & G. 19.

2. Perrine v. Newell, 49 N. J. Eq. 57; Freeman v. Tompkins, 1 Strobb. Eq.

(S. Car.) 53; Mathews v. Dragaud, 3 Desaus. Eq. (S. Car.) 25.

A trustee of real estate may, with the beneficiary's consent, take title in his own name for the purpose of securing the repayment to himself of the money advanced by him upon the contract of purchase. Stewart v. Fellows, 128 Ill. 480.

In Iredell v. Langston, 1 Dev. Eq. (N. Car.) 392, it was held that a creditor of the *cestui que trust* would not be allowed to draw the trust fund out of the hands of the trustee, without paying the debts due from the beneficiary to the trustee.

3. Matthews v. McPherson, 65 N. Car. 189; McMeekin v. Edmonds, 1 Hill Eq. (S. Car.) 288; 26 Am. Dec. 203.

A trustee who has made necessary repairs and improvements on the trust estate, this expenditure being approved by the *cestui que trust*, may hold the land on which the money was expended till the sum is repaid. Woodard v. Wright, 82 Cal. 202.

4. Johnson v. Packer, 1 Nott. & M. (S. Car.) 1.

5. Burr v. McEwen, Baldw. (U. S.) 154; Lehmann v. Rothbarth, 111 Ill. 185; Voorhees v. Stoothoff, 11 N. J. L. 145; Fulton v. Davidson, 3 Heisk. (Tenn.) 614. See also the additional cases of Gott v. State, 44 Md. 319; *In re* Hensing's Estate (Cal. 1892), 31 Pac. Rep. 578.

Upon a bill by *cestuis que trustent* against a trustee, for an account and general relief, interest may be allowed against the trustee, though not prayed for in the bill, if, under the facts disclosed, it appears equitable that it should be allowed. Glenn v. Cockey, 16 Md. 446.

An assignee, who is a member of a

so as to produce interest,<sup>1</sup> or has suffered them to lie idle when they might have been invested,<sup>2</sup> or has needlessly delayed settlement and surrender of the property.<sup>3</sup>

He is entitled to interest on all advances made by him to satisfy the debts of the estate,<sup>4</sup> but on funds in his hands at the same time, he is chargeable with interest.<sup>5</sup>

*e. COMPENSATION OF THE TRUSTEE—(1) In General.*—A different rule from that prevalent in *England* prevails in the *United States* with reference to the compensation of trustees for their services in the conduct of the trust. Under the English practice,

private banking firm, deposits with them the trust fund, distinct from his own money, and draws no interest on such deposit. The fact that, as a member of the banking firm, he may receive a profit from the use of such deposits generally does not make him liable for interest on the fund. He is not bound to invest the trust fund. *Hess's Estate*, 68 Pa. St. 454.

Where personal property has come into the hands of a testamentary trustee, and there is no evidence showing that he had sold it or converted it to his own use, it is error to charge him with interest in his final account on the value of the property from the time it came into his hands. *Reading F. Ins. Co.'s Appeal*, 125 Pa. St. 164.

1. *Interest.*—A trustee who has collected from the executors interest upon the legacy from the time of the testator's death must pay it over to the trust estate. *Foscue v. Lyon*, 55 Ala. 440.

Where the account of a trustee extends over a number of years, and the legal rate of interest has meanwhile been changed, that charged in the account should conform to the fluctuations in the legal rate. *Gilmore v. Tuttle*, 34 N. J. Eq. 45.

The *cestui que trust* will get the benefit of all profits accruing from money lent on usurious interest by the trustee. *Barney v. Saunders*, 16 How. (U. S.) 535.

2. *Tew v. Winterton*, 1 Ves. Jr. 452; *Plety v. Stace*, 4 Ves. 619; *Pocock v. Reddington*, 5 Ves. 799; *Roche v. Hart*, 11 Ves. 58; *Bates v. Scales*, 12 Ves. 402; *Forbes v. Ross*, 2 Cox 113; *Tebbs v. Carpenter*, 1 Madd. 290; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Andrew v. Schmit*, 64 Wis. 664.

A trustee who is found to have little or no money on hand at the time when his report shows that he held a large amount of the trust fund, is accountable for interest on such fund, even though

his report states that he was unable to invest it. *Lehmann v. Rothbarth*, 111 Ill. 185.

3. *Royall v. McKenzie*, 25 Ala. 363; *Jenkins v. Doolittle*, 69 Ill. 415.

A decedent devised his daughter's portion of his estate to executors, as trustees, the income to be paid to his daughter. One of the trustees accepted the trust, but afterwards resigned, no order of discharge being entered. The daughter brought suit to declare the trust discharged, and for a payment of the trust fund to her. It was held that the trust would not be discharged, and that the original trustee should account to the *cestui que trust* for interest on the fund, from the date of the settlement of the estate. *Tucker v. Grundy*, 83 Ky. 540.

Where a trustee uses the trust funds, realizes a large profit, and fails to keep an exact account, or refuses to account, the court will charge him with the original fund and interest computed with annual rests. *Ogden v. Larabee*, 57 Ill. 389; *Asay v. Allen*, 124 Ill. 391.

In *Hughes v. People*, 111 Ill. 457, it was said that the law was settled where the trustee willfully violated a duty in respect to the trust estate resulting in loss, he might be charged properly with compound interest. The case was one of a guardian who objected that he should be charged only with simple interest, but the court said that, by putting out the money in the manner he did, in violation of an express provision of the statute, he placed it beyond his power to make it bring compound interest, as it would have done if it had been properly lent, and that the violation of the statute was knowingly and therefore willfully done.

4. See *supra*, this title, *Disbursements and Allowances*.

5. *Garvey v. Owens*, 12 N. Y. Supp. 349; 58 Hun (N. Y.) 609.

and under the common law, except as modified by American decisions, no allowance is made to the trustee for his time and labor,<sup>1</sup> the reason assigned being found in the familiar rule that "the trustee must make no profits out of his office."<sup>2</sup>

In the *United States*, it has been the general practice, to compensate the trustee in some form for services actually rendered.<sup>3</sup>

1. See the notes on the subject of compensation of trustees in 17 Am. Dec. 266.

No compensation is allowed trustees under the English practice. Perry on Trusts, § 904; Flint on Trusts and Trustees, § 337; Bonithon v. Hockmore, 1 Vern. 316; Moore v. Frowd, 3 Myl. & C. 50; Charitable Corp. v. Sutton, 2 Atk. 406; Ayliffe v. Murray, 2 Atk. 58; Robinson v. Pitt, 3 P. Wms. 251; 2 Ld. Cas. in Eq. 238 and note; *In re Ormsby*, 1 B. & B. 189; Kendall v. New England Carpet Co., 13 Conn. 383.

Although a *per diem* is sometimes allowed them and termed an "indemnity." See Ringgold v. Ringgold, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250.

2. Compensation.—See Perry on Trusts, § 904, citing Moore v. Frowd, 3 Myl. & C. 50; Burton v. Wookey, 6 Madd. 368; Hamilton v. Wright, 9 Cl. & F. 111. See also Hough v. Harvey, 71 Ill. 72.

3. Compensation Is Allowable.—See Barney v. Saunders, 16 How. (U. S.) 535; Spence v. Whitaker, 3 Port. (Ala.) 327; Phillips v. Thompson, 9 Port. (Ala.) 667; Benford v. Daniels, 13 Ala. 667; Bethea v. McColl, 5 Ala. 314; Grimbail v. Cruse, 70 Ala. 534; Clark v. Platt, 30 Conn. 282; Muscotee Lumber Co. v. Hyer, 18 Fla. 698; 43 Am. Rep. 332; Lowe v. Morris, 13 Ga. 165; Phillips v. Bustard, 1 B. Mon. (Ky.) 348; Winder v. Diffenderffer, 2 Bland (Md.) 166; Widener v. Fay, 51 Md. 273; Longley v. Hall, 11 Pick. (Mass.) 124; Urann v. Coates, 117 Mass. 41; Schwarz v. Wendell, Walk. (Mich.) 267; Barnebee v. Beckley, 43 Mich. 613; Clark v. Hoyt, 8 Ired. Eq. (N. Car.) 222; Boyd v. Hawkins, 2 Dev. Eq. (N. Car.) 329; Royster v. Johnson, 73 N. Car. 474; Morris v. Harris, 19 Ohio St. 15; Kinney v. Heatley, 13 Oregon 35; Spangler's Estate, 21 Pa. St. 335; Heckert's Appeal, 24 Pa. St. 482; Lane's Appeal, 24 Pa. St. 487; Hubbard v. Fisher, 25 Vt. 539; 2 Kelly's Rev. Stat. (W. Va. 1879) 625, ch. 92, § 18. And see note, 17 Am. Dec. 266.

Where a *cestui que trust* has faithfully and skillfully managed the trust fund, he should be liberally compensated. Fleming v. Wilson, 6 Bush (Ky.) 610.

In Sollee v. Croft, 9 Rich. Eq. (S. Car.) 474, a *South Carolina* trustee was compensated for his personal services in going to *Alabama* to see after and secure the trust property.

Under the *Georgia* Act of 1764, every fiduciary should be compensated for his services in such trust. Burney v. Spear, 78 Ga. 223.

A trust deed by a railroad company provided that upon a sale of trust property by the trustee, he should, after paying the costs and expenses of the sale and of this trust, pay to the holders of the bond secured thereby, the amount so held by them out of the proceeds of the sale. If the trustee performed services in executing the bonds, etc., for which he was entitled to compensation, his compensation for these services should be paid in preference to the bondholders secured by the deed. Smith v. Washington City, etc., 33 Gratt. (Va.) 617.

A trustee of a sum of money invested on bond and mortgage by a testatrix and bequeathed to her two sons on their reaching the age of twenty-one years, meanwhile to be applied for their use and benefit, should have a reasonable commission on the principal of the trust on the settlement of his accounts, where the bequest was not a specific gift of one-half the mortgage, and there was no obligation on the part of the legatees to receive the balance due on the mortgage itself. Lukens' Appeal, 47 Pa. St. 356.

A trustee should be allowed, not only a fair commission, but also actual expenses. But where a master in his report allowed the trustee nothing for his expenses, but a greater amount of commission than had been agreed upon by the parties, and, upon the whole, it appeared that the trustee had received no more than a reasonable compensation, the court refused to disturb the report. Clark v. Hoyt, 8 Ired. (N. Car.) 222.



This, in many of the states, is awarded as a commission based upon a certain fixed percentage of the amount for which the trustee has become responsible, the rate per cent. to be determined by judicial custom or legislative enactment.<sup>1</sup> In other states, an allowance is made in accordance with the chancellor's estimate of the

A father made a conveyance of land and negroes to one of his sons, to be managed under the direction of that son, in trust that he would apply the proceeds to the support of the father and his family during his father's lifetime. After his death he should sell the property and distribute the proceeds thereof among his heirs and distributees. It was held that the son was entitled to a fair compensation for his trouble in the management of the property. *Raiford v. Raiford*, 6 Ired. Eq. (N. Car.) 490.

Where it has become necessary for a trustee to engage in litigation for the settlement of the rights of different claimants to the trust property, he is entitled to compensation for any extra labor cast upon him by reason of such suit. *Grimball v. Cruse*, 70 Ala. 534.

When the trust estate is partly real and partly personal, the allowance and compensation granted should be apportioned between the two kinds of property. *Grimball v. Cruse*, 70 Ala. 534.

**1. Percentage Commission.**—A certain fixed rate of commission is awarded by way of compensation, either by custom or by statutory authority, in the following states: *Alabama, Arkansas, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia*. See Perry on Trusts, § 918 and notes; *Donelson v. Perry*, 13 Ala. 752; *Gantt's Dig.* *Arkansas St.* (1874), § 122; *Comp. Laws Arizona* (1877) 273, § 221; *Moore v. Felkel*, 7 Fla. 44; *Lowe v. Morris*, 13 Ga. 169; *Gilman v. Des Moines Valley R. Co.*, 41 Iowa 22; *Fleming v. Wilson*, 6 Bush (Ky.) 613; *Ellicott v. Ellicott*, 6 Gill & J. (Md.) 35; *Waring v. Darnall*, 10 Gill & J. (Md.) 126; *Williams v. Mosher*, 6 Gill (Md.) 454; *Denny v. Allen*, 1 Pick. (Mass.) 147; *Ellis v. Ellis*, 12 Pick. (Mass.) 178; *Dixon v. Homer*, 2 Met. (Mass.) 420; *Longley v. Hall*, 11 Pick. (Mass.) 120; *Scudder v. Crocker*, 1 Cush. (Mass.) 323; *Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 307;

*Merrill v. Moore*, 7 How. (Miss.) 292; 60 Am. Dec. 60; *Cherry v. Jarratt*, 25 Miss. 221; *Shurtleff v. Witherspoon*, 1 Smed. & M. (Miss.) 613; *Smart v. Fisher*, 7 Mo. 581; *Boyd v. Hawkins*, 2 Dev. Eq. (N. Car.) 329; *Sherrill v. Shuford*, 6 Ired. Eq. (N. Car.) 228; *Raiford v. Raiford*, 6 Ired. Eq. (N. Car.) 490; *Wendell v. French*, 19 N. H. 210; *Tuttle v. Robinson*, 33 N. H. 118; *Nixon's Digest (New Jersey)* 566, §§ 98, 99; *State Bank v. Marsh*, 1 N. J. Eq. 288; *Stretch v. Gowdey*, 3 Tenn. Ch. 565; *Granberry v. Granberry*, 1 Wash. (Va.) 246; 1 Am. Dec. 455; *Taliaferro v. Minor*, 2 Call (Va.) 197; *Kee v. Kee*, 2 Gratt. (Va.) 132; *Lyons v. Byrd*, 2 Hen. & M. (Va.) 22; *Whitehead v. Whitehead*, 85 Va. 870.

A delivered certain claims to B, for which B was to have a certain commission. Afterward A assigned the claims to B in trust, the better to enable him to collect them. B died without having collected them, and they were collected by his administratrix. It was held she was entitled to the commissions. *DePeyster v. Ferrers*, 11 Paige (N. Y.) 13.

Unless the will otherwise directs, trustees under the will, who have received commissions on the fund, should receive full actual commissions on the income. *Frame v. Willets*, 4 Den. (N. Y.) 368.

A trustee appointed to prosecute certain suits, may claim commissions on the sum received by the *cestui que trust* by way of compromise, the money being paid on the joint receipt of them. *Lainer v. Brunson*, 21 S. Car. 41.

H., after enjoying the rents and profits of certain land for years, against the claim of a judgment creditor of his grantor, was held to be a *bona fide* owner of the property. It was held, in accounting for the rents and profits, that he was entitled to commissions. *Cowing v. Howard*, 46 Barb. (N. Y.) 579.

The fact that a trustee had semi-annually for five years rendered informal accounts to the *cestui que trust*, without deducting his commissions, did not estop him from claiming them in his

final account, in the absence of any contrary agreement. *Wister's Appeal*, 86 Pa. St. 160.

When a trustee dies before completing his trust, the court will allow a reasonable compensation to his estate. *Bentley v. Shreve*, 2 Md. Ch. 215.

#### Method of Determining the Amount.

—Though receivers of insolvent corporations and partnerships have often been allowed a commission of eight per cent., yet that is not the established rule. The allowance should be according to the circumstances of each case, and the general rule in regard to trustees should be taken as a guide. *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 310.

When several sales are made at different times, the sales are not to be treated as if made at one time, and the commissions of the trustee should be calculated upon each sale separately. *Goodburn v. Stevens*, 1 Md. Ch. 420.

It was held in *Pennsylvania*, that a trustee was entitled to commissions, under the equity act of that state, which allows them to executors. *Prevost v. Gratz*, 3 Wash. (U. S.) 434; and so in *Maryland*, *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250; and *North Carolina*, *Boyd v. Hawkins*, 2 Dev. Eq. (N. Car.) 329.

In *New York*, the trustee's commissions must be based upon the value of the real estate; not on the value of the life estate therein during the continuance of which the trust is to last. *Phoenix v. Phoenix*, 28 Hun (N. Y.) 629.

A trustee who resigns for his own convenience, is not entitled to commissions upon the principal of the trust estate. He is, however, entitled to commissions upon the income. *Matter of Allen*, 29 Hun (N. Y.) 7.

In the payment of trustees, the usage which exists among factors, merchants, and others who undertake to manage the interests of others, and the highest rates at which those services are usually paid for, should be allowed to the trustee. *Barrell v. Joy*, 16 Mass. 221; *Rathburn v. Colton*, 15 Pick. (Mass.) 471.

In *New York*, trustees for the payment of debts, and in all cases of express trusts of a similar nature, should have only the same compensation for their services which is allowed by statute to executors, etc., unless there is an agreement for a different allowance. *Meacham v. Stearns*, 9 Paige (N. Y.)

398; *Woodruff v. New York, etc., R. Co.*, 129 N. Y. 27.

In computing the commissions of trustees, under a will, the principal and income are to be regarded as one fund, and if the trustees have received the five per cent. allowed by statute on \$1,000, and two and a half per cent. on \$9,000, they are entitled afterward to one per cent. only. *Matter of Schmidt*, 3 Dem. (N. Y.) 245.

A trustee is entitled to his commission upon the entire fund in his hands, even though he turns over to the beneficiaries the identical securities received by him. *Matter of Moffat*, 24 Hun (N. Y.) 325.

Where the trustee has properly administered the trust, he will be allowed a rehearing as to a decree for compensation, which was entered without permitting him to prove the value of his services. *Hodges v. McDuff*, 76 Mich. 303.

In *New York*, a trustee is entitled to the same commissions as an executor, even though nothing is said of compensation in the instrument creating the trust, and the amount of property, both real and personal, held by the trustee will be looked upon as the basis of the allowance of commissions. *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *Duffy v. Duncan*, 32 Barb. (N. Y.) 587.

Where the principal of a trust fund is less than \$100,000, it is not permissible to add the income to it in order to bring up the amount, so that the trustees under the will may have the separate commissions to which they are entitled under the *New York Code*, §§ 2736, 2811, when the fund reaches that amount. *Slosson v. Naylor*, 2 Dem. (N. Y.) 257; *Biddle's Appeal*, 83 Pa. St. 340; 24 Am. Rep. 183. See generally *Mauzy v. Chesapeake, etc., R. Co.*, 27 Gratt. (Va.) 698; *Matter of Meserole*, 36 Hun (N. Y.) 298; *Phoenix v. Livingston*, 101 N. Y. 451; *Matter of Selleck*, 111 N. Y. 284.

**Amount of Commissions Allowable.**—See generally *Whitehead v. Whitehead*, 85 Va. 870; *Palmer v. Dunham*, 52 Hun (N. Y.) 468; *Wistar's Appeal*, 125 Pa. St. 526; *Hosack v. Rogers*, 9 Paige (N. Y.) 461; *Matter of Allen*, 96 N. Y. 327; *Montgomery's Appeal*, 86 Pa. St. 230.

Where, from the nature of the trust property, the trustee is put to unusual annoyance and trouble, a fair compensation will be five per cent. on the amount

of his receipts and disbursements each. *Woodruff v. Snedecor*, 68 Ala. 437.

One per cent. on receipts and disbursements allowed to trustees for the settlement of the affairs of the United States Bank, not to exceed \$2,000 per annum to each trustee, is not unreasonable. *U. S. Bank v. Huth*, 4 B. Mon. (Ky.) 423.

Where a trustee receives money to be profitably and prudently invested, and used for the purposes of the trust, five per cent. on their disbursements, which were finally decreed to be paid by them, was held to be a reasonable compensation. *Greening v. Fox*, 12 B. Mon. (Ky.) 187.

The amount of compensation allowed to trustees varies with their skill and fidelity; and where a trust fund had been retained and used by a trustee for a number of years, under such circumstances that he was made to pay compound interest, but who had kept full and fair accounts of his receipts and disbursements, it was held that he had not forfeited all claims to commissions, as he otherwise would have done, and half the usual amount was decreed. *Difenderffer v. Winder*, 3 Gill & J. (Md.) 311.

In *Maryland*, the court of chancery will not allow a testamentary trustee more than five per cent. commission upon a sale of land, although he has retained a larger amount under the sanction of the orphans' court. *Waring v. Darnall*, 10 Gill & J. (Md.) 126.

B and C were appointed executors and trustees under the will of A. They were allowed by the auditor five per cent. commission upon certain rents of the trust estate which they had collected in person, and one-half per cent. on others, for the collection of which they had previously paid an agent seven and a half per cent., and he rejected their claim for a solicitor's fee, paid for preparing their answer in this cause. It was held that these allowances and this rejection were properly made. *Williams v. Mosher*, 6 Gill (Md.) 454.

Where an orphans' court had allowed a commission of one and a half per cent., it was held on appeal to be a fair compensation. *Luken's Appeal*, 47 Pa. St. 356.

A trustee may be entitled to compensation beyond the mere percentage payable out of the income of the trust estate. *Pedrick's Estate*, 5 Phila. (Pa.) 478.

As to the settlement of the accounts

of trustees, and the charges and compensation allowed, see *Pennell's Appeal*, 2 Pa. St. 216.

At a sale of real estate, assigned for the benefit of creditors, the assignees were allowed two and a half per cent. commissions, the purchase-money being about \$44,000, of which \$13,000 came into their hands, the residue remaining a lien, by agreement between the purchaser and the mortgagee. *Shunk's Appeal*, 2 Pa. St. 304.

Where four trustees of an estate committed the management to one of them, and his charge of five per cent. was not objected to, the amount thus charged was held a proper compensation for the services of the trustee. *Savage v. Sherman*, 24 Hun (N. Y.) 307.

Upon the death of the managing trustee, the survivors committed his duties to his son, upon an agreement for similar compensation. It was held that no additional charge could be made by the trustees. *Savage v. Sherman*, 24 Hun (N. Y.) 307.

Where property is conveyed to a creditor in trust, to be sold for the benefit of himself and other creditors, the trustee is entitled to compensation for making the sale and disposing of the proceeds, and two and a half per cent. commission is not unreasonable. *Ingram v. Kirkpatrick*, 8 Ired. Eq. (N. Car.) 62.

Where real estate was given to a trustee to sell and apply the proceeds, though the trust continued in existence for sixteen years, the allowance of five per cent. commission and one per cent. brokerage was unreasonable. *Dunal's Appeal*, 38 Pa. St. 112.

In *Turnbull v. Pomeroy*, 140 Mass. 117, the court, by Holmes, J., discusses the subject of compensation of trustees, and, citing a number of cases, says: "It is to be remembered that the English rule, refusing compensation for professional or business services which it was not the duty of the trustee to render, and for which he might have employed and paid another, is only a special application of the general rule which refuses trustees compensation for services, as such, of any kind (citing English case), a rule which does not prevail here. But when it is once admitted that a trustee may be paid for ordinary services, it is hard not to admit also that there may be circumstances under which he may be allowed an additional sum for extraordinary services which it was not his

duty to render, the allowance not standing on contract any more than in the common case, but being subject to the discretion and control of the court." Citing *Urann v. Coates*, 117 Mass. 41; *Blake v. Pegram*, 109 Mass. 541; *Bainbrigg v. Blair*, 8 Beav. 588.

A trustee is entitled to an allowance and compensation while an interpleader suit is pending, where he has not used the fund, even though he may not have paid it into court. *Daniel v. Fain*, 5 Lea (Tenn.) 258.

The question of reasonable compensation to trustees depends largely upon the circumstances of the particular case, and is not governed by any inflexible rule. *Carrier's Appeal*, 79 Pa. St. 230; *Perkins' Appeal*, 108 Pa. St. 314; 56 Am. Rep. 208.

It must be graduated according to the responsibility incurred, the amount of the estate, and the nature and extent of the services performed. *Harland's Accounts*, 5 Rawle (Pa.) 330; *Perkins' Appeal*, 108 Pa. St. 314; 56 Am. Rep. 208.

An allowance of one per cent. to trustees under a mortgage for \$2,600,000 was held to be reasonable in *Dow v. Memphis, etc., R. Co.*, 32 Fed. Rep. 185.

Five per cent. will not be allowed a trustee for simply receiving and disbursing dividends to the *cestuis que trustent*. *Turnage v. Greene*, 2 Jones Eq. (N. Car.) 63; 62 Am. Dec. 208.

For the sale of real estate, a commission of two and a half per cent. has generally been regarded as a proper one in *Pennsylvania*, for the trustee. *Carrier's Appeal*, 79 Pa. St. 230.

An allowance to executors and trustees of six per cent. commission for collecting rents of thirty-six houses, is sufficient where there appears no evidence of peculiar difficulty in the collection. *Wood's Appeal*, 86 Pa. St. 346.

The commission on the *corpus* of a trust fund of \$46,500 allowed to a trustee under the Girard will, was reduced to one and one-fourth per cent. *Hemphill's Estate*, 9 Phila. (Pa.) 486.

For the care of funds which have come into his hands as a volunteer, he will be given no commission. *Riddle v. Lewis*, 7 Bush (Ky.) 197; *Haglar v. McCombe*, 66 N. Car. 345. But compare *Carrier's Appeal*, 79 Pa. St. 230, in which a compensation of \$500 was allowed him in lieu of his claim of five per cent. on \$37,740, where the heirs on whom the real estate descended were all

*sui juris* and made a contract for its sale, and the trustee under his own advice was appointed by the orphans' court, under the act of April 18th, 1853, to make a private sale according to the contract, merely to pass the title.

**Disbursements.**—Payments over to the *cestui que trust* by a trustee, are not disbursements within the meaning of a decree allowing to the trustee commissions upon his disbursements. *Whyte v. Dimmock*, 55 Md. 452.

**Instances Where a Commission Was Refused.**—Where a portion of a trust fund was invested in a mortgage, a commission being allowed to the trustees on the investment, and the mortgage was paid, the amount to be invested in ground rents, it was held that the trustees were not entitled to a commission on the mortgage debt collected, nor on the amount reinvested in ground rents. *Jenkins v. Whyte*, 62 Md. 427.

Where a debtor conveyed to his creditor his farm, with the power to sell it and apply the proceeds to the payment of his debt and the discharge of prior liens, returning the surplus to the debtor, it was held, in the absence of any proof that the parties contemplated any remuneration for the transaction, that the creditor was not entitled to any commission therefor. *First Nat. Bank v. Owen*, 23 Iowa 185.

A will directed the executors "immediately after my death to transfer and deliver to the C. college the certificate of stock for \$166,000, in the city of C. six-per-cent. stocks, and convey, for the best price that can be obtained, said plantation, with the negroes, etc., and after deducting and retaining to their own use five per cent. on the proceeds of such sale, as well as all costs and expenses they may incur in the transaction, as compensation for their care and trouble in the premises, shall divide the net proceeds" among certain legatees. It was held that the executors should not have commissions on the stock certificate transferred to C. college. *Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 195.

The trustee of a sum of money, invested by a testator in a certain loan, should not be allowed commissions on the fund itself, where the investment continues unchanged by the trustee, but only for the interest on the loan paid in to him. *McCausland's Appeal*, 38 Pa. St. 466.

A trustee to invest moneys is not

actual value of the services, in a gross sum.<sup>1</sup> In some states no compensation is awarded.<sup>2</sup> But where compensation is claimed, it will be allowed only when the trustee can show that he has

entitled to commissions on each temporary loan he may see proper to make, unless, from the circumstances of the case, the interests of the beneficiary will be thereby enhanced. *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373.

By the terms of a deed of trust executed in 1855, provision was made for payment to the trustee of a commission on sales of land, and for the appointment by the court of a successor, upon the resignation of the trustee. The trustee resigned a year later, and the defendant was appointed to succeed him. The *cestuis que trustent*, under the original deed, sold their interests, and subsequently their vendees conveyed the land to the plaintiff in trust for themselves. By this latter conveyance, the plaintiff was authorized to sell or appoint agents for the purpose, with the power of substitution. For eleven years from the time of the original deed of trust, the defendant did nothing in relation to the trust property. From 1866 to 1874, he had charge of the property for the plaintiff's agents, and on their behalf made sales of the land. All his conveyances the plaintiff executed as trustee, sales being made in his name, and notes taken payable to him as trustee. The defendant never demanded of him any commissions. The plaintiff managed his business through agents, and was ignorant of the defendant's appointment as trustee. It was held that the defendant did not make these sales as trustee, and that accordingly he was not entitled to receive any commissions. *Lathrop v. Baubie*, 106 Mo. 470.

1. *Harris v. Martin*, 9 Ala. 899; *Gould v. Hays*, 25 Ala. 432; *Canfield v. Bostwick*, 21 Conn. 551; *Clark v. Platt*, 30 Conn. 282; *Schwarz v. Wendell*, Walk. (Mich.) 267; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Moore v. Zabriskie*, 18 N. J. Eq. 51; *Harland's Accounts*, 5 Rawle (Pa.) 323; *Kennedy's Appeal*, 4 Pa. St. 149; *McElhenny's Appeal*, 46 Pa. St. 347; *Biddle's Appeal*, 83 Pa. St. 340; 24 Am. Rep. 183; *Evarts v. Nason*, 11 Vt. 122; *Hubbard v. Fisher*, 25 Vt. 539; *Nimms v. Com.*, 4 Hen. & M. (Va.) 57; 4 Am. Dec. 488.

2. None is allowed in *Delaware*.

*State v. Platt*, 4 Harr. (Del.) 154; *Egbert v. Brooks*, 3 Harr. (Del.) 112.

Nor in *Illinois*, unless expressly agreed upon. *Cheaney v. Lafayette*, etc., R. Co., 68 Ill. 570; 18 Am. Rep. 584; *Buckingham v. Morrison*, 136 Ill. 437; *Jenkins v. Doolittle*, 69 Ill. 415; *Huggins v. Rider*, 77 Ill. 360; *Constant v. Matteson*, 22 Ill. 547; *Hough v. Harvey*, 71 Ill. 72; *Cook v. Gilmore*, 133 Ill. 139; 33 Ill. App. 532.

No compensation was allowed a trustee at common law, and could not be recovered on a *quantum meruit*; and, in *Illinois*, the president and directors of a railway company are trustees for the stockholders, and for that reason no promise will be imposed to pay them for discharging the duties implied upon persons occupying that position. *Following Cooper v. Platt*, 39 Pa. 528; *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170; *Butts v. Wood*, 37 N. Y. 317; *Cheaney v. Lafayette*, etc., R. Co., 68 Ill. 570; 18 Am. Rep. 584.

Nor in the early *Kentucky* decisions. *Hite v. Hite*, 1 B. Mon. (Ky.) 179; *Breckenridge v. Brooks*, 2 A. K. Marsh. (Ky.) 339; 12 Am. Dec. 401; *McMillen v. Scott*, 1 T. B. Mon. (Ky.) 150; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

If a trust coupled with an interest is accepted by a trustee without any stipulation as to remuneration, he is entitled to none. *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

But the English doctrine was denied in *Lane v. Coleman*, 8 B. Mon. (Ky.) 571. And see *Phillips v. Bustard*, 1 B. Mon. (Ky.) 350; *Greening v. Fox*, 12 B. Mon. (Ky.) 190; *Fleming v. Wilson*, 6 Bush (Ky.) 610.

In *New Jersey*, at first no allowance will be made to trustees for their services in the discharge of their trust, and under an order to make them a "just allowance" they are entitled only to charges and expenses. *State Bank v. Marsh*, 1 N. J. Eq. 288.

Nor under the early *North Carolina* practice. *Schaw v. Schaw*, Taylor (N. Car.) 125. But this is changed now.

Nor under the common law in the early *New York* decisions. *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 37; 7 Am. Dec. 475; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 534. But

fulfilled his duties to the trust,<sup>1</sup> and the services paid for must be only such as the instrument creating the trust will authorize.<sup>2</sup>

If he has neglected his duties, exercised bad faith in the conduct of his trust, or committed a breach of his obligation in any way, he forfeits his right to compensation.<sup>3</sup> This rule is not inflexible,

this rule was overthrown in *Meacham v. Sternes*, 9 Paige (N. Y.) 398.

Nor in *Ohio*, *Gilbert v. Sutliff*, 3 Ohio St. 129, until remedied by statute.

By a general rule of equity, compensation will be allowed a trustee only for time and expenses, unless it is stipulated by the parties to be paid. But, where the assignee of a certain manufacturing company's stock, to work it up and from the profits to indemnify himself for his responsibilities for such company, accepted the trust under an agreement with one of the partners, who was agent of the company, that he should be allowed the same compensation to which he would have been entitled had he not been the trustee, and it appeared that the business was conducted with good faith and without unnecessary delay, that his services were highly important to the company and all concerned, and without them the consequences would have been ruinous, it was held that he was entitled to certain sums charged in his account as commissions on his responsibilities, which were found to be, all things considered, only a fair compensation. *Kendall v. New England Carpet Co.*, 13 Conn. 383.

1. *Jenkins v. Doolittle*, 69 Ill. 415.

A trustee who resigns for his own convenience cannot claim compensation as of course, but may be allowed it by the court, if the court considers that he is entitled to receive it, on terms and conditions, if the court deems it proper to impose terms and conditions. *Matter of Allen*, 96 N. Y. 327.

2. A trustee can receive pay out of the trust fund for such services and disbursements only as are within the line of duties which the instrument creating the trust imposes upon him. *Tracy v. Gravois R. Co.*, 84 Mo. 210.

3. *Flagg v. Mann*, 3 Sumn. (U. S.) 84; *Barney v. Saunders*, 16 How. (U. S.) 535; *Jenkins v. Eldredge*, 3 Story (U. S.) 325; *Walker v. Beal*, 9 Wall. (U. S.) 743; *Henderson v. Sherman*, 47 Mich. 267; *Gordon v. Matthews*, 30 Md. 235; *Marcy's Account*, 24 N. J. Eq. 451; *Dufford v. Smith*, 46 N. J. Eq. 216; *Kemp v. Foster* (Mo. App.),

16 L. R. A. 42; *Polis v. Tice*, 28 N. J. Eq. 432; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Fall v. Simmons*, 6 Ga. 274; *Kenan v. Hall*, 8 Ga. 417; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *Cook v. Lowry*, 95 N. Y. 103; *Matter of Baker*, 35 Hun (N. Y.) 272; *Sherrill v. Shuford*, 6 Ired. Eq. (N. Car.) 228; *Gilbert v. Sutliff*, 3 Ohio St. 129; *Dyott's Estate*, 2 W. & S. (Pa.) 557; *Nagle's Estate*, 12 Phila. (Pa.) 25; *Berryhill's Appeal*, 35 Pa. St. 245; *Robinet's Appeal*, 36 Pa. St. 174; *Stehman's Appeal*, 5 Pa. St. 413; *Hermstead's Appeal*, 60 Pa. St. 423; *Swartzwalter's Account*, 4 Watts (Pa.) 77; *Norris' Appeal*, 71 Pa. St. 106; *Harris v. Sheldon* (Pa. 1889), 16 Atl. Rep. 828; 24 W. N. C. (Pa.) 370; *Singleton v. Lowndes*, 9 S. Car. 465; *Frazier v. Vaux*, 1 Hill Eq. (S. Car.) 203; *McCloskey v. Gleason*, 56 Vt. 264; 48 Am. Rep. 770; *Spaulding v. Wakefield*, 53 Vt. 660; 38 Am. Rep. 709; *Ward v. Funsten*, 86 Va. 359.

A trustee assuming a position hostile to the trust is not entitled to compensation from the trust fund. *Greenfield's Estate*, 24 Pa. St. 232.

A trustee failing for a long period to reinvest, as directed by the testator, the funds obtained from the sale of a trust estate, violates his duty, and forfeits his title to compensation, which is given by theory for a faithful discharge of duty. *Warbass v. Armstrong*, 10 N. J. Eq. 263.

A trustee violating his trust is not entitled to anything as such trustee, but he may be allowed compensation for any important services rendered to the *cestui que trust*. *Moore v. Zabriskie*, 18 N. J. Eq. 51.

Where services are self-imposed by the trustee and result from his own wrong, he cannot receive compensation. *Stearly's Appeal*, 38 Pa. St. 525.

The trustees of the Real Estate Bank had no power, by an order passed by themselves, to increase their compensation beyond that fixed in the instrument creating the trust, and a court of chancery will not interfere to allow extra compensation, where it appears

however.<sup>1</sup> A mere technical or trivial violation of imposed duties will not be permitted to outweigh valuable services rendered. Thus, where the trustee has faithfully discharged the trust for years, he will not forfeit his right to be paid for his time and labor by receiving small gifts from those with whom he may have had dealings,<sup>2</sup> nor by mingling the trust funds with his own.<sup>3</sup> Nor will he necessarily forfeit his commissions by irregularities that have done no harm.<sup>4</sup>

that they have not faithfully performed their duty. *Biscoe v. State*, 23 Ark. 592.

Where a creditor, having accepted a trust to provide for his own security, as well as the security of other debtors, repudiates the trust by insisting that the assignment to him was absolute, and refuses to pay other creditors out of the surplus, he will be allowed no commissions as a trustee, upon its being established by a creditor that he is a trustee. *Ireland v. Potter*, 16 Abb. Pr. (N. Y.) 218; 25 How. Pr. (N. Y.) 175.

One who turns over trust funds to a life tenant, in violation of the trust, is entitled to no commissions. *Singleton v. Lowndes*, 9 S. Car. 465.

A trustee whose conduct of the trust is vexatious to the heirs, and who delays distribution by an exorbitant claim for commissions, is not entitled to as liberal an allowance by way of compensation as one who makes a reasonable claim. *Carrier's Appeal*, 79 Pa. St. 230.

Where a trustee so violates his trust that the damage resulting to the beneficiaries exceeds the benefit derived from his services, he will be allowed no compensation. *Probate Judge v. Jackson*, 58 N. H. 458.

One in the possession of property, who is sought to be charged as trustee, and who denies the trust, claiming title as the absolute owner, cannot, upon a rendition of judgment against him, claim compensation for services in the management of the property. *Stallcup, C., dissenting*; *Pollard v. Lathrop*, 12 Colo. 171.

A trustee appointed to sell property in pursuance of a decree, cannot be deprived of his ordinary allowance for commissions and expenses accruing under the execution of the trust, on the ground of misconduct, without being notified of the charge, and without having an opportunity given him of proving his innocence. *Ellicott v. Ellicott*, 6 Gill & J. (Md.) 35.

Where a trustee succeeding another

trustee found the funds invested in a mortgage for \$2,416.66 on property, for which the mortgagor had paid \$4,000, and the land subsequently depreciated; but the trustee, on repeated inquiries, was informed by the residents in the neighborhood that it was worth \$3,000, until, on foreclosure of the mortgage, it was sold for only \$2,000, it was held that the trustee was not guilty of negligence, and should be allowed compensation for his services. *Fahnestock's Appeal*, 104 Pa. St. 46.

1. *Finch v. Ragland*, 2 Dev. Eq. (N. Car.) 137; *Gee v. Hicks*, Rich. Eq. Cas. (S. Car.) 5; *Kee v. Kee*, 2 Gratt. (Va.) 116; *Myers' Appeal*, 62 Pa. St. 104.

2. *Jacobus v. Munn*, 37 N. J. Eq. 48. In this case, a testamentary trustee had for thirty years the sole management of a large amount of real estate, involving great responsibility and care, and the expenditure of large sums of money in repairing and the renting and collecting of rents of several houses thereon. It was held that the fact that he, several years before, had received presents from one of the tenants and from some of the mechanics whom he had employed to repair houses, which he had openly admitted at the time and since, and which caused no loss whatever to the estate, was not sufficient proof of malfeasance to deprive him of his commissions, although he must account to the estate, of course, for the money so received by him.

3. *Biddle's Appeal*, 129 Pa. St. 26; *Parker's Estate*, 64 Pa. St. 307. See also *Cook v. Lowry*, 29 Hun (N. Y.) 20; modified on appeal in 95 N. Y. 103.

4. The omission to make regular returns to the secretary's office, will not deprive a trustee, other than an executor or administrator, of his right to commissions, except where the estate has received an injury by such omission. *Muckerfuss v. Heath*, 1 Hill Eq. (S. Car.) 182. See also *Morgan v. Morgan*, 4 Dem. (N. Y.) 353.

No allowance will be made to the trustee if he has rendered no valuable services to the trust. And if the services rendered were rendered for his own advantage, rather than in the interest of the trust, he can make no charge therefor.<sup>1</sup>

Serving as a merely nominal trustee, with no active duties to perform and no responsibilities, will not entitle him to make any charge therefor.<sup>2</sup> Services needlessly rendered will not be paid for.<sup>3</sup>

The instrument creating the trust may take the question of compensation out of the hands of the court altogether by stipulating that the trustee shall receive none,<sup>4</sup> or by fixing what his compensation shall be.<sup>5</sup> And where the beneficiary is *sui juris*

A trustee will be entitled to remuneration for his skill and care in managing the estate, and such remuneration will not be the less because of the fact that he has been charged with interest on certain funds by reason of his misconduct in relation to them. *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

1. In *Reiff's Appeal*, 124 Pa. St. 145, the testator divided his estate into as many portions as he had children; as to the shares intended for his daughters, he provided that one be given to each, to be held by her in trust, to receive the income for her life, and her share to be thereupon paid over to her children then living, or to their issue. In default of issue, the share was to be held in trust, to be paid to the testator's surviving children, or to the issue of such children as should be deceased. One of his daughters survived him, and died without issue. One of his sons died in the daughter's lifetime, leaving children who survived her. Upon these facts the court held that the share received by such deceased daughter was her own for life, and subject only to a liability against her estate to pay it over to the remainder-men at her death, and she was entitled to no compensation out of the fund as a trustee for her services in taking care of it.

2. *Henderson v. Sherman*, 47 Mich. 267.

Where it appears from the instrument creating the trust that it was not the intention that any commissions should be allowed conventional trustees for their services in executing the trust, and very little labor is imposed upon them, and very little of their time required, and the trust is in its nature somewhat of a public character, and in its execution the trustees are engaged in subserving great and important pub-

lic interests, commissions will not be allowed. *Northern Cent. R. Co. v. Keighler*, 29 Md. 572.

In the absence of a contract for compensation, see *Wetmore v. Brown*, 37 Barb. (N. Y.) 133.

3. A trustee who could have settled his trust by merely handing the funds, etc., over, will not be allowed a charge for filing an account. *Harris v. Sheldon* (Pa. 1889), 16 Atl. Rep. 828; 24 W. N. C. (Pa.) 370.

Testamentary trustees who have made up their accounts each year, the same, however, not having been ordered by the surrogate nor settled, do not thereby acquire the right to claim commissions annually. *Brush v. Smith*, 1 Dem. (N. Y.) 477.

4. A trustee who accepts a trust coupled with an interest, with no contract as to compensation, is entitled to none. *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 116.

5. A case where the rate of interest is fixed by the terms of the trust deed does not come within the general law specifying the commissions of trustees. *Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 195.

Where by the terms of the trust deed the trustee is to receive twelve and one-half per cent., this will not be sufficient to avoid it, where no proof appears that such compensation was unconscionable. *Donelson v. Posey*, 13 Ala. 752.

Where the compensation of one of the testamentary trustees was intrusted by the testator to the discretion of the other trustees, it was held that the court had no right to interfere to control its exercise while the trustees continued to exercise this discretionary power in good faith. *Hawley v. James*, 5 Paige (N. Y.) 318.

Where the testator said that the tes-



and competent to act, a valid agreement may be made between the trustee and the beneficiary which will bind the court in the control of the trust, and the allowance of compensation.<sup>1</sup> Where a will has fixed a certain compensation and the same has been paid to the first executor or trustee, a successor in the trust is entitled to an allowance for services rendered.<sup>2</sup>

The trustee may waive his right to compensation,<sup>3</sup> although his waiver will not estop him from receiving commissions subsequently earned.<sup>4</sup>

He will not as a rule be permitted to fix the amount which he shall receive for his services. This must be determined by the court or by the terms of the instrument by which the trust was created.<sup>5</sup>

The allowance of compensation rests within the sound discretion of the court. Except so far as the trustee's remuneration is governed by the terms of the instrument of trust, or by contract, or by statute, the court may diminish or increase the allowance, or refuse it altogether, as it sees fit.<sup>6</sup>

tamentary trustee, whom he also appointed his executor, should have ten per cent. on the whole amount of property which should come into his hands as trustee, it was held that he was entitled to this percentage on the whole amount of the property, and not on the income only, independent of the amount allowed him by the orphans' court as executor, and that in this respect the two offices were to be looked upon as distinct as if filled by two different persons. *Mitchell v. Holmes*, 1 Md. Ch. 287.

Where the trust instrument provides that the trustee shall have a reasonable compensation for his services, he is not confined to the statutory allowance, but his compensation will be whatever shall be determined, upon judicial investigation, to be reasonable under the circumstances, regardless of the statute. *Matter of Schell*, 53 N. Y. 263.

A testator created a dry trust and gave the trustee \$5,000 for his services. It was held that there was, notwithstanding that the compensation was out of proportion to the labor, a consideration for the legacy which gave it preference over legacies such as were merely bounties—at least, that, so long as the trust continued in force, it should be so held. *Harper's Appeal*, 111 Pa. St. 243.

Powers were given by will to the two executors as trustees of the testator's niece, authorizing them to act collectively or individually in all matters

appertaining to the estate, and giving to each \$3,000 "in lieu of any and all commissions, and in full compensation for their services in closing up my estate and making distribution thereof, in conformity with and on the conditions herein before stated." This was held to cover their whole compensation, and they could receive no separate commissions as trustees. *Brownson v. Roberts*, 5 Redf. (N. Y.) 576.

1. *Bowker v. Pierce*, 130 Mass. 262; *Jackson v. Jackson*, 3 N. J. Eq. 113.

2. *Young v. Smith*, 9 Bush (Ky.) 429.

3. *Ridgely v. Gittings*, 2 Har. & G. (Md.) 58; *Vestry, etc. v. Barksdale*, 1 Strobb. Eq. (S. Car.) 197; *Haglar v. McCombs*, 66 N. Car. 345; *Barry v. Barry*, 1 Md. Ch. 20.

A trustee having waived all claim to commissions before his appointment, and having procured his appointment under a family arrangement, in which he was himself concerned, on the express agreement and understanding, by parol, and proved by parol evidence, that no compensation was to be charged, is entitled to nothing but his actual expenses. *Ridgely v. Gittings*, 2 Har. & G. (Md.) 58.

4. *Denmead v. Denmead*, 62 Md. 321.

Nor will the trustee forfeit his right to commissions by the mere expression of an intention to charge nothing. *Eversfield v. Eversfield*, 4 Har. & J. (Md.) 12.

5. *Geisse v. Beall*, 3 Wis. 395.

6. *Gibson's Case*, 1 Bland (Md.) 138; 17 Am. Dec. 257.

(2) *Double Compensation*.—The fact that the trustee is receiving compensation as executor or administrator, or in any other capacity, will not necessarily deprive him of his right to commissions for services rendered or responsibilities borne as trustee, where the duties are separate.<sup>1</sup>

6. *The Duty of Good Faith*.—*a. IN GENERAL*.—Good faith is at once the duty of a trustee and his protection.<sup>2</sup> A trustee who

Where the statute provides for the payment of certain commissions, the court has no discretion to allow or disallow them. *King v. Talbot*, 40 N. Y. 96.

1. *Clark v. Anderson*, 10 Bush (Ky.) 99; *Laytin v. Davidson*, 29 Hun (N. Y.) 622; 95 N. Y. 263; *Matter of Jackson*, 32 Hun (N. Y.) 200; *Hall v. Campbell*, 1 Dem. (N. Y.) 415; *Matter of Mason*, 98 N. Y. 527; *Matter of Crawford*, 113 N. Y. 560.

This exception to the general doctrine that double commissions will be denied, is explained by Finch, J., in *Johnson v. Lawrence*, 95 N. Y. 162, as follows: "Taking the adjudged cases together, they appear to establish that to entitle the same persons to commissions as executors and as trustees, the will must provide, either by express terms or by fair intendment, for the separation of the two functions and duties, one duty to precede the other and to be performed before the latter is begun, or substantially so performed, and must not provide for the co-existence, continuously and from the beginning, of the two functions and duties." *Matter of Mason*, 98 N. Y. 527. See also *Phoenix v. Livingston*, 101 N. Y. 451; *Matter of Crawford*, 113 N. Y. 560.

The *New York Statute of 1866*, which gave to testamentary trustees the same commissions allowed by law to executors and administrators, applies to the case where such trustees have also been executors, provided that the will discriminates between their office as executors and trustees; and, in such case, they may be allowed full commissions as trustees, although they have already received full commissions as executors, on their final accounting in that character. *Matter of Carman*, 3 Redf. (N. Y.) 46.

Certain persons were named as executors and trustees, by a will which created a series of trust estates running for the lives of the beneficiaries, and requiring the setting apart of money, the partitioning of land, and the management of the estates. It was held

that commissions could be claimed in both capacities, but that the trustees were not entitled to commissions on the value of the real estate left unsold at the termination of the trusts. *Phoenix v. Livingston*, 101 N. Y. 451.

A trustee may receive commissions as upon six separate trusts, although the property has not been divided, where six trusts were created by the will, and the trustee has actually managed the property and paid over the income to the six beneficiaries. *Clute v. Gould*, 28 Hun (N. Y.) 348.

Where the executor is also a trustee, and the will contemplated a separation of the powers and duties incident to each capacity, a settlement of the executorial accounts having been made, the allowance of commissions therein will not prevent a further compensation by way of commissions for services as trustee, upon the settlement of his accounts in the latter capacity. *Matter of Willets*, 112 N. Y. 289, 665.

In the following cases the duties were held to be so inseparably blended that double commissions must be denied: *Johnson v. Lawrence*, 95 N. Y. 154; *Matter of Hood*, 98 N. Y. 363; *Matter of McAlpine* (Supreme Ct.), 15 N. Y. St. Rep. 532. Great care should be taken to prevent double compensation. See *Gibson's Case*, 1 Bland (Md.) 138; 17 Am. Dec. 257; *Holley v. S. G.*, 4 Edw. Ch. (N. Y.) 284; *Blake v. Pegram*, 101 Mass. 592.

2. *Good Faith*.—Absolute good faith is required of him. In *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 853, the court, by Simonton, J., said: "A trustee, in dealing with his *cestui que trust*, or in the management of the trust estate, must always show *uberrima fides*. He must never lose sight of the fact that he is acting for another, who is the real beneficiary; and no thought or hope or purpose of personal advantage can have part in the motive for or in the result of his act." See also *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Ellig v. Naglee*, 9 Cal. 683; *Colton v. Stanford*, 82 Cal. 351; 16 Am. St.

acts in good faith is treated with indulgence by the courts, and, in the absence of inexcusable neglect, misconduct or fraud, will be relieved from any responsibility for loss.<sup>1</sup>

Any want of good faith will of itself create a presumption of

Rep. 137; *Fairman v. Bavin*, 29 Ill. 75; *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 310; *Diffenderfer v. Winder*, 3 Gill & J. (Md.) 311; *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281; *Chesley v. Chesley*, 49 Mo. 540; *Fraser v. Davie*, 11 S. Car. 56. See also *California Code*, § 7228; *Dakota Civ. Code* 1298.

1. *Cromie v. Bull*, 81 Ky. 646; *Mattocks v. Moulton*, 84 Me. 545; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; 35 Am. Dec. 277; *Bryant v. Russell*, 23 Pick. (Mass.) 540; *Perrine v. Vreeland*, 33 N. J. Eq. 102, *affirmed* 33 N. J. Eq. 596; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 76; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Denton v. Sanford*, 103 N. Y. 607; *Crabb v. Young*, 92 N. Y. 56; *Stewart v. KISSAM*, 11 Barb. (N. Y.) 271.

Acts of a trustee done in good faith, and for the benefit of the estate, will be sanctioned, even though not strictly legal. *Putnam v. Ritchie*, 6 Paige (N. Y.) 391.

A trustee does not transcend his power or abuse his trust by paying over to his beneficiary the funds of the estate in good faith, under authority from the instrument of trust to do so, when in his judgment it seems necessary. *Kimball v. Reding*, 31 N. H. 352; 64 Am. Dec. 333.

Where money is bequeathed to a trustee to be paid over to the testator's son, at such times and in such sums as in the judgment of the trustee his interest shall seem to require, the court will not, ordinarily, make the trustee accountable for money actually paid over by him in good faith. *Kimball v. Reding*, 31 N. H. 352; 64 Am. Dec. 333.

If a trustee makes a sale or investment in good faith, the court will be slow to make him account for any loss. *Dorsett v. Frith*, 25 Ga. 537.

When trustees, in the sale of real estate under an authority, act in good faith, and for what they consider the best interest of the *cestuis que trustent*, they will not be accountable beyond the amount of the sale. *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; 7 Am. Dec. 513.

A party who agrees with two others to unite in the purchase of land, each to furnish one-third of the purchase-money, such party to conduct the negotiations and buy the land for the lowest possible price, his position is that of a trustee towards his associates, and he is bound to exercise the utmost good faith toward them and to share with them all the profits of the bargain. *King v. Wise*, 43 Cal. 628.

A trustee who had a large number of houses belonging to the trust estate, in good faith and in pursuance of a definite policy, demanded such high rents that many of the houses remained empty. It was held that he was not to be charged with what he might have received had he let the houses on the best terms obtainable. *Pleasanton's Appeal*, 99 Pa. St. 362.

Where a debt, intended to be secured by a trust deed, is not correctly described in the deed, though the creditor may, by identifying it, recover it out of the trust fund, while that remains; yet if the trustee has in good faith paid out the trust fund to discharge other debts, without any notice of the mistake by the creditor to the trustee, the creditor cannot make the trustee personally responsible. *Almond v. Russell*, 5 Ired. Eq. (N. Car.) 183.

Where the instrument creating the trust gives the trustee discretion to do, or not to do a particular thing, the courts will not command or prohibit the exercise of the power, so long as the trustee is acting in good faith and is not influenced by improper motives. *Read v. Patterson*, 44 N. J. Eq. 211; 6 Am. St. Rep. 877.

Where a trustee has, in good faith and at a fair price, taken land from a debtor to an estate, in satisfaction of a debt which cannot be collected in money, such land becomes trust property, and the trustee cannot sell it without an order of the court. For this reason, if he, a few days after the transfer, has refused an offer made to him by a third person to take the land off his hands at the same price, this refusal will not operate to charge him with any subsequent depreciation in its value. *Foscoe v. Lyon*, 55 Ala. 440.

wrong against him,<sup>1</sup> whereas, if he exercises good faith in his acts as trustee, he will be protected, even though the trust subsequently be declared void.<sup>2</sup>

Conduct in relation to the trust property which is fraudulent in its nature or tendency, is deemed to be the individual conduct of the trustee; its consequences, if injurious, are imputed to him personally, and his own estate will be held therefor.<sup>3</sup>

1. See *Snyder v. McComb*, 39 Fed. Rep. 292.

The rule that the burden of proving the perfect good faith of any transaction between the trustee and the beneficiary is upon the trustee, applies to a mortgage by a legatee and her husband of her residuary legacy, given to an executor to secure a debt of the husband to the executor; also to a subsequent deed of trust from the life annuitant to secure the same debt. *Pairo v. Vickery*, 37 Md. 467.

2. *Hawley v. James*, 16 Wend. (N. Y.) 61.

3. Trustees to sell and pay debts, when they sell within a reasonable time and apply the proceeds to pay the debts, execute their trust; but in case of a fraudulent sale and the subsequent application of the proceeds to the debts, the trustees would be answerable for the difference between the full value at the time, and the price brought, with interest. *Cleghorn v. Love*, 24 Ga. 590.

Thus, where a testamentary trustee caused improvements to be made on his beneficiary's land by representing that a lease would be given, when no such lease could be made, was responsible out of his own estate for the value of the improvements. *Findley v. Wilson*, 3 Litt. (Ky.) 390.

Where a trustee obtained from the beneficiary a release of his contingent remainder in the trust fund, for an inadequate consideration, and concealed from him a material fact, as, for example, that part of the funds had been used in the purchase of land which had been conveyed to the trustee's wife, such release should be held invalid for the suppression of this fact, though the beneficiary is of full age, and employed counsel to examine the records, etc., to determine the value of his interest. *Simpson, C. J., dissenting. Waldrop v. Leaman*, 30 S. Car. 428. See also *McCook v. Harp*, 81 Ga. 229; *Deegan v. Capner*, 44 N. J. Eq. 339.

If a trustee acting in bad faith, prevents a sale of the stock held by him in trust while it possesses some value, he

must account for any loss which ensues by reason of depreciation, unless evidence is adduced as to the market value of the stock when the sale could have been made, and of the receipt of any dividends or interest by the stockholders for the amount paid in. He will also be held for interest from the time the trust was acknowledged. *Snyder v. McComb*, 39 Fed. Rep. 292.

In the same case, the trustee of certain shares of stock made a very advantageous sale of other shares of the same stock which belonged to him, and transferred the trust stock to the same persons without consideration. Subsequently, the *cestui que trust*, ignorant of either transaction, urged him to dispose of the trust property, and he, although in a position to know that in a few days its value would be merely nominal, dissuaded the *cestui que trust* from selling, by alleging its great value. The trustee was held liable for want of a faithful performance of his duty, and the court ruled that the *cestui que trust* could not be compelled to receive worthless shares in satisfaction. *Snyder v. McComb*, 39 Fed. Rep. 292.

If a trust fund, or any part thereof, is misapplied by anyone, and the trustee who has not applied to the court for direction, receives from the one misapplying, any property as payment or security, he must state the transaction plainly, or answer for the consequences which may result from his failure to do so. *Wayman v. Jones*, 4 Md. Ch. 500. It is immaterial whether goods are converted into money or not; trustees are equally accountable to creditors whose rights to the goods or proceeds are established; and if the trustees pay away the proceeds *pendente lite*, they are responsible, and where there is no allegation that the trustees are insolvent, transient or irresponsible, or the fund is in a hazardous condition, the court will not grant nor sustain an injunction. *Thayer v. Swift, Harr.* (Mich.) 430.

A trustee who intentionally destroys the written evidence of his trust, places himself in a position where the court

A distinction in respect to the trustee's liability is made between a trustee whose control of the property is absolute and one who is the mere repository of the legal title. One who is in possession is held to a strict accountability.<sup>1</sup> But in the other case, the trustee is bound only to good faith and reasonable diligence, and liable only for gross negligence.<sup>2</sup> But evidence of good faith will not shield him from the consequences of his inexcusable neglect or imprudence.<sup>3</sup>

b. USING THE TRUST FOR PERSONAL GAIN.—In the execution of the trust, duty and interest must not be allowed to come into conflict. Nor will any opportunity for conflict be permitted. The trustee is forbidden to reap any personal advantage from his position, or deal with the trust property for his own benefit,<sup>4</sup> and

is bound to make all reasonable presumptions against him. *Jones v. Knauss*, 31 N. J. Eq. 609; 32 N. J. Eq. 323.

Where a trustee has bought for the trust estate, a mortgage, owned by himself on property at the time worth much less than the amount of the mortgage, his liability for the amount of such investment is not affected by the fact that on a sale of the property under the mortgage it is bid in by order of the beneficiaries, and a conveyance of it made to one of them, when their suit is based altogether upon the false representations of the trustee as to the value of the property, and on learning the real value, they promptly demand that he take back the property and account for the amount invested in the mortgage. *Nichols' Appeal*, 157 Mass. 20.

1. *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *Draper v. Joiner*, 9 Humph. (Tenn.) 612; 49 Am. Dec. 719; *Carter v. Rolland*, 11 Humph. (Tenn.) 333; *Lowry v. McGee*, 3 Head (Tenn.) 269.

2. *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215; 44 Am. Dec. 303; *Carter v. Rolland*, 11 Humph. (Tenn.) 333.

3. See *supra*, this title, *Duty of Diligence*; *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718.

4. *Sloo v. Law*, 3 Blatchf. (U. S.) 459; *Campbell v. Campbell*, 8 Fed. Rep. 460; *Saltmarsh v. Beene*, 4 Port. (Ala.) 291; 30 Am. Dec. 525; *Wright v. Ross*, 36 Cal. 432; *Page v. Naglee*, 6 Cal. 241; *Wickersham v. Crittenden*, 93 Cal. 17; *Miller v. Davidson*, 8 Ill. 518; 44 Am. Dec. 715; *Hughes v. Hughes*, 87 Ala. 652; *Sypher v. McHenry*, 18 Iowa 232; *Pugh v. Bell*, 1 J. J. Marsh. (Ky.) 399;

*Richardson v. Spencer*, 18 B. Mon. (Ky.) 450; *Handlin v. Davis*, 81 Ky. 34; *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637; *Arnold v. Brown*, 24 Pick. (Mass.) 96; 35 Am. Dec. 296; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *Loring v. Salisbury Mills*, 125 Mass. 138; 97 Am. Dec. 107; *Nichols' Appeal*, 157 Mass. 20; *Emerson v. Atwater*, 7 Mich. 12; *Jones v. Smith*, 33 Miss. 215; *Stine v. Wilkison*, 10 Mo. 75; *Sallee v. Chandler*, 26 Mo. 124; *Jamison v. Glascock*, 29 Mo. 191; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Dodd v. Wakeman*, 26 N. J. Eq. 488; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56; *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 118; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620; 7 Am. Dec. 507; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27; 7 Am. Dec. 475; *Parkist v. Alexander*, 1 Johns. Ch. (N. Y.) 394; *Reed v. Warner*, 5 Paige (N. Y.) 656; *Vestal v. Sloan*, 76 N. Car. 127; *Tagg v. Bowman*, 99 Pa. St. 376; *Chorpenning's Appeal*, 32 Pa. St. 315; 72 Am. Dec. 789; *Whitman v. Bowden*, 27 S. Car. 53; *Baker's Appeal*, 120 Pa. St. 33; *Bass v. Lucas*, 7 S. Car. 116; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; 16 Am. Dec. 648; *Merriman v. Russell*, 39 Tex. 285; *Graff v. Castleman*, 5 Rand. (Va.) 195; 16 Am. Dec. 741; *Coltrane v. Worrell*, 30 Gratt. (Va.) 434; *Geisse v. Beall*, 3 Wis. 367. See also *California Code*, §§ 7229, 7231; *Dakota Civ. Code*, §§ 1299, 1301; *Georgia*, § 2332; *Titherington v. Hodge*, 81 Ky. 286. See article by Russell Duane in 30 Am. Law Reg. 569, on "The Liabilities Arising out of the Employment of Trust Funds in Part-

nerships." See *supra*, this title, *Conversion*.

A trustee has no right to apply the trust fund to the payment of a debt which he claims is owing to him from the *cestui que trust*, especially if the latter disputes the debt. *Terry v. Bale*, 1 Dem. (N. Y.) 452.

Where land belonging to a wife is conveyed by the husband and wife to a trustee, in trust to sell for the use of the grantors, the land being unsold, it cannot be held by the trustee, as against a subsequent *bona fide* mortgagee without notice, in satisfaction of debts due to him from the husband before the mortgage was executed. *McClanachan v. Siter*, 2 Gratt. (Va.) 280.

A trustee may not settle a debt due to the trust estate by receiving a credit on his individual obligation to the debtor. *Maynard v. Cleveland*, 76 Ga. 52.

Nor will a trustee be permitted to settle a debt owing to him in his fiduciary capacity by merely cancelling one due from him individually to the trust debtor. If, however, the *cestui que trust* adopts the settlement and sues the trustee's sureties to make good the amount, the *cestui que trust* will not afterward be permitted to recover it from the original debtor. *Sweet v. Jeffries*, 67 Mo. 420.

One receiving a claim from another, in trust to collect it, and applying the proceeds in the discharge of debts, to which third persons are sureties, is accountable for the proceeds at the nominal amount for which it was made available to him, in the discharge or payment of his own debt. *Smith v. McGehee*, 14 Ala. 404.

A party who receives an estate from another under an agreement to deliver it to a third person, cannot refuse to do so because the person who delivers it to him is indebted to himself or others. *Sledge v. Clopton*, 6 Ala. 589.

A trustee authorized by his *cestui que trust* to sell land, and receive one-half in cash, and take a mortgage for the balance, is liable to the *cestui que trust* for the whole amount, although the note is not yet due, if he gets the mortgage note discounted and uses the proceeds himself. *Brown v. Cowell*, 116 Mass. 461. But compare *Patterson v. Lennig*, 118 Pa. St. 571, where the rule was held not to apply, upon the following facts: The owners of stock of an insolvent corporation intrusted it to one of their number, who was himself a

creditor, to be applied in the discharge of debts, the surplus to be returned to the contributors. Four years after paying the other creditors, the trustee paid his own debt with the stock which remained, at a fair valuation.

A trustee is not allowed to alien trust funds for the liquidation of his own debts. *Graff v. Castleman*, 5 Rand. (Va.) 195.

He may not mortgage the trust property for his own debts. *Brewster v. Galloway*, 4 Lea (Tenn.) 558; *Merriman v. Russell*, 39 Tex. 278.

If a trustee who borrows money for his own use, assigns an order or decree in favor of the trust estate as security, the assignment is invalid. *Brewster v. Galloway*, 4 Lea (Tenn.) 558.

The receiving of a *bonus* by a trustee for lending the trust funds, does not of itself show bad faith. The trustee, however, must charge himself with the *bonus*. *Sherman v. Lanier*, 39 N. J. Eq. 249.

A trustee receiving gifts from the tenants of his estate, should be punished more severely than simply by being compelled to give up the sums he has received, though possibly the deprivation of all his commission might be too severe. *Jacobus v. Munn*, 38 N. J. Eq. 622.

A trustee is not permitted to use the trust property for his own benefit, and his being the father of the *cestuis que trustent*, and maintaining them in the meantime, do not affect the question. *Myers v. Myers*, 2 McCord Eq. (S. Car.) 213; 16 Am. Dec. 648.

An agent who had charge of his principal's real estate during his absence, let a portion of it and received rents, but neglected to pay taxes, in consequence of which the property was sold at a tax sale, the agent being the purchaser. It was held that the court would enjoin the agent from executing a writ of possession under a judgment obtained by default against his principal for the land so purchased. *Morris v. Joseph*, 1 W. Va. 256; 91 Am. Dec. 386.

A testator gave a portion of his estate to A, as trustee, to pay the income at his discretion to the testator's son B for his life, and on his death to divide the same equally among B's children. B had previously compromised with his creditors, who accepted a percentage and discharged him from the balance, A being among them and doing the same. B afterward made his note

his acts will be scrutinized with great care for the prevention of any improper use of his trust. The doctrine is a familiar one that every presumption is indulged against the trustee who has personal dealings with the trust. Nor can he, after accepting the

for the balance to A, who, with B's consent, took payment therefor out of the income which he was to pay to B. This was held to be an abuse of his discretion as trustee. *Clement's Appeal*, 49 Conn. 519.

A trustee, though chargeable with all profits which he himself may have secretly made out of his trust relation, will not be held to answer for what some one else has been enabled to make through an accidental connection with him. *Bent v. Priest*, 10 Mo. App. 562.

In order that a charge may be made by the trustee against the trust fund, for articles furnished the *cestui que trust* by the latter's express desire, upon the faith and credit of said fund, it must be shown that the articles were reasonably worth the sum charged, and that no profit was made by him thereon. *Cleveland v. Pollard*, 37 Ala. 556.

Parties who deal with an executor or trustee, and co-operate with him in misapplying assets or trust funds, in breach of the duties of the executor, or in breach of the trust, cannot use such transactions as a defense against the claim of creditors, legatees, or *cestuis que trustent*; and the application of assets or trust fund by the executor or trustee to the discharge of his individual debts is, unless the estate or trust is indebted to the executor or trustee, a violation of the trust. *Jackson v. Updegraffe*, 1 Rob. (Va.) 114.

A trustee's promise to allow his personal debt as a credit upon a note held by him as trustee will not bind the trust; and a breach thereof is no defense to the note, even though the personal debt may have become barred by statute from delay to sue induced by the promise. *Vason v. Beall*, 58 Ga. 500.

**Transaction for His Benefit Indirectly.**—A sale by a trustee, directly or indirectly, to a corporation in which he is a large owner, is as fraudulent as an outright transfer to himself. *Robbins v. Butler*, 24 Ill. 387.

A majority of the trustees in one religious corporation were also trustees of another. Acting as such trustees, they conveyed certain real estate from one corporation to the other, without the payment of any price, but for the sole purpose of affording pecuniary aid

gratuitously. It was held that these facts alone established the fraudulent character of the transaction. *St. James Church v. Church of the Redeemer*, 45 Barb. (N. Y.) 356.

One who, by agreement with the owner of land which is about to be sold on execution, becomes the purchaser under a promise to reconvey, stands, until the obligation to reconvey is discharged, in the relation of trustee, within the rule which restricts a trustee from dealing with the trust property for his own benefit. *Vestal v. Sloan*, 76 N. Car. 127.

A contract entered into with the trust for the benefit of the trustee's wife or child, is subject to the same restrictions that govern a trustee's personal dealings with the trust. *Dunham v. Milhous*, 70 Ala. 596; *Carter v. Burr*, 46 N. J. Eq. 134; *affirmed* 47 N. J. Eq. 599.

Where trustees make investments in securities which they are obliged to sell within two years, and each one of them, in the absence of the other, at a judicial sale, buys for his son, at about two-thirds the amount of the investment, the son just having reached his majority, being in his father's employ at a small compensation, not present at the sale nor in any wise consulted; and the father admitting the property sold to be worth \$300, at least, more than his bid, and retaining the possession of the deed and of the property, and managing it for all for his own protection, and continuing to pay interest on the original sum so invested for several years, such sale will not be upheld, but the property will be decreed to be liable for the whole amount due upon such investment, and another sale of the premises ordered. *Carter v. Burr*, 46 N. J. Eq. 134; *affirmed* 47 N. J. Eq. 599. See also *Higgins v. Curtiss*, 82 Ill. 28; *Dundas' Appeal*, 64 Pa. St. 325.

But it is not a fraud *per se*, for a trustee to lend a part of the trust fund to his son, if the loan is well secured. *Caldwell v. Boyd*, 109 Ind. 447.

If he contracts with himself, the contract will not stand. *Pickett v. School Dist. No. 1*, 25 Wis. 551; 3 Am. Rep. 105. See also *Cumberland Coal Co.*

trust, dispute the title of his *cestui que trust* nor set up any claim adverse thereto.<sup>1</sup> Nor may he make any admission to the prejudice of the trust fund and against the *cestuis que trustent*.<sup>2</sup>

c. BUYING AT HIS OWN SALE.—He may not buy at his own sale, either directly or through another,<sup>3</sup> unless the peculiar circumstances of the case will justify the court, upon application, in directing the sale to be made, or unless the several parties in

*v. Sherman*, 30 Barb. (N. Y.) 553; *People v. Township Board*, 11 Mich. 222; *Whitcote v. Lawrence*, 3 Ves. 740.

1. *Benjamin v. Gill*, 45 Ga. 110; *Smith v. Sutton*, 74 Ga. 528; *McLeran v. Melvin*, 3 Jones Eq. (N. Car.) 195; *Irby v. Kitchell*, 42 Ala. 438.

A person who holds the naked legal title, the trust being satisfied, cannot assert that title in an action of ejectment to recover the land from a beneficiary who has the entire beneficial interest. *Lockhart v. Canfield*, 48 Miss. 470.

The executor or administrator of a trustee holding the trust estate at his death, is estopped from setting up another title to defeat that under which his intestate held. *Colburn v. Broughton*, 9 Ala. 351.

A trustee for a *feme covert* and her children, under an appointment from the chancery court, who knew, at the time of his acceptance, that the deed creating the trust was fraudulent as to creditors, assumes all the duties, liabilities, and disabilities which attach to ordinary trustees, and is estopped from setting up against the beneficiaries creditors' claims or his own claims as surety of the debtor. *Henderson v. Segars*, 28 Ala. 352.

A trustee acting for another person in selling land, and receiving the purchase-money, is estopped from questioning his principal's title to the premises, or to the proceeds of the sale. *Von Hurter v. Spengeman*, 17 N. J. Eq. 185.

2. *Thomas v. Bowman*, 29 Ill. 426; *Thomas v. Bowman*, 30 Ill. 84; *McKissick v. Pickle*, 16 Pa. St. 140; *Mayrant v. Guignard*, 3 Strobb. Eq. (S. Car.) 112.

3. SEE AGENCY, vol. 1, p. 375; ATTORNEY AND CLIENT, vol. 1, p. 960; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Michoud v. Girod*, 4 How. (U. S.) 503; *Allen v. Gillette*, 127 U. S. 589; *Keith v. Kellam*, 35 Fed. Rep. 243; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283; 30 Am. Dec. 525; *James v. James*, 55 Ala. 525; *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 117; *Wright v. Campbell*, 27 Ark. 637; *Boyd v.*

*Blankman*, 29 Cal. 19; 87 Am. Dec. 146; *Van Dyke v. Johns*, 1 Del. Ch. 93; 12 Am. Dec. 76; *Renew v. Butler*, 30 Ga. 954; *Thorp v. McCullum*, 6 Ill. 614; *Casey v. Casey*, 14 Ill. 112; *Kruse v. Steffens*, 47 Ill. 112; *Munn v. Burges*, 70 Ill. 604; *Bush v. Sherman*, 80 Ill. 160; *Higgins v. Curtiss*, 82 Ill. 28; *Commercial Union Assur. Co. v. Scammon*, 126 Ill. 355; 9 Am. St. Rep. 607; *Clark v. Wilson*, 77 Ind. 176; *Narcissa v. Wathan*, 2 B. Mon. (Ky.) 241; *Stapp v. Toler*, 3 Bibb (Ky.) 450; *Price v. Thompson*, 84 Ky. 219; *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Freeman v. Harwood*, 49 Me. 195; *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410; 6 Am. Dec. 506; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250; *Mason v. Martin*, 4 Md. 124; *Davis v. Simpson*, 5 Har. & J. (Md.) 147; 9 Am. Dec. 500; *Singstack v. Harding*, 4 Har. & J. (Md.) 186; 7 Am. Dec. 669; *North Baltimore Bldg., etc., Assoc. v. Caldwell*, 25 Md. 420; 90 Am. Dec. 67; *Ricketts v. Montgomery*, 15 Md. 46; *Clark v. Blackington*, 110 Mass. 369; *Dyer v. Shurtleff*, 112 Mass. 165; 17 Am. Rep. 77; *Prichard v. Farrar*, 116 Mass. 213; *Brown v. Cowell*, 116 Mass. 461; *Dwight v. Blackmar*, 2 Mich. 330; 57 Am. Dec. 130; *Schwarz v. Wendell*, Walk. (Mich.) 267; *White v. Trotter*, 14 Smed. & M. (Miss.) 30; 53 Am. Dec. 112; *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; 45 Am. Dec. 310; *Wasson v. English*, 13 Mo. 176; *Jamison v. Glascock*, 29 Mo. 191; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Roberts v. Moseley*, 64 Mo. 507; *King v. Remington*, 36 Minn. 15; *Winn v. Dillon*, 27 Miss. 494; *Remick v. Butterfield*, 31 N. H. 70; 64 Am. Dec. 316; *Holitt v. Webb*, 36 N. H. 158; *Den v. Wright*, 7 N. J. L. 175; 11 Am. Dec. 546; *Den v. Hillman*, 7 N. J. L. 180; *Den v. Hammel*, 18 N. J. L. 73; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Wright v. Smith*, 23 N. J. Eq. 106; *Smith v. Drake*, 23 N. J. Eq. 302; *Wakeman v. Dodd*, 27 N. J. Eq. 564; *Bassett v. Shoemaker*, 46 N. J. Eq. 538; 19 Am. St. Rep. 435; *Torrey*



*v. Bank of Orleans*, 9 Paige (N. Y.) 649; *De Caters v. De Chaumont*, 3 Paige (N. Y.) 178; *Child v. Brace*, 4 Paige (N. Y.) 309; *Campbell v. Johnston*, 1 Sandf. Ch. (N. Y.) 148; *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214; *Cram v. Mitchell*, 1 Sandf. Ch. (N. Y.) 251; *Sweet v. Jacocks*, 6 Paige (N. Y.) 355; 31 Am. Dec. 252; *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 263; *Chapin v. Weed, Clarke Ch.* (N. Y.) 464; *Sheldon v. Sheldon*, 13 Johns. (N. Y.) 220; *Brothers v. Brothers*, 7 Ired. Eq. (N. Car.) 150; *Boyd v. Hawkins*, 2 Ired. Eq. (N. Car.) 304; *Hill v. Frazier*, 22 Pa. St. 320; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412; *Chorpenning's Appeal*, 32 Pa. St. 315; 72 Am. Dec. 789; *Hallman's Estate*, 13 Phila. (Pa.) 562; *Hammond v. Stanton*, 4 R. I. 65; *Wilson v. Central Bridge*, 9 R. I. 590; *McCants v. Bee*, 1 McCord Eq. (S. Car.) 383; 16 Am. Dec. 610; *Mathews v. Dragand*, 3 Desaus. Eq. (S. Car.) 25; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596; 64 Am. Dec. 775; *Wade v. Harper*, 3 Yerg. (Tenn.) 383; *Hamblin v. Warnecke*, 31 Tex. 91; *Marsh v. Hubbard*, 50 Tex. 203; *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 592; 100 Am. Dec. 710; *Geisse v. Beall*, 3 Wis. 367; *Puzey v. Senier*, 9 Wis. 370; *Gillett v. Gillett*, 9 Wis. 194; *Roller v. Spilmore*, 13 Wis. 26; *Barker v. Barker*, 14 Wis. 131; *In re Taylor Orphan Asylum*, 36 Wis. 534; *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 423; *Newcomb v. Brooks*, 16 W. Va. 32; *Lewis v. Hillman*, 3 H. L. Cas. 607; 18 Eng. L. & Eq. 34; *Fox v. Mackreth*, 2 Bro. C. C. 400; *Gibson v. Jeyes*, 6 Ves. Jr. 266.

Nor may an executor, administrator, or guardian, either directly or indirectly, become a purchaser at his own sale. *Mulford v. Bowen*, 9 N. J. Eq. 797; *Price v. Morris*, 5 McLean 4; *Huston v. Cassedy*, 13 N. J. Eq. 228; *Mulford v. Minch*, 11 N. J. Eq. 16; 64 Am. Dec. 472; *Culver v. Culver*, 11 N. J. Eq. 215; *Scott v. Gamble*, 9 N. J. Eq. 218.

It has been held in *Louisiana*, that a sale to curators or administrators is null and void. This has no application, however, to a sale made by an heir, of his interest in the succession, to the administrator; such a nullity is relative, and does not avail anybody, except the vendor. *Peyton v. Enos*, 16 La. Ann. 135; *Vanwickle v. Matta*, 16 La. Ann. 325; *Dugas v. Gilbeau*, 15 La. Ann. 581.

A testamentary trustee cannot make a legal transfer of the trust fund to his wife. Such transfer would create, at most, but an equity in the wife subordinate to that of the beneficiaries and as to them fraudulent. *Leitch v. Wells*, 48 Barb. (N. Y.) 637.

A trustee purchasing the trust property at his own sale, or procuring another to purchase it for him at such sale, holds it subject to the original trust. *Herr's Estate*, 1 Grant Cas. (Pa.) 272; *Rosenberger's Appeal*, 26 Pa. St. 67.

The courts will not permit a trustee to acquire a title adverse to the interest of his *cestui que trust*, even by purchase at a judicial sale under a title superior to that conveyed to him as a trustee, and his grantee, under the sale, with notice actual or constructive, of the rights of the beneficiary and of her heirs, takes no better title. *Roberts v. Moseley*, 64 Mo. 507; *Toole v. McKiernan*, 48 N. Y. Super. Ct. 163.

Nor can a trustee of land, who is in possession, purchase an outstanding title, or acquire a personal interest by a tax sale, and set up the title which he thus acquires to defeat that of the beneficiary, in equity. Until he has surrendered the possession, he cannot claim adversely to the title under which he enters. *O'Halloran v. Fitzgerald*, 71 Ill. 53. See also *Cushman v. Bonfield*, 139 Ill. 219, *affirming* 36 Ill. App. 436.

In *Greenlaw v. King*, 5 Jur. 18, the court, by Lord Chancellor Cottingham, said: "The principle is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but is a rule of universal application to all persons coming within the principle, which is, that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of purchaser." Cited and quoted in *Torrey v. Bank of Orleans*, 9 Paige (N. Y.) 663, and *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 422; 89 Am. Dec. 779. See also *Keighler v. Savage Mfg. Co.*, 12 Md. 384; 71 Am. Dec. 600.

A trustee who buys in the trust property for his own benefit, who, although legally in possession of the trust property, refuses a rightful demand to deliver it to the *cestui que trust*, is chargeable with a conversion. *Smith v. Frost*, 42 N. Y. Super. Ct. 87. And this doctrine reaches all cases in which confidence has been reposed,

and it extends as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are engaged for that purpose and paid for it. *Wright v. Smith*, 23 N. J. Eq. 106.

The rule applied where an administrator attempted to purchase a decedent's lands, which had been sold under an order obtained by him, to raise money for the payment of debts. *Smith v. Drake*, 23 N. J. Eq. 302.

A trustee, as such, became an accommodation indorser on his beneficiary's note, suffered a judgment to be rendered therefor against the beneficiary, and at the execution sale purchased the equitable interest at an inadequate price. It was held that this purchase was voidable, and that the trustee could be compelled to reconvey to the beneficiary and answer for all rents and profits. *Ricketts' Appeal* (Pa. 1888), 12 Atl. Rep. 60.

At public sale, where the interest of the trust estate calls for the highest possible price, the trustee cannot bid and purchase. *Price v. Thompson*, 84 Ky. 219; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 254. See also *Carter v. Burr*, 46 N. J. Eq. 134; *Deegan v. Capner*, 44 N. J. Eq. 339.

Equity will not allow a trust estate to be conveyed to one of several trustees before his duties as trustee are ended, although the consideration paid was the same as that for which the property was sold by them, unless it is for the benefit of the beneficiary that such conveyance is made. *Boynton v. Brastow*, 53 Md. 362.

A trustee is not allowed, by a sale of trust property on proceedings in partition at which he is the purchaser, to defeat the estate of the *cestui que trust*. The Statute of Limitations can no more run in his favor after such a purchase than before. *Williams v. Van Tuyl*, 2 Ohio St. 336.

Where the purchaser of real estate at a foreclosure sale was, at the time, the confidential advisor of the foreclosure defendant upon matters in connection therewith, he was held to be disqualified, on account of that trust relationship, from becoming a purchaser for himself, and required to account as trustee. *Wakeman v. Dodd*, 27 N. J. Eq. 564.

A trustee of land denied his *cestui que trust's* title, and instituted a suit at law to evict him, and the land was sold *pendente lite* on execution against the

*cestui que trust*, the trustee becoming the purchaser at a grossly inadequate price. It was held that the land should stand as security to the trustee, for the amount paid by him, only. *Keaton v. Cobb*, 1 Dev. Eq. (N. Car.) 443; 18 Am. Dec. 595.

Where a judgment held in trust for minors, is a lien upon the lands of a party, and prior judgment liens exist against the same land, which is the only estate of the judgment debtor, said land must be regarded as the trust subject, and the trustee will not be permitted to buy it at a judicial sale for his personal benefit. *Fearnster v. Fearnster*, 35 W. Va. 1.

Where a trustee, acting for others, sells an estate and becomes interested in the purchase, the *cestui que trust* is entitled, in a court of equity, to set aside the purchase, and have the property re-exposed for sale. *Bank of Old Dominion v. Dubuque, etc.*, R. Co., 8 Iowa 277; 74 Am. Dec. 302; *McGregor v. Gardner*, 14 Iowa 326; *Sypher v. McHenry*, 18 Iowa 232; *Clark v. Lee*, 14 Iowa 425.

The bill averred that the defendant trustee purchased at his own sale through a relative. The answer denied collusion between the defendant and the purchaser, but admitted that the immediate purchaser soon after conveyed to the defendant. It did not aver that the first purchaser paid for the property or received consideration from the defendant for the conveyance to him. It was held that this answer was an admission that the defendant was in fact a purchaser at his own sale. *Higgins v. Curtiss*, 82 Ill. 28.

Where at an administrator's sale land was bought by a stranger, and afterward, for a nominal consideration, conveyed by the purchaser to the administrator, the administrator's title is voidable if attacked within a reasonable time. *Mitchell v. McMullen*, 59 Mo. 252.

A sale by a trustee to himself, for a grossly inadequate consideration made through the medium of a third person, should be set aside. *McNeil v. Gates*, 41 Ark. 264.

In *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433, the court, by Ryan, C. J., said: "A trustee is not barred from ever becoming a purchaser of what had once been part of the trust estate. When the title of the trust estate has passed by valid sale, in which the trustee has no interest, and all interest of

interest consent to its consummation.<sup>1</sup> There is so evident a conflict between his personal interests and his duties as trustee, that the courts have, almost without exception, held such transactions constructively fraudulent. The courts will not only prevent fraud wherever possible, but they will remove all opportunity for fraud and all temptation to it. For this reason they will set aside such dealings, whether they appear to be fair or not.<sup>2</sup> The trustee's

the *cestui que trust* in it has ceased, the trustee becomes a stranger to the property, and may purchase it like any other stranger. But, where the trustee's sale to a stranger is colorable only, and made in whole or in part for the use of the trustee, or upon any understanding, expressed or implied, between the trustee and the purchaser, for any future interest of the trustee in the purchase, or in the trust property purchased, a court of equity will deal with the trustee as a direct purchaser from himself, and will avoid his purchase at the suit of his *cestui que trust*. And where the trustee, having ostensibly conveyed to a stranger, suddenly becomes interested with his own grantee, the court of equity will regard the transaction with great jealousy, and void it in favor of the *cestui que trust*, upon slight evidence of collusion in the trustee's sale, between the trustee and the purchaser."

A sale of a trust estate and an immediate resale, as within two days, to the trustee, is conclusively presumed to be simply a means of getting the property into the hands of the trustee, and is as fraudulent as a direct sale by the trustee to himself. *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578.

B devised real estate to trustees in trust for his slaves, with the power to sell if one of the slaves, named Jack, desired to sell, and the trustees did sell for a grossly inadequate consideration, and after a week one of the trustees bought back for his own use the land sold at an advance. It was held that the interposition of a third person, and the inadequacy of the price, were both indicative of fraud. *Smith v. Isaac*, 12 Mo. 106.

**Exceptions.**—But a judgment plaintiff or mortgagee is not forbidden to purchase at his own sale. *Murdock's Case*, 2 Bland (Md.) 461; 20 Am. Dec. 381. And the following cases are in conflict with the general doctrine.

Where A delivered to B a treasurer's deed for certain land, as security for a

debt, it was held that B did not thereby sustain such a fiduciary relation as to prevent him from purchasing the same land at a subsequent treasurer's sale. *Smith v. Reber*, 1 Grant Cas. (Pa.) 217.

In the absence of any proof of collusion, the fact that property was sold by a trustee for less than half its actual value, and was shortly afterward resold to him by the purchaser for the same amount, is not sufficient to charge him with speculation in violation of his duty. *Boehlert v. McBride*, 48 Mo. 505.

A trustee who holds a legal title to a railroad for the use of its bondholders, can purchase an outstanding title at a judicial sale or elsewhere, and hold it for his own use. *Baker v. Springfield R. Co.*, 86 Mo. 75.

1. Parties acting as fiduciaries, and having the power to sell, cannot become purchasers of the trust property, unless such purchase is made under the authority of the court, or with the concurrence and approval of those interested. *Faucett v. Faucett*, 1 Bush (Ky.) 511; 89 Am. Dec. 639; *Cumberland Coal, etc., Co. v. Sherman*, 20 Md. 117; *Ames v. Port Huron Log Driving, etc., Co.*, 11 Mich. 139; 83 Am. Dec. 731.

In the absence of permission from the court, a trustee will never be permitted to buy the trust property. *Carson v. Marshall*, 37 N. J. Eq. 213; 38 N. J. Eq. 250.

2. The case of *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252, is the leading case upon this subject. The early decisions of the English courts are considered by the court, speaking in that decision through Chancellor Kent. There the executor sold the trust property at public sale to his wife, and the court set aside the sale upon the ground that the trustee's interests conflicted with his duty, and the sale therefore could not stand. The court, by Chancellor Kent, said, following the ruling of Lord Eldon in *Ex p. Bennett*, 10 Ves. 385: "If the trustee can buy in an honest case, he may

prime duty is to serve the highest interest of the estate. His is not only the negative obligation to do nothing that will impair the property held in trust, but he is charged with the positive duty of using every reasonable active endeavor to protect the estate from loss.

And where one trustee buys of his co-trustee, the same princi-

in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise; and yet the power of the court would not be equal to detect the deception. Human infirmity will rarely permit a man to exert against himself that providence which the vendor ought to exert, in order to sell the estate most advantageously for the *cestui que trustent*, and which a purchaser is at liberty to exert for himself in order to purchase at the lowest price. If the trustee cannot bid for himself, he cannot, on the same principle, bid for another. The distinction of its being a weaker temptation is too thin to form a safe rule of justice." See also *Bassett v. Shoemaker*, 46 N. J. Eq. 538; 19 Am. St. Rep. 435.

In *Michoud v. Girod*, 4 How. (U. S.) 503, the court, by Wayne, J., said: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt and its application is more frequent in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest the law wisely interposes. . . . The inquiry in such a case is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a re-sale ordered, on the ground of the temptation to abuse and of the danger of imposition inaccessible to the eye of the court."

In *Moore v. Moore*, 5 N. Y. 256, the court, by Gardiner, J., said: "The law does not stop to speculate upon the probabilities that the agent has resisted temptation; it removes the temptation

by proclaiming in advance that he shall not acquire the property."

The reason of the rule is well stated in *Staats v. Bergen*, 17 N. J. Eq. 554, by Beasley, C. J., as follows: "The rule is one of public policy. The trustee is not prevented from bidding for property which he himself sells, on the ground simply of the supposition of actual fraud, but because the law has established, as an inflexible rule, applicable to every emergency, that he shall not place himself in a situation in which he will be tempted to take advantage of his *cestui que trust*. This is a wise public regulation, intended to protect a species of property, which otherwise would be constantly exposed to peculiar hazard. The trustee must, therefore, submit to this regulation, and if he does an act in violation of it, no matter how pure his intention may be, such act is voidable at the instance of the person whom he represents. . . . At these sales, then, the trustee is forbidden to purchase, because his interest as such purchaser is opposed to the interest of his *cestui que trust*, and he acts therefore under a bias in his own favor. Nor does this rule rest, to any considerable extent, in the fact that, in a particular line of cases, the trustee has peculiar opportunities for the practice of fraudulent acts with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trust, such opportunities may exist, and consequently the prohibition is universal, that he may not do anything which, while it is an advantage to himself, is, or may be, a loss to the trust estate. So jealous is the law upon this point, that a trustee may not put himself in a position, in which to be honest must be a strain upon him."

In *Gillett v. Gillett*, 9 Wis. 194, the court, by Painé, J., said: "The rule is well settled that trustees are not permitted to purchase trust property; not because they might not, in many instances, make fair and honest disposition of it to themselves, but because the

ple controls, for joint trustees are, in contemplation of law, one collective trustee.<sup>1</sup> For the same reason, the trustee cannot act as agent for another in purchasing at his own sale, nor in any transaction where interest and duty conflict, for the same conflict between interest and duty will arise when he buys for another as when he buys for himself.<sup>2</sup>

The purchase of trust property by the trustee is voidable at the election of the party holding the beneficial interest, who may have it set aside as a matter of course and without any showing of cause.<sup>3</sup>

probability is so great that they would frequently do otherwise, without danger of detection, that the law considers it better policy to prohibit such purchases entirely than to assume them to be valid, except where they can prove them to be fraudulent." See also *Puzey v. Senior*, 9 Wis. 370; *Roller v. Spillmore*, 13 Wis. 26; *Pickett v. School Dist. No. 1*, 25 Wis. 551; 3 Am. Rep. 105; *Stuart v. Mather*, 32 Wis. 344; *In re Taylor Orphan Asylum*, 36 Wis. 552.

In *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 434, the court, by Nesbit, J., said: "Trustees, generally, are unable to buy the property of their *cestui que trust*. The purchase is not in their case void *per se*, but the *cestui que trust* may come in, as a matter of right, and set it aside. He may do this whether the sale be *bona fide* or not. His right to set it aside does not depend upon the fairness of the transaction. The honesty of the trustee has nothing to do with it. The object of the rule is to secure fidelity of the trustee to the interests committed to his hands. To secure this, the law does not abrogate his purchase because it was fraudulent and injurious to the rights and interests of the *cestui que trust*, but goes upon the idea that he shall not be subjected to the temptation of violating his trust by committing a fraud. It shields him from the temptation by declaring him incapable of making a purchase which will bind those whom he represents; and it gives them the option of vacating or affirming the purchase, according as they may consider it their interest to do one or the other."

In *Anderson v. Butler*, 31 S. Car. 183, the court, by Simpson, C. J., said: "This doctrine has been long settled, both in *England* and this country, and it is a wise and wholesome principle. It strikes at once at the

root of danger, and destroys it. It removes from the trustee the temptation to do wrong, and guarantees the faithful execution of his trust in the sale of the property of his *cestui que trust*." See *Munson v. Syracuse, etc.*, R. Co., 103 N. Y. 75.

1. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250. See also *infra*, this title, *Co-Trustees*.

Where a trustee is a purchaser at the sale of a co-trustee, in order to render the sale utterly void by reason of the fraudulent acts of the seller, it is necessary to connect the purchaser with them. *Beeson v. Beeson*, 9 Pa. St. 279.

2. *Bryson v. Rayner*, 25 Md. 424; 90 Am. Dec. 69; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Gould v. Gould*, 36 Barb. (N. Y.) 270; *U. S. Rolling Stock Co. v. Atlantic, etc.*, R. Co., 34 Ohio St. 450.

When a trustee appointed by a decree of the court to sell real estate, bids for and purchases the property for a third person at a public sale of the same, the sale should be set aside. *North Baltimore Bldg. Assoc. v. Caldwell*, 25 Md. 420; 90 Am. Dec. 67.

3. *Lenox v. Lenox*, Hempst. (U. S.) 225; *Andrews v. Hobson*, 23 Ala. 219; *Crutchfield v. Haynes*, 14 Ala. 49; *Charles v. Dubose*, 29 Ala. 367; *Carter v. Thompson*, 41 Ala. 375; *Wiswall v. Stewart*, 32 Ala. 433; 70 Am. Dec. 549; *McNeil v. Gates*, 41 Ark. 264; *Searcy v. Yarnell*, 47 Ark. 269; *Guererro v. Ballerino*, 48 Cal. 118; *Golson v. Dunlap*, 73 Cal. 157; *Wickersham v. Crittenden*, 93 Cal. 17; *Van Dyke v. Johns*, 1 Del. Ch. 93; 12 Am. Dec. 76; *Bellamy v. Bellamy*, 6 Fla. 62; *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Carr v. Houser*, 46 Ga. 477; *Anderson v. Green*, 46 Ga. 361; *Thorp v. McCullum*, 6 Ill. 614; *Robbins v. Butler*, 24 Ill. 387; *Miles v.*

Wheeler, 43 Ill. 123; Kruse v. Steffens, 47 Ill. 112; Ogden v. Larrabee, 57 Ill. 389; Borders v. Murphy, 125 Ill. 577; Brackenridge v. Holland, 2 Blackf. (Ind.) 377; 20 Am. Dec. 123; Potter v. Smith, 36 Ind. 231; Murphy v. Teter, 56 Ind. 545; Rice v. Cleghorn, 21 Ind. 80; Bank of Old Dominion v. Dubuque, etc., R. Co., 8 Iowa 277; 74 Am. Dec. 302; Buell v. Buckingham, 16 Iowa 284; 85 Am. Dec. 516; Sypher v. McHenry, 18 Iowa 232; McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388; 12 Am. Dec. 412; Price v. Thompson, 84 Ky. 219; Pratt v. Thornton, 28 Me. 355; 48 Am. Dec. 492; Boynton v. Brastow, 53 Me. 362; Patten v. Pearson, 60 Me. 220; Mason v. Martin, 4 Md. 124; Richardson v. Jones, 3 Gill & J. (Md.) 163; 22 Am. Dec. 293; Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co., 16 Md. 456; 77 Am. Dec. 311; Jennison v. Hapgood, 7 Pick. (Mass.) 1; 19 Am. Dec. 258; Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Arnold v. Brown, 24 Pick. (Mass.) 96; 35 Am. Dec. 296; Ives v. Ashley, 97 Mass. 198; Burns v. Thayer, 115 Mass. 89; Learned v. Foster, 117 Mass. 365; Scott v. Freeland, 7 Smed. & M. (Miss.) 409; 45 Am. Dec. 310; Jones v. Smith, 33 Miss. 215; Staats v. Bergen, 17 N. J. Eq. 554; Smith v. Drake, 23 N. J. Eq. 302; Deegan v. Capner, 44 N. J. Eq. 339; Bassett v. Shoemaker, 46 N. J. Eq. 538; 19 Am. St. Rep. 435; Jewett v. Miller, 10 N. Y. 406; 65 Am. Dec. 751; Boerum v. Schenck, 41 N. Y. 182; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Graves v. Waterman, 63 N. Y. 658; Smith v. Frost, 70 N. Y. 65; Dodge v. Stevens, 94 N. Y. 209; Munson v. Syracuse, etc., R. Co., 103 N. Y. 58; Brothers v. Brothers, 7 Ired. Eq. (N. Car.) 150; Pitt v. Petway, 12 Ired. (N. Car.) 69; Brantly v. Kee, 5 Jones Eq. (N. Car.) 332; Hunt v. Bass, 2 Dev. Eq. (N. Car.) 292; 24 Am. Dec. 274; Froneberger v. Lewis, 70 N. Car. 456; Ryden v. Jones, 1 Hawks (N. Car.) 497; 9 Am. Dec. 660; Glass v. Great-house, 20 Ohio 503; Riddle v. Roll, 20 Ohio St. 572; Campbell v. Pennsylvania L. Ins. Co., 2 Whart. (Pa.) 53; Bunting's Estate, 5 Pa. Co. Ct. Rep. 623; Rosenberger's Appeal, 26 Pa. St. 67; Costen's Appeal, 13 Pa. St. 292; Patterson v. Lennig, 118 Pa. St. 571; *Ex p.* Wiggins, 1 Hill Eq. (S. Car.) 353; Edmondson v. Crenshaw, 1 McCord Eq. (S. Car.) 252; McCleure v. Miller, 1 Bailey Eq. (S. Car.) 107; 21 Am. Dec. 522; Zimmerman v. Harmon,

4 Rich. Eq. (S. Car.) 165; Connally v. Hammond, 51 Tex. 647; Armstrong v. Campbell, 3 Yerg. (Tenn.) 236; 24 Am. Dec. 556; Mead v. Byington, 10 Vt. 116; Green v. Sargeant, 23 Vt. 466; 56 Am. Dec. 88; Bailey v. Robinson, 1 Gratt. (Va.) 4; 42 Am. Dec. 540; Moore v. Hilton, 12 Leigh (Va.) 1; Newcomb v. Brooks, 16 W. Va. 32; *In re* Taylor Orphan Asylum, 36 Wis. 534; Whitcomb v. Minchin, 5 Madd. 91; Campbell v. Walker, 5 Ves. 678; Sanderson v. Walker, 13 Ves. 601; *Ex p.* Lacey, 6 Ves. 625; *Ex p.* Bennett, 10 Ves. 381; Morse v. Royal, 12 Ves. 355.

A conveyance of trust property from the trustee to himself is not *ipso facto* void; and where it is freed from suspicion by circumstances, is at least sufficient to give color of title. Veasey v. Graham, 17 Ga. 99; 63 Am. Dec. 228.

In Dodge v. Stevens, 94 N. Y. 209, the records disclosed that the trust estate had been purchased by the trustee. A suit was brought by the *cestui que trust* to compel the transfer of the title. It was held that the trustee could not be heard to contend that the defect of the trustee's title being apparent, no relief was required, such purchase being merely voidable and not void.

A, against whom a judgment had been recovered, assigned his property to B, to secure his claims against, and liabilities for, A; the property of A was sold on execution, and bid off at a low price by B's agent. The *cestui que trust* attended the sale, and declined to bid himself, but did not discover that the purchaser was the agent of B until eighteen years afterward. Upon a bill brought by A against B, it was held that the sale was voidable at the election of A; that the purchase was made by B as the trustee of A; that B would be accountable to A for the same, after his own claims were satisfied; and that the fact that his trust was coupled with an interest did not alter his relation as trustee. Bell v. Webb, 2 Gill (Md.) 122.

A trustee cannot become the purchaser of trust property in his charge at a sale under the trust agreement. Such purchases are void *ipso jure*, and may be set aside by the *cestui que trust* at his option, and irrespective of the question as to whether the bargain was advantageous or detrimental to either party. Star F. Ins. Co. v. Palmer, 41 N. Y. Super. Ct. 267. Such a transaction is voidable and not void, and a clear and unequivocal affirmation of the

While the decisions are for the most part clear on this point, they do not without exception go to the limit of the rule stated.

sale may bind the *cestui*, if he is under no legal disability and the act is voluntary, with full knowledge of all the facts, and free from undue influence arising out of the relation between the parties. Accepting the proceeds of such a sale would, in general, be an affirmation by the beneficiary of the sale; but where the proceeds are received under protest, and with an express reservation of the right to contest the validity of the sale, such receipt does not operate as an estoppel, nor otherwise preclude proceedings by the beneficiary to disaffirm the sale and obtain a resale. *Boerum v. Schenck*, 41 N. Y. 182.

In *Kruse v. Steffens*, 47 Ill. 112, the facts were as follows: The auctioneer at an administrator's sale bid in the premises, and, without having made any payment or given any notes or other security therefor, exchanged deeds with the administrator, who took possession thereof, married the decedent's widow, and was appointed guardian of the minor heir, who, ten years after the sale, died, still a minor. The court held the sale to be voidable, and that the bringing of a bill to set it aside within a year after such death, was within a reasonable time.

The purchase of trust property by a trustee is voidable, and not void; and it is valid to pass the title as against strangers until rescinded. *Union State Co. v. Tilton*, 69 Me. 244.

Where a trustee, appointed by the court of chancery to sell land, sold and conveyed it to A, who, in fact, purchased for the trustee, and subsequently reconveyed it to him, the court of chancery, upon the application of the *cestui que trust*, compelled the trustee to reconvey it to him on the repayment of the purchase-money. There was no evidence that the *cestui que trust* ever assented to the purchase. *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410; 6 Am. Dec. 506.

A guardian or trustee will not be permitted to gain any advantage at the expense of the ward or *cestui que trust*. Hence, if he purchases the trust property, the sale may be set aside at the option of the ward or *cestui que trust*, even though full value was paid for such property. *Clarke v. Deveau*, 1 S. Car. 172. See also *Culver v. Culver*, 11 N. J.

Eq. 215; *Mulford v. Bowen*, 9 N. J. Eq. 797.

If a trustee trades with himself upon the trust fund, the *cestui que trust* may repudiate such act. *Boyd v. Clements*, 14 Ga. 639.

The court will sustain a bill to set aside a purchase by a trustee at his own sale made under a decree, although the sale was ratified without any objection on the part of the complainants, if there was no objectionable conduct on their part. *Davis v. Simpson*, 5 Har. & J. (Md.) 114; 9 Am. Dec. 500.

Where the trustee purchased the estate of his *cestui que trust*, the question is not whether he has made a profit, but the sale will be set aside as a matter of course, unless ratified with a full knowledge of the circumstances. *Piatt v. Oliver*, 2 McLean (U. S.) 267; *Ricketts v. Montgomery*, 15 Md. 46; *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442; 39 Am. Dec. 185.

The courts will not permit a trustee to purchase for his own benefit property which, although not the subject of the trust, is so connected with it, that a sale of such property for less than its value will impair the trust fund, and if he buys for less than the value of the property, the advantage resulting inures to the benefit of the *cestui que trust*. *Fulton v. Whitney*, 66 N. Y. 548.

Under this rule, a receiver who has bought upon a foreclosure, property of which he held the equity of redemption as receiver, is forbidden to hold the property as against a *cestui que trust* who elects to claim the benefit of the purchase. *Jewett v. Miller*, 10 N. Y. 402; 61 Am. Dec. 751.

A *cestui que trust* need make no showing of fraud to successfully impeach the transaction. *Price v. Winter*, 15 Fla. 109; *Grubbs v. McGlawn*, 39 Ga. 675; *Personneau v. Bleakley*, 14 Ill. 15; *Miles v. Wheeler*, 43 Ill. 126; *Bardars v. Murphy*, 125 Ill. 577; *Bank of Old Dominion v. Dubuque*, etc., R. Co., 8 Iowa 277; 74 Am. Dec. 302; *Sypher v. McHenry*, 18 Iowa 232; *McGregor v. Gardner*, 14 Iowa 326; *Clark v. Lee*, 14 Iowa 425.

The rule that a purchase of trust property by the trustee is voidable, and may be set aside at the will of the beneficiary, extends to a guardian *ad*

For it has been held that a *bona fide* purchase by the trustee of the property held by him in trust will be sustained, if made for a valuable consideration;<sup>1</sup> while others have held such a sale absolutely void.<sup>2</sup>

If the transaction is to be set aside, steps tending thereto must be taken within a reasonable time, or the silence of the *cestui* will be taken as acquiescence.<sup>3</sup> And if the *cestui que trust* has given his consent to the purchase,<sup>4</sup> or ratifies his trustee's

*item* in a suit for partition under the statute. *Gallatian v. Cunningham*, 8 Cow. (N. Y.) 361.

1. Such a sale will not be set aside when it is evident that the beneficiary intended the trustee to buy, and that there is no fraud, concealment, or advantage taken by the trustee. *Buell v. Buckingham*, 16 Iowa 284; 85 Am. Dec. 516.

A trustee to whom property has been conveyed in trust, may purchase the property, if he does so *bona fide*, and for value. *Birdwell v. Cain*, 1 Coldw. (Tenn.) 301.

A trustee sold trust property under a power for an adequate price, afterward purchased other property with his own funds, made improvements upon it, and finally exchanged it for the trust property so sold by him. It was held that no presumption of fraud arose from these circumstances, and that the trustee was only liable for the price for which he sold the property. *De Bevoise v. Sandford, Hoffm.* (N. Y.) 192.

2. *Hamblin v. Warnicke*, 31 Tex. 91; *Miles v. Wheeler*, 43 Ill. 123; *Morse v. Royal*, 12 Ves. 355; *Ex p. Bennett*, 10 Ves. 381; *Wright v. Campbell*, 27 Ark. 637; *North Baltimore Bldg. Assoc. v. Caldwell*, 25 Md. 420; 90 Am. Dec. 67; *Korns v. Shaffer*, 27 Md. 83.

Where trust property at a sale by the trustee, is purchased by a third person, in trust for the trustee and others, the sale is void. *Hunt v. Bass*, 2 Dev. Eq. (N. Car.) 292; 24 Am. Dec. 274.

3. *Johnson v. Johnson*, 5 Ala. 90; *James v. James*, 55 Ala. 525; *Carter v. Thompson*, 41 Ala. 375; *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146; *VanDyke v. Johns*, 1 Del. Ch. 93; 12 Am. Dec. 76; *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Flanders v. Flanders*, 23 Ga. 249; 68 Am. Dec. 523; *Kruse v. Steffens*, 47 Ill. 112; *Munn v. Burges*, 70 Ill. 604; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; 20 Am. Dec. 123; *Wallace v. Associate Reformed Church*, 10 Ind. 162; *Patten v. Pearson*, 60 Me. 220; *Litchfield v.*

*Cudworth*, 15 Pick. (Mass.) 23; *Clark v. Blackington*, 110 Mass. 369; *Learned v. Foster*, 117 Mass. 365; *Mitchell v. McMullen*, 59 Mo. 252; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Jackson v. Walsh*, 14 Johns. (N. Y.) 407; *Barr v. New York, etc., R. Co.*, 125 N. Y. 263; *Musselman v. Eshleman*, 10 Pa. St. 394; 51 Am. Dec. 493; *Connolly v. Hammond*, 51 Tex. 647; *Green v. Sargeant*, 23 Vt. 466; 56 Am. Dec. 88; *Chalmer v. Bradley*, 1 J. & W. 51.

A delay of ten days is too long. *Hubbell v. Medbury*, 53 N. Y. 98. So with a delay of eight years. *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; 45 Am. Dec. 310. So with sixteen years. *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1; 2 Am. Dec. 281.

If a *cestui que trust* discovers facts which may give him a right to repudiate the acts of his trustee, *e. g.*, in purchasing property, he is entitled to reasonable time to investigate them. But he must make his decision to repudiate or affirm the acts within a reasonable time. And if he lies by for three years and suffers the trustee to make payments for the property, he will be bound by his acts. *Follansby v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691.

Where a trustee purchases his *cestui que trust's* property, if the *cestui que trust* does not in a reasonable time take steps after he knows of the sale, or, if he is a minor, after his disability is removed, to set the sale aside, his assent to the purchase will be conclusively presumed. *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; 45 Am. Dec. 310.

A *cestui que trust* has the option of taking the benefit of any purchase which may be made by the trustee of claims or titles adverse to the estate, upon reimbursing the trustee to the extent of his outlay; but he must signify that he elects to do so within a reasonable time. *Wiswall v. Stewart*, 32 Ala. 433; 70 Am. Dec. 549.

4. See *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442; 39 Am. Dec. 185. A trustee cannot purchase the trust



act, he is estopped by such consent or ratification thereafter to attempt its overthrow.<sup>1</sup>

The transaction is voidable only at the election of those who hold a beneficial interest. Third persons cannot impeach it;<sup>2</sup> not even the settlor.<sup>3</sup>

It must follow that the trustee who has bought at his own sale cannot enforce his purchase in court, even though it was made with the consent of the *cestui que trust*.<sup>4</sup> All such transactions are presumed to have been entered into for the benefit of the trust.<sup>5</sup> The profits arising therefrom inure to the trust, while

estate, for his own benefit, but his purchase will be for the benefit of the *cestui que trust*, if the latter elects to avail himself of it. But if the beneficiary chooses to confirm the purchase, or even to hold the trustee to it against his wishes, he can do so. *Huff v. Earl*, 3 Ind. 306; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412.

Where a trustee purchases a trust estate at his own sale, the parties interested, by claiming the price, are estopped from setting aside the sale. *Price v. Nesbit*, 1 Hill Eq. (S. Car.) 445.

Where a trustee has been guilty of a violation of trust by secretly buying the trust property at his own sale, in order to avail himself of the *cestui que trust's* acquiescence in his ownership as a bar to his rights, he must show that the latter was fully apprised by him of the nature and extent of the fraud practised on him. *West v. Sloan*, 3 Jones Eq. (N. Car.) 102.

1. *VanDyke v. Johns*, 1 Del. Ch. 93; 12 Am. Dec. 76; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1; 19 Am. Dec. 258; *Boerum v. Schenck*, 41 N. Y. 182. See also *Piatt v. Oliver*, 2 McLean (U. S.) 313; *Dunlap v. Mitchell*, 10 Ohio 117; *Beeson v. Beeson*, 9 Pa. St. 279; *Harrington v. Erie County Sav. Bank*, 101 N. Y. 257.

2. *McKinley v. Irvine*, 13 Ala. 681; *Thorp v. McCullum*, 6 Ill. 614; *Larco v. Casaneuava*, 30 Cal. 560; *Rice v. Cleghorn*, 21 Ind. 80; *Harrington v. Brown*, 5 Pick. (Mass.) 519; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1; 10 Pick. (Mass.) 77; 19 Am. Dec. 258; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 31; *Baldwin v. Allison*, 4 Minn. 25; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Wilson v. Troup*, 2 Cow. (N. Y.) 238; 14 Am. Dec. 458; *Waelper's Appeal*, 2 Pa. St. 71; *Paniter v. Henderson*, 7 Pa. St. 48; *McNish v. Pope*, 8 Rich. Eq. (S. Car.) 112.

It is not a matter of course for equity to interfere and set aside a purchase by a trustee of the trust estate; but if the *cestui que trust* agrees to the sale, the purchase will stand. And in such case, a court of law will not permit a stranger to raise the objection or invalidate the sale. *Jackson v. Van Dalfsen*, 5 Johns. (N. Y.) 43; *Wilson v. Troup*, 2 Cow. (N. Y.) 195; 14 Am. Dec. 458; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237; *Villines v. Norfleet*, 2 Dev. Eq. (N. Car.) 167; *Beeson v. Beeson*, 9 Pa. St. 279.

Where an administratrix forecloses a mortgage, and herself purchases the land at the sale, the beneficiary only can call the purchaser in question. *Kern v. Chalfant*, 7 Minn. 487.

Of course, the trustee will not be allowed to plead his fiduciary relationship in avoidance of his purchase. *McClure v. Miller*, 1 Bailey Eq. (S. Car.) 107; 21 Am. Dec. 522.

No one but the *cestui que trust* can avoid the purchase of trust property, made by the trustee in his own name. *Kern v. Chalfant*, 7 Minn. 487. Compare *Baldwin v. Allison*, 4 Minn. 25.

3. Where a father, by deed, creates a voluntary trust in favor of his children, who are minors, and delivers the deed and the property conveyed by it to the trustee, who accepts the trust, the *cestuis que trustent* are not concluded by the grantor's ratification of a purchase by a trustee at his own sale. *Andrews v. Hobson*, 23 Ala. 219.

In *Miller v. Iowa Land Co.*, 56 Iowa 374, it appeared that the trustee of a railway company had conveyed some of its real estate for their own benefit, in payment for their services as trustees, under authority from the board of directors. The court held that this conveyance was valid as to all other persons except the beneficiaries, and as to them, it was voidable only.

4. *Munro v. Alaire*, 2 Cal. (N. Y.) 320.

5. *Wiswall v. Stewart*, 32 Ala. 433;

70 Am. Dec. 549; *Russell v. Peyton*, 4 Ill. App. 473; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 477; 20 Am. Dec. 123; *McCrary v. Foster*, 1 Iowa 271; *Phillips v. Overfield*, 100 Mo. 466; *Mulford v. Minch*, 11 N. J. Eq. 16; 64 Am. Dec. 472; *Ashuelot Railroad v. Elliott*, 57 N. H. 397; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27; 7 Am. Dec. 475; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 76; *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223; *Moore v. Moore*, 4 Sandf. Ch. (N. Y.) 37; *Colburn v. Morton*, 5 Abb. Pr. N. S. (N. Y.) 315; *Stiles v. Stiles*, 1 Lans. (N. Y.) 99; *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 498; *Torrey v. Bank of Orleans*, 9 Paige (N. Y.) 650; 7 Hill (N. Y.) 260; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Penman v. Slocum*, 41 N. Y. 63; *Jewett v. Miller*, 10 N. Y. 405; 65 Am. Dec. 751; *Fulton v. Whitney*, 66 N. Y. 548; *Valentine v. Belden*, 20 Hun (N. Y.) 542; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 91; *Hubbell v. Medbury*, 53 N. Y. 98; *Slade v. Van Vechten*, 11 Paige (N. Y.) 21; *De Caters v. De Chaumont*, 3 Paige (N. Y.) 178; *Matter of Oakley*, 2 Edw. Ch. (N. Y.) 478; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; 16 Am. Dec. 648.

A trustee may become the purchaser of trust property levied on and sold at the sheriff's sale, at the instance of others, and he should be reimbursed for his expenditures in the purchase, but he cannot deprive the beneficiary of the benefit arising from the purchase, if there is such benefit. *Spindler v. Atkinson*, 3 Md. 409; 56 Am. Dec. 755.

If a trustee purchases at his own sale, and immediately sells to another, at an advance, according to a previous agreement that such other should not bid at the sale, equity will compel him to account for the advance to the beneficiary. *Wasson v. English*, 13 Mo. 176.

A trustee for creditors suing out a mortgage belonging to the trust, and purchasing real estate at such sale in his own name, acts as trustee for the creditors. *Campbell v. McLain*, 51 Pa. St. 200.

Where one acted as *prochain ami* to infants in a proceeding for partition, and, at the sale, became himself the purchaser, it was held that the purchase accrued to the benefit of the infants, and created a trust in their favor, even as against a purchaser with no-

tice, and even before the court. *Collins v. Smith*, 1 Head (Tenn.) 251.

Where the president of a steamship company held a mortgage on all the vessels, and had authority to sell them, and did at a private sale sell them to his son, taking his note payable in one year for the purchase-money, and then himself continued to control and manage the vessels, and did not account to his son, it was held that the transaction should be set aside, and that the trustee must be ordered to resell the vessels and account to the company for the proceeds. *Murray v. Vanderbilt*, 59 Barb. (N. Y.) 140.

A party who holds half a contract of land in his own right and half as trustee, and buys under an adverse claim, acts for the joint benefit of himself and the beneficiary, but the latter must refund half the sum with interest; but if the trustee relinquish to an opposing title, he must show the superiority of such title, or on a division between himself and his beneficiary, he must convey the land relinquished in his name. *M'Clanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388; 12 Am. Dec. 412.

A trustee purchasing a debt due from the *cestui que trust* to a third person, at a discount, will be regarded as having purchased for the benefit of the *cestui que trust*. *Matter of Oakley*, 2 Edw. Ch. (N. Y.) 478.

A trustee who purchases an incumbrance upon a trust estate, takes it for the benefit of the estate, and cannot be allowed to use it for his own benefit. *Hawley v. Maucius*, 7 Johns. Ch. (N. Y.) 174; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27; *Boyd v. Hawkins*, 2 Dev. Eq. (N. Car.) 195.

An administrator who, knowing that his intestate held in trust for third parties, certain lands, which were partly paid for, permits the same to be forfeited, and acquires a patent in his own name on the sale, will be compelled to convey to the real parties in interest. *Carrier v. Pecker*, 62 Mich. 441.

Where the receiver uses trust funds for the purchase of property, the profit accrues to the benefit of the *cestui que trust*. *People v. Merchants' Bank*, 35 Hun (N. Y.) 97.

Purchasing property with trust funds, he will be deemed to have taken the property in trust for his beneficiary. *Phillips v. Overfield*, 100 Mo. 466.

Where the trustee owned a half interest in the estate and held the other half for his *cestui que trust* and

purchased an adverse claim, it was held that the *cestui* was entitled to the benefit of half of the claim so purchased. *M'Clanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388; 12 Am. Dec. 412.

A person having occupied part of a lot of land adjoining his own under an alleged parol contract for the purchase, and having made improvements thereon, assigned his property for the benefit of creditors; and the assignee, being unable to obtain a consummation of the alleged agreement, made an absolute purchase in his own name, it was held that the purchase inured to the benefit of the *cestui que trust*. *Chapin v. Weed*, 1 Clarke Ch. (N. Y.) 464.

The treasurer of a corporation who buys at an execution sale of the corporate property, will be deemed to have bought for the company's benefit and not for his own. *McAllen v. Woodcock*, 60 Mo. 174.

An executor who had become a purchaser of land at his own sale, filed an account, purporting to be a final settlement, in which he charged himself with the price at which the land was bid off by his own agent. Afterward, he sold the land at a higher price, and it was held that he could not set up the account already filed to estop the legatees from claiming further. *Shuman's Appeal*, 27 Pa. St. 64.

A trustee of the equity of redemption in mortgaged premises cannot become a purchaser upon foreclosure so as to remove them from the operation of the trust. He is liable to be called upon by the *cestui que trust* for an accounting and a payment of the rents and profits. *Hubbell v. Medbury*, 53 N. Y. 98.

If land upon which a judgment held in trust for infant children is a lien, is purchased by the trustee at a price which fails to satisfy the judgment of his beneficiaries, and is resold by him at a profit, the beneficiaries may require that said profits be applied toward the payment of their judgment. *Feamster v. Feamster*, 35 W. Va. 1.

If a trustee purchases claims against the trust estate at a discount, the courts will not permit him to derive a personal profit from the transaction. The profit inures to the benefit of the estate. He may demand, however, that he be reimbursed the amount of his expenditure in making the purchase, with interest. *Baugh v. Walker*, 77 Va. 99.

So, a trustee who purchases lands at his own sale conducted under an order

of the court, and uses the trust funds to pay for them, must account to the beneficiaries for all profits made on a re-sale, even though the order of sale allows the trustee to become a bidder. *Baker's Appeal*, 120 Pa. St. 33.

A trustee who buys in property under a prior incumbrance and at a price below what it is actually worth, will be held to have done so for the benefit of his beneficiary, and it matters not whether the property purchased belongs to the trust nor whether the purchase necessarily has the effect of injuring other trust property. *Fulton v. Whitney*, 5 Hun (N. Y.) 16.

A trustee who has taken a conveyance of the lands of his testator from a purchaser thereof at a sale, in the notice of which such trustee joined with his co-trustees, and declared with them, by the conditions of the sale, the terms upon which it must be made (thereby accepting the trust), cannot relieve himself from liability to his *cestui que trust* for the profits which he made on a re-sale of those lands, on the ground that he did not take out letters testamentary under the testator's will. *Romaine v. Hendrickson*, 27 N. J. Eq. 162.

A trustee is not allowed to purchase the trust property, when sold under a prior incumbrance, for his own benefit and to the prejudice of the beneficiary. *Slade v. Van Vechten*, 11 Paige (N. Y.) 21; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Jewett v. Miller*, 10 N. Y. 402; 65 Am. Dec. 751.

A trustee is forbidden to deal with the property for his own benefit. He cannot purchase an outstanding title and hold for his own use against his *cestui que trust*, even though such purchase is at a judicial sale and under a title superior to that conveyed to him as trustee. *Roberts v. Moseley*, 64 Mo. 507; *Crutchfield v. Haynes*, 14 Ala. 49. See also *Evertson v. Tappan*, 5 Johns. Ch. (N. Y.) 497.

He cannot acquire any interest that is hostile to that of his beneficiary. *Harrison v. Mock*, 10 Ala. 185; *Adams v. LaRose*, 75 Ind. 471; *Shuey v. Latta*, 90 Ind. 136; *Roberts v. Moseley*, 64 Mo. 507; *Conger v. Ring*, 11 Barb. (N. Y.) 364; *Streeter v. Shultz*, 45 Hun (N. Y.) 408; *Toole v. McKiernan*, 48 N. Y. Super. Ct. 163; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Lee v. Fox*, 6 Dana (Ky.) 176; *Cavagnaro v. Don*, 63 Cal. 227; *Columbus Co. v. Hurford*, 1 Neb. 146; *Stettinsche v. Lamb*, 18

Neb. 619; *Hawley v. Mancius*, 7 Johns. Ch. (N. Y.) 174; *Kellogg v. Wood*, 4 Paige (N. Y.) 578; *Morris v. Joseph*, 1 W. Va. 256; 91 Am. Dec. 386; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433. See also *California Code*, § 7233; *Dakota Civ. Code*, § 1303.

A court of equity under no circumstances will allow a trustee to secure a debt of his own, not secured by the trust, by forming a combination with one who claims adversely to the *cestui que trustent*. *Irwin v. Harris*, 6 Ired. Eq. (N. Car.) 215.

Where a trustee has placed himself in a position adverse to the trust, he can claim no benefit under it. *Ennor v. Hodson*, 28 Ill. App. 445.

Any adverse claim which he purchases, inures to the benefit of the trust. *McClanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388; 12 Am. Dec. 412.

So he is forbidden to hold possession adverse to the claims of his *cestui que trust*, or to establish any title thereby in himself. *Huntly v. Huntly*, 8 Ired. Eq. (N. Car.) 250.

An administrator and trustee invested trust funds in a second mortgage on an estate upon which, in his individual capacity, he held a first mortgage. A building upon the estate burned, leaving the security insufficient to pay both mortgages. It was held that the trust mortgage should be treated as senior to the mortgage which he held individually, even as against the assignee of such first mortgage, who took it after maturity and with constructive, if not actual, notice of the facts. *Shuey v. Latta*, 90 Ind. 136.

A trustee who allows trust property to get out of repair for the purpose of purchasing it, and thereby does purchase it for less than its value, should be charged with its full value. *Prichard v. Farrar*, 116 Mass. 213.

**Corporate Officers Acquiring Interests Adverse to Those of Stockholders.**—A familiar application of this doctrine is made in cases where the officers and directors of corporations have attempted to secure some personal advantage out of their official position, in violation of their obligations as trustees for the stockholders. The officers and directors of a corporation are trustees for its stockholders, and are forbidden in equity to acquire any interest hostile to the interests of the stockholders. See

*Cook v. Sherman*, 20 Fed. Rep. 167. See also note of J. C. Harper, same case, pp. 175-179.

In *Cook v. Sherman*, 20 Fed. 167, two directors and the president and chief engineer of the Chicago, etc., Railroad Company purchased certain lands in advance of the location of the railroad line and of the depots and stations of the road, with a view to locating the same on the lands so secured. In that case, the court, by McCrary, J., said: "If the courts should enforce such contracts, they would lend their sanction to a practice, the inevitable tendency of which is to encourage breaches of trust to the sacrifice of private rights and of the public interest. The managing officers of *quasi* public corporations, possessing vast powers and engaged in great enterprises, are too apt to forget that they are not to have any interest adverse to those whom they represent, and the courts of justice should not in the least relax the rule requiring of them scrupulous fidelity and entire impartiality in the discharge of their official duties."

A director occupies one of those fiduciary relations where his dealing with the subject-matter of the trust and with the beneficiary is viewed with jealousy by the courts, and may be set aside on slight grounds. *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715; *Drury v. Cross*, 7 Wall. (U. S.) 299; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Wickersham v. Crittenden*, 93 Cal. 17; *Widrig v. Newport St. R. Co.*, 82 Ky. 511; *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456; 77 Am. Dec. 311; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Railroad Co. v. Magnay*, 25 Beav. 586.

Upon this subject Beach says: "It is by no means a well-settled point, what is the precise relation which directors sustain to stockholders. They are undoubtedly said by many authorities to be trustees, but this is to be taken only in a general sense, as the term is to be applied to any agent or bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. . . . A director whose personal interests are adverse to those of the corporation has no right to act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign." Beach

the losses, if any, fall on the trustee, and the *cestui que trust* has the option of ratifying the transaction and accepting the proceeds or having the sale set aside.<sup>1</sup>

There are cases, it is true, where a purchase by the trustee of the trust property will be sustained. But this apparent exception is not an actual one. It extends to open public sales conducted by officers of the court who are in no way under the control or direction of the trustee, and where it is manifest that the trustee is party to no combination or scheme to govern the price. There can be no opportunity for fraud under these limitations, and hence sales thus made will be upheld.<sup>2</sup> Indeed, it sometimes becomes

on Private Corporations, § 240. See also Cook on Stock and Stockholders, § 648 *et seq.*

In *Young v. Fox*, 37 Fed. Rep. 385, the general manager of a corporation, Powell, sold his thirty shares of stock to Young, who became manager in his place, and who paid a portion of the purchase price of the stock. While Young was acting as manager, the sheriff called on him with an attachment against Powell and asked if Powell owned any stock in the company. Upon Young's representation that the thirty shares belonged to Powell, the sheriff sold them, Young giving Powell no notice of the suit, but attending the sale and buying the stock for \$496. Young having failed to pay the \$2,000 when due, F., another stockholder, who had guaranteed its payment, paid it. In a suit between them as to the ownership of the stock, Young relied entirely on his purchase at the attachment sale, repudiating his purchase from Powell. It was held that he must be treated as holding the stock in trust for Powell and F., and that, in view of his conduct, he was not entitled to have the \$496 which he had paid refunded to him.

A railroad director who makes a contract with his company for the construction of a road, is forbidden to gain any benefit from the contract. *European, etc., Co. v. Poor*, 59 Me. 277.

Corporate directors are trustees for the stockholders and cannot buy the property of the corporation. *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433. In this case the court, by Ryan, C. J., said: "A distinction is recognized in the books between corporate officers, whose offices are of the essence of the corporation, and whose offices are merely ministerial. Courts of equity deal with the former as trustees, and with the latter as agents."

But a director may lend money to his corporation, where the money is needed, and the loan is openly and conscientiously made. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

1. *Ogden v. Larrabee*, 57 Ill. 389; *Bush v. Sherman*, 80 Ill. 160; *Watson v. Sherman*, 84 Ill. 263; *Creveling v. Fritts*, 34 N. J. Eq. 134. See also *Silverthorn v. McKinister*, 12 Pa. St. 67; *De Bevoise v. Sandford, Hoffm. Ch.* (N. Y.) 192.

Where a trustee, having power to sell and convey land, executes a deed, for a valuable consideration, of a part of the trust property, and immediately thereafter takes a reconveyance of the premises granted, the conveyance is valid at law, and the grantee will not be regarded as taking as trustee. *Jackson v. Brooks*, 8 Wend. (N. Y.) 426.

An administrator is not allowed to agree with anyone before the sale to bid off the land for his own benefit, but the moment his sale is concluded, he may agree with the purchaser for a conveyance to himself. *Wortman v. Skinner*, 12 N. J. Eq. 358.

Where the title of a mortgagor, remainder-man, or beneficiary, is destroyed, the mortgagee, tenant for life, or trustee may acquire the real title, if his condition and conduct are free from fraud. *Price v. Evans*, 26 Mo. 30.

But a *New York* court has held that one who holds mortgaged lands as trustee will not be permitted to buy of the purchaser at the foreclosure sale so as to acquire an interest adverse to that of the *cestui que trust*. *Toole v. McKiernan*, 48 N. Y. Super. Ct. 163.

2. *Prevost v. Gratz*, 1 Pet. (C. C.) 378; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Allen v. Gillette*, 127 U. S. 589; *Felton v. LeBreton*, 92 Cal. 457; *Barber v. Bowen*, 47 Minn. 118; *Baker v. Springfield, etc., R. Co.*, 86 Mo. 75; *Fisk v. Sarber*, 6 W. & S.

the duty of the trustee to buy at such sales, as it does where, by so doing, he can better protect the estate,<sup>1</sup> or where the trustee already has an individual interest in the property and must purchase in order to prevent the sacrifice of that interest.<sup>2</sup>

(Pa.) 18; Chorpensing's Appeal, 32 Pa. St. 315; 72 Am. Dec. 789; Lusk's Appeal, 108 Pa. St. 152.

In *Allen v. Gillette*, 127 U. S. 589, the court, by Lamar, J., said: "The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court and of other courts of this country (citing cases in this note, *supra*). It is true that the rule upon this subject as stated by some text-writers is more stringent than that stated in these cases. 1 Perry on Trusts, § 205; Hill on Trustees, § 250. We think, however, that the language employed by them does not present a thorough and perfect generalization of the essential principles pervading the decisions upon this subject. They are in manifest conflict with the uniform current of decisions of the supreme court of Texas, which are our guides in this case." The court, in this connection, cited *Howards v. Davis*, 6 Tex. 174; *Scott v. Mann*, 33 Tex. 725; *Goodgame v. Rushing*, 35 Tex. 722; *Erskine v. De LaBaum*, 3 Tex. 406; 49 Am. Dec. 75.

The rule which forbids a trustee from purchasing for his own benefit at his own sale, does not apply to the guardians of infant heirs who purchase lands belonging to the ancestor's estate at an administrator's sale, held under the order of the probate court, the guardian having no power or control over such sale. *Barber v. Bowen*, 47 Minn. 188.

1 See *Spindler v. Atkinson*, 3 Md. 409; 56 Am. Dec. 755; *Munro v. Aire*, 2 Cal. Cas. (N. Y.) 183; 2 Am. Dec. 330.

2 *Michoud v. Girod*, 4 How. (U. S.) 503; *Faucett v. Faucett*, 1 Bush (Ky.) 511; 89 Am. Dec. 639; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 251; *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 20; 2 Am. Dec. 281; *DeCaters v. DeChaumont*, 3 Paige (N. Y.) 178; *Chapin v. Weed*, 1 Clarke Ch. (N. Y.) 464; *Abell v. Bradner* (Supreme Ct.), 15 N. Y. Supp. 64; *Scholle v. Scholle*,

101 N. Y. 167; *Froneberger v. Lewis*, 79 N. Car. 426; *McCelvey v. Thomson*, 7 S. Car. 185; *Anderson v. Butler*, 32 S. Car. 283; *Bohn v. Davis*, 75 Tex. 24; *Farmer v. Dean*, 32 Beav. 327; *Campbell v. Walker*, 5 Ves. 678.

The directors of a corporation may buy in corporate property at a sale under the foreclosure of a mortgage given to them to secure their own debts. *McMurtry v. Montgomery Masonic Temple Co.*, 86 Ky. 206.

The executor of a will, who was also a legatee and trustee for certain other legatees, purchased at a sale of the decedent's real estate made under order of court to pay debts. It appeared that he was a *bona fide* purchaser, that there was no chilling combination or conspiracy, and that he paid the highest price the land would bring. These facts were held to show that the trustee did not sustain the inconsistent relation of vendor and vendee, and hence the rule that the *cestui que trust* may at his option abide by or set aside a purchase made by the trustee is inapplicable. *Anderson v. Butler*, 31 S. Car. 183.

A court of equity will not allow one, acting as trustee, to create an interest in himself opposed to that of his beneficiary; but where a *bona fide* creditor afterward becomes trustee, he may buy in a judgment against the beneficiary and may pursue all legal remedies to enforce payment of it, nor has the *cestui que trust* a right to demand to know how much the former paid for it. *Prevost v. Gratz*, Pet. (C. C.) 364.

A person to whom certain property has been conveyed in trust for other parties, is not thereby debarred from purchasing or levying on other property of the debtor for his own personal benefit. *Eldridge v. Smith*, 34 Vt. 484.

A beneficiary under a mortgage, who is also trustee with power to sell, holds a power coupled with an interest, and may be a purchaser of the property at a sale otherwise fairly made, whether he makes the purchase himself or by his agent or attorney. So held, reluctantly, in deference to *Howards v. Davis*, 6 Tex. 183, *distinguishing* *Shannon v. Marmaduke*, 14 Tex. 220; *Scott v. Mann*, 33 Tex. 721.

A trustee may purchase the trust

And the statute sometimes makes a special provision for the purchase by the fiduciary at his own sale, always requiring, however, that there be perfect fairness in the transaction.<sup>1</sup>

Wherever such sales have been permitted, it has been because some such special provision of the statute or some order of the court has authorized the transaction, or where the parties holding the beneficial interest and having authority to consent or ratify the sale, have done so, and there has been entire good faith.<sup>2</sup> But if the trustee is permitted, by the court, to bid at his own sale, he must act strictly within his authority, and in no case can he so bid where his duty conflicts with his personal interests.<sup>3</sup>

property at a judicial sale which is not under his control, provided he acts in good faith and to protect the interests of himself and others. *Lusk's Appeal*, 108 Pa. St. 152.

A person to whom certain property has been conveyed by his debtor, in trust for other parties, is not thereby debarred from purchasing or levying upon other property of the debtor for his own personal benefit. *Eldridge v. Smith*, 34 Vt. 484.

It was held in *Colgate v. Colgate*, 23 N. J. Eq. 372, that when it is necessary that land held in trust should be sold, and the trustee is in a situation that induces him to give more than any other purchaser would give, the court may authorize a sale by him at a full, fair price, to be approved by the court, to himself, or to someone for his benefit.

*Citing Campbell v. Walker*, 5 Ves. 678; *Michoud v. Girod*, 4 How. (U. S.) 503.

1. See *Huger v. Huger*, 9 Rich. Eq. (S. Car.) 217; *Anderson v. Butler*, 31 S. Car. 183; *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 361.

Thus the *New York* statute permits a mortgagee with power to sell to be a purchaser at such sale. *Wilson v. Troup*, 2 Cow. (N. Y.) 196; 14 Am. Dec. 458; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Ten Eyck v. Craig*, 5 Thomp. & C. (N. Y.) 65; 2 Hun (N. Y.) 452. But this power exists only by virtue of the statute. *Dobson v. Racey*, 3 Sandf. Ch. (N. Y.) 60. And a purchase by such a mortgagee, where not expressly so empowered by statute, may be set aside at the suit of the cestui. *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 122; *Wade v. Harper*, 3 Yerg. (Tenn.) 383.

Of course, the mortgagee without power of sale is under no such restriction, for he has no duty to perform that is inconsistent with the character of a

purchaser. *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 116; *Murdock's Case*, 2 Bland (Md.) 468; 20 Am. Dec. 381; *Lyon v. Jones*, 6 Humph. (Tenn.) 533.

2. *Kennedy v. Dunn*, 58 Cal. 339; *Faucett v. Faucett*, 1 Bush (Ky.) 511; 89 Am. Dec. 639; *Cumberland Coal, etc., Co. v. Sherman*, 20 Md. 117; *Roberts v. Roberts*, 65 N. Car. 27; *Ames v. Port Huron Log Driving, etc., Co.*, 11 Mich. 139; 83 Am. Dec. 731; *Scholle v. Scholle*, 101 N. Y. 167.

A guardian *ad litem* may obtain the consent of the court to his bidding at a partition sale. *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 361.

Although, as a general rule, a sale by a trustee to his wife would be set aside on the ground of her relationship to the trustee, yet it is in the power of the orphans' court to make an order permitting the wife to bid. *Dundas' Appeal*, 64 Pa. St. 325.

A trustee who has an interest to protect by bidding at a sale of the trust property, and who makes a special application to the court for permission to bid, which, upon a hearing of all the parties interested, is granted, can make a purchase which is valid and binding upon all the parties, and obtain thereunder a perfect title. *Scholle v. Scholle*, 101 N. Y. 167.

Trustees are never permitted to buy the trust property, except upon authority of the court. *Carson v. Marshall*, 37 N. J. Eq. 213.

3. *Cadwalader's Appeal*, 64 Pa. St. 293.

For cases in which leave was granted by the court to the trustee to bid at his own sale, see *Michoud v. Girod*, 4 How. (U. S.) 503; *Faucett v. Faucett*, 1 Bush (Ky.) 511; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 20; 2 Am. Dec. 281; *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 361; *DeCaters v. DeChaumont*, 3

This prohibition rests upon the trustee only so long as the trust continues; as soon as that ceases, he occupies the same relation to the trust property that a stranger does, and may have dealings with the trust or acquire the trust property by purchase or otherwise, so long as he acts in good faith.<sup>1</sup>

*d. DEALINGS WITH THE BENEFICIARY.*—The trustee is not forbidden to buy directly of his *cestui que trust*, but the burden is on him to show a full, fair, and sufficient consideration, and it must appear that the *cestui* had power to sell, and had the fullest information concerning the transaction and the trust.<sup>2</sup> But the

Paige (N. Y.) 178; Scholle v. Scholle, 101 N. Y. 172; Froneberger v. Lewis, 79 N. Car. 426.

1. Munn v. Burges, 70 Ill. 604; Bush v. Sherman, 80 Ill. 160; Ball v. Carew, 13 Pick. (Mass.) 28; Creveling v. Fritts, 34 N. J. Eq. 134; Rammelsberg v. Mitchell, 29 Ohio St. 22. See Colton v. Stanford, 82 Cal. 351; 16 Am. St. Rep. 137.

Where trust property was sold under a decree upon adverse proceedings upon an incumbrance, made prior to the trust, and the trustee afterwards purchased, for his own benefit, from a *bona fide* purchaser, it was held that, by the sale under the decree, the trust determined and the subsequent purchase by the trustee was valid. DeBevoise v. Sanford, Hoffm. (N. Y.) 192.

2. Cook v. Sherman, 20 Fed. Rep. 167; Kennedy v. Kennedy, 2 Ala. 571; Bryan v. Duncan, 11 Ga. 67; Buford v. Guthrie, 14 Bush (Ky.) 677; Brackenridge v. Holland, 2 Blackf. (Ind.) 377; 20 Am. Dec. 123; Buell v. Buckingham, 16 Iowa 284; 85 Am. Dec. 516; Smith v. Townshend, 27 Md. 368; 92 Am. Dec. 637; Farnam v. Brooks, 9 Pick. (Mass.) 212; Brown v. Cowell, 116 Mass. 461; Schwarz v. Wendell, Walk. (Mich.) 267; Staats v. Bergen, 17 N. J. Eq. 554, 297; Graves v. Waterman, 63 N. Y. 657; Bruch v. Lantz, 2 Rawle (Pa.) 392; 21 Am. Dec. 458; McCants v. Bee, 1 McCord Eq. (S. Car.) 383; 16 Am. Dec. 610; Hickman v. Stewart, 69 Tex. 255; Coffee v. Ruffin, 4 Coldw. (Tenn.) 487; Puzey v. Senier, 9 Wis. 370; Coles v. Trecothick, 9 Ves. 247; Morse v. Royal, 12 Ves. 355.

Where one of several joint purchasers of real estate has taken the title for their joint benefit, with authority to sell and divide the proceeds, he is deemed a trustee, and cannot purchase the others' interests save upon such

full and fair disclosure of all the facts as enables them to deal with him on terms of perfect equality. Cook v. Sherman, 20 Fed. Rep. 167; 4 McCrary (U. S.) 20.

"The burden is on the trustee to establish that there was such a *bona fide* contract as will support the purchase in a court of equity on a careful and jealous examination of all the circumstances, and a rigid inquiry into the perfect fairness and propriety of the transaction." Graves v. Waterman, 63 N. Y. 657.

A court of equity will only sustain such a purchase when it has been deliberately agreed and understood between them that the relation shall be considered dissolved, and the court, upon a scrupulous examination of all the circumstances, is convinced that there is a clear contract, and that the *cestui* intended that the trustee should buy; and that there is no fraud, concealment, or advantage taken by him. Beckett v. Tyler, 3 MacArthur (D. C.) 319.

The burden is on a trustee who has purchased the trust estate from the *cestui*, to prove the fairness of the transaction; as all presumptions are against its validity. Lathrop v. Polard, 6 Colo. 424.

A trustee who purchases from his *cestui*, must show that he made the fullest disclosures of all he knew as to the subject, and that the price he paid was adequate. Spencer's Appeal, 80 Pa. St. 317. It has been held in *Mississippi*, however, that, although a trustee may purchase of the *cestui que trust* his share in the fund, the sale is voidable at the election of the *cestui que trust*. Tatum v. McLellan, 50 Miss. 1.

In Puzey v. Senier, 9 Wis. 370, the court, by Cole, J., said: "It is true, in certain cases, the trustee has been permitted to buy trust property, but it is the language of all the authorities



that such a transaction is always scrutinized in a court of equity with a watchful and jealous eye, and will not be sustained to the disadvantage of the *cestui que trust*, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee." *Citing Stuart v. Kilsam*, 2 Barb. (N. Y.) 494; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Gibson v. Jeyes*, 6 Ves. Jr. 266.

A trustee may deal with the *cestui que trust* and may purchase his share in the funds. The *cestui que trust* may either avoid the sale, or, by acquiescence, confirm it; it is for him to say whether it shall stand or not. *Tatum v. McLellan*, 50 Miss. 1.

But deeds from the beneficiary to the trustee will be set aside if it appear that the *cestui* was ignorant of the value of the property and sold it for an inadequate price. *Smith v. Townshend*, 27 Md. 388; 92 Am. Dec. 637.

**Other Dealings With the Beneficiary.**—The same principles govern all dealings between trustee and *cestui*, and such dealings are jealously watched by the courts. *McCants v. Bee*, 1 McCord Eq. (S. Car.) 383; 16 Am. Dec. 610; *Gibson v. Jeyes*, 6 Ves. Jr. 266; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250.

The rule as followed by the *Illinois* decisions, is stated in *Thorp v. McCullum*, 6 Ill. 614, to be, that one standing in a fiduciary relation cannot deal on his own account with the person or the thing affected by the trust relation. Followed by *Wickliff v. Robinson*, 18 Ill. 145; *Dennis v. McCagg*, 32 Ill. 429; *Miles v. Wheeler*, 43 Ill. 123; *Munn v. Burges*, 70 Ill. 604; *Bush v. Sherman*, 80 Ill. 160; *Ward v. Armstrong*, 84 Ill. 151; *Fast v. McPherson*, 98 Ill. 496; *Allen v. Jackson*, 122 Ill. 567; *Vallette v. Tedens*, 122 Ill. 607. And it applies to all who hold fiduciary relations, as well as trustees, strictly so called. *Colton v. Field*, 28 Ill. App. 354. See *Reed v. Peterson*, 91 Ill. 288.

In an action by a trustee of the separate estate of a *feme covert*, to recover a debt from her, it is not enough to prove that the articles were furnished at her request, on the credit of her separate estate, and were suitable for her condition in life; it is necessary to repel the presumption of bad faith which such a transaction gives rise to, and it must be shown that the charges were reasonable, and that the trustee made no profit by the transaction.

*Cleveland v. Pollard*, 1 Ala. Sel. Cas. 481.

Dealings between a trustee and beneficiary in relation to the trust estate are not prohibited, but the court watches them with great jealousy, and the trustee is required to show affirmatively that the dealings were fair and for a reasonable consideration, so as to remove all suspicion that any advantage was taken of the confidence which the fiduciary relation inspires. *Allen v. Bryant*, 1 Ired. Eq. (N. Car.) 276; *Boyd v. Hawkins*, 2 Dev. Eq. (N. Car.) 195; *Marshall v. Stephens*, 7 Humph. (Tenn.) 159.

Contracts between a trustee and his beneficiary, or guardian and ward, soon after the ward becomes of age, or of one acting as guardian, are voidable by the latter, provided he seeks to avoid them in a reasonable time. *Johnson v. Johnson*, 5 Ala. 90.

Where a *cestui que trust* has undertaken to indemnify his trustees for a breach of the trust, the court of chancery requires to be satisfied that he was free to act as a rational, intelligent man, and if he appears to have been governed by the belief that he was in a state of dependence upon them, such indemnity will not be regarded. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250.

A contract made between the executor and the life beneficiary to whom the income of a certain fund was to be paid by the terms of the will, after eighteen years had passed without any accounting by the executor, whereby he agreed to support the beneficiary during her life, in lieu of paying her the income of the fund, will not bind the beneficiary, though she was of sound mind and fully understood the nature and effect of the contract, unless evidence is adduced which affirmatively shows that she had knowledge of all facts bearing on the contract, and that she acted therein advisedly and without undue influence. *In re Hodges' Estate*, 63 Vt. 661.

In *Whiteside v. Taylor*, 105 Ill. 496, it was held that where a trustee is seeking to purchase from his *cestui que trust*, he is not bound to disclose that he has already sold half of the property, if the deed is duly recorded.

The fairness of a contract by which the trustee purchases trust property directly from the *cestui que trust* is a question of fact for the jury. *Brown v. Crowell*, 116 Mass. 461.

purchase by the trustee of the *cestui que trust*, puts an end to the trust.<sup>1</sup> Indeed, the parties may, under certain conditions, first dissolve the trust relation, and, putting themselves at arm's length, deal freely with one another.<sup>2</sup>

**7. Co-Trustees.**—The duties and liabilities of co-trustees are joint and not individual. Co-trustees may not act independently of one another nor ignore each other in the management of the estate. The trust is entitled to the benefit of the united judgment, discretion, and ability of all the trustees selected.<sup>3</sup>

1. *Johnson v. Johnson*, 5 Ala. 90; *Chalmer v. Bradley*, 1 Jac. & W. 51.

2. In *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137, the court, by Paterson, J., said: "If at the time of the purchase, or compromise, the trustee has shaken off his fiduciary character and the confidence which is presumed to result therefrom, it matters not what has occurred immediately preceding or long prior to the final transaction. In other words, if the transaction is one in which the trustee may lawfully deal with his *cestui que trust* by first dissolving the trust relation, it is not too late for him to do so at any time before the *cestui que trust* is prevented from making a full and fair investigation and consideration of the business in hand, and before he executes the contract."

3. **Co-Trustees.**—Perry says: "Where a settlor vests his property in several co-trustees, they all form as it were, one collective trustee." Perry on Trusts, § 411.

And Lewin: "Where the administration of the trust is vested in co-trustees they all form, as it were, but one collective trustee, and therefore must execute the duties of their office in their joint capacity." Lewin on Trusts and Trustees, p. \*258; *Sloo v. Law*, 3 Blatchf. (U. S.) 459; *Wilbur v. Almy*, 12 How. (U. S.) 189; *Patterson v. Leavitt*, 4 Conn. 50; 10 Am. Dec. 98; *Smith v. Wildman*, 37 Conn. 384; *Ex p. Griffin*, 2 Gill & J. (Md.) 116; *Cox v. Walker*, 26 Me. 504; *Heard v. March*, 12 Cush. (Mass.) 580; *Ames v. Armstrong*, 106 Mass. 15; *Towne v. Jaquith*, 6 Mass. 46; 4 Am. Dec. 84; *Austin v. Shaw*, 10 Allen (Mass.) 552; *Shaw v. Canfield*, 86 Mich. 1; *White v. Watkins*, 23 Mo. 423; *Hill v. Josselyn*, 13 Smed. & M. (Miss.) 597; *Crane v. Hearn*, 26 N. J. Eq. 378; *King v. Stow*, 6 Johns. Ch. (N. Y.) 323; *Green v. Miller*, 6 Johns. (N. Y.) 39; 5 Am. Dec. 184; *Shook v. Shook*, 19 Barb.

(N. Y.) 653; *Sherwood v. Reade*, 7 Hill (N. Y.) 431; *DePeyster v. Ferrers*, 11 Paige (N. Y.) 13; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Wilder v. Ranney*, 95 N. Y. 7; *Vandever's Appeal*, 8 W. & S. (Pa.) 405; 42 Am. Dec. 305; *Blin v. Hay*, 2 Tyler (Vt.) 304; 4 Am. Dec. 738; *Low v. Perkins*, 10 Vt. 532; 33 Am. Dec. 217; *Lipse v. Spear*, 4 Hughes (U. S.) 535; *Lee v. Sankey*, L. R., 15 Eq. 204; *Fellows v. Mitchell*, 1 P. Wms. 83; *Churchill v. Hobson*, 2 Vern. 241; *Leigh v. Barry*, 3 Atk. 584; *Belchier v. Parsons*, Ambl. 219; *Chambers v. Minchin*, 7 Ves. 198; *Ex p. Rigby*, 19 Ves. 463; *Right v. Cathill*, 5 East 491; *Cole v. Wade*, 16 Ves. 44; *Down v. Worrall*, 1 Myl. & K. 561; *Townsend v. Wilson*, 1 B. & Ald. 608; *Nailor v. Goodall*, 47 L. J. Ch. 53.

**Powers, Joint.**—All of several trustees must join both in receipts and conveyances; their power over the trust estate being equal and undivided, they cannot act separately. *Latrobe v. Tiernan*, 2 Md. Ch. 474; *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527.

Separate conveyances, not for a charity or public trust, are void. *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 580. A sale and conveyance by one of two trustees is void, *Wilbur v. Almy*, 12 How. (U. S.) 180; *Learned v. Welton*, 40 Cal. 349; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 553; *Van Rensselaer v. Akin*, 22 Wend. (N. Y.) 540; *Ham v. Ham*, 58 N. H. 70; and a court of equity will order a reconveyance. *Heard v. March*, 12 Cush. (Mass.) 580. Neither can make a contract to convey which will bind the other, *Wilder v. Ranney*, 95 N. Y. 7; nor a valid lease of the estate, *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; and a lease given by a part of the trustees can give the lessee no better right to disposition than the residue of the trustees have, though they are in the minority. *Cox v. Walker*, 26 Me. 504.

One of several co-trustees cannot, in

For this reason they may not delegate discretionary power among themselves, nor escape responsibility for the safe exercise of the entire trust by distributing the duties among themselves and dividing its responsibilities.<sup>1</sup>

the absence of authority or pressing necessity, make a binding contract for repairs to the trust estate, *Busse v. Schenck*, 12 Daly (N. Y.) 12; nor pledge the property, *Ham v. Ham*, 58 N. H. 70; nor assign a mortgage held by them. *Austin v. Shaw*, 10 Allen (Mass.) 552. They must all unite and bring an action on behalf of the estate. *Thatcher v. Candee*, 4 Abb. App. Dec. (N. Y.) 387.

A deed of trust to the trustees, "their executors, administrators, and assigns, the survivor or survivors of them, his or their executors, administrators or assigns, or a majority of them," implies that the majority have power to execute the provisions of the deed. *Ratcliffe v. Sangston*, 18 Md. 383.

When an estate is conveyed to trustees and the survivors or survivor of them, with the power to appoint a new trustee in case of the death of any of their number, the surviving trustees may sell and give a good title without making such appointment. *Belmont v. O'Brien*, 12 N. Y. 394.

A majority cannot, by the adoption of any rule or resolution, exclude one of their number, and so divest him of his rights as to make his subsequent act of obtaining possession of the trust fund a tort. *Church v. Stewart*, 27 Barb. (N. Y.) 553.

1. See articles by Arthur Biddle, Esq., on "Delegation of Discretionary Powers by a Trustee," 12 Cent. L. J. 266, and 12 Cent. L. J. 290; *Crewe v. Dicken*, 4 Ves. 97; *Gill v. Atty. Gen'l*, Hardr. 314; *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Sloo v. Law*, 3 Blatchf. (U. S.) 471; *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 583; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 544; *State v. Guilford*, 15 Ohio 593; *Vandever's Appeal*, 8 W. & S. (Pa.) 405; 42 Am. Dec. 282.

**Liabilities, Joint.—When.**—A trustee permitting his co-trustee to take the trust fund into his exclusive possession and control, is jointly answerable with him for it, *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; 9 Am. Dec. 298; *Rayall v. McKenzie*, 25 Ala. 363; *Graham v. Davidson*, 2 Dev. & B. Eq. (N.

Car.) 165; *Evans' Estate*, 2 Ashm. (Pa.) 470; *McMurray v. Montgomery*, 2 Swan (Tenn.) 374; and the sale of the property by one trustee to his co-trustees is illegal, and renders them jointly responsible. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250.

Where trustees divide the amount of the trust fund between them, they are both responsible for the whole amount, and not each for the amount received by him only, *Thomas v. Schruggs*, 10 Yerg. (Tenn.) 400; and this, though the division was made with the consent of the beneficiary. *Graham v. Austin*, 2 Gratt. (Va.) 273.

One trustee is not exempted from liability by the fact that the duties of the trustees have been exclusively performed by his co-trustees with his concurrence and consent. He is accountable for the management of the co-trustees, to whom he has thought proper to delegate his power, to the same extent as if they had been executed by himself. *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157. They are both liable for the proceeds of stock belonging to the trust fund, although such proceeds passed wholly into the hands of one of them. *Spencer v. Spencer*, 11 Paige (N. Y.) 299.

Two or more trustees who jointly receipt for the trust funds, are each liable presumptively for the entire sum, even though a part of it may have gone into the exclusive possession of one of them. *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; 9 Am. Dec. 298; *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277; 29 Am. Dec. 84; *McKim v. Aulbach*, 130 Mass. 484; 39 Am. Rep. 473; *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263; 31 Am. Dec. 578.

Where a trustee has suffered the entire trust funds to pass into the control of his co-trustee, he is liable for the acts of the co-trustee in reference thereto. *Royall v. McKenzie*, 25 Ala. 363; *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474; *Porter v. Moores*, 4 Heisk. (Tenn.) 25; *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 474; *Breen v. Gillet*, 115 N. Y. 10; 12 Am. St. Rep. 764; *Bone v. Cooke*, McClell. 168. See *Langford v. Gascoyne*, 11 Ves. 333; *Williams v. Nixon*, 2 Beav. 472;

"It has been more than once asserted," says a learned author, "that there are certain cases where trustees may delegate their powers, which constitute an exception to the rule we have laid down" (that a trustee cannot delegate a discretionary power), "as where a trustee is resident abroad or where there is a case of urgent necessity."<sup>1</sup>

With ministerial duties the rule is different. The transaction of the ordinary business of the trust, which involves no special personal fitness in the one who must conduct it, and calls for the exercise of no particular degree of judgment or discretion upon his part, may legally be deputed to one of a number of trustees by the others, and they will be liable for losses only where they have been guilty of negligence in connection with such delegation of power.<sup>2</sup> If trustees may delegate such powers to agents and employes,<sup>3</sup> there can be no reason to forbid them from delegating the performance of like duties to certain of their own number.

A trustee cannot be held responsible for a loss or injury to the estate, occurring through the fault of a co-trustee, if he himself has been blameless.<sup>4</sup> Co-trustees who continue the business of

Joy v. Campbell, 1 Sch. & Lef. 341; Rodbard v. Cooke, 36 L. T. N. S. 504; 25 W. R. 555.

The trustee who receives any of the proceeds of a transaction must personally see to their application. He may not turn them over to his co-trustee for investment or distribution and thus escape responsibility. Fox v. Tay, 89 Cal. 339; 23 Am. St. Rep. 474.

The rule that where trustees unite in the execution of a power of sale and one receives the money all will be liable, does not govern where the one receiving was allowed to hold the money for twenty years with the consent of the *cestui*, who was *sui juris*, and the other trustee received no benefit. Laurel County Ct. v. Trustees, etc. (Ky. 1892), 20 S. W. Rep. 258.

1. Mr. Biddle, in 12 Cent L. J., p. 293, citing and quoting from Rossiter v. Trafalgar L. Assur. Assoc., 27 Beav. 381; Stuart v. Morton, 14 Moore P. C. 32:

"In matters of discretion, in contradistinction to ministerial acts, co-trustees cannot act separately in discharging their trust; their receipts and their certificates of bankruptcy must be joint. A case of urgent necessity might be an exception to the rule; but if the other trustee might be consulted, such necessity does not exist." Vandever's Appeal, 8 W. & S. (Pa.) 405; 42 Am. Dec. 305.

2. Howard F. Ins. Co. v. Chase, 5 Wall. (U. S.) 509.

3. See *supra*, this title, *Delegation of Powers and Duties*.

4. Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99; Kip v. Deniston, 4 Johns. (N. Y.) 23; Matter of Cozzens' Estate, (Surr. Ct.), 15 N. Y. Supp. 771; State v. Guilford, 15 Ohio 593; Fesmire's Estate, 134 Pa. St. 67; 19 Am. St. Rep. 676; Glenn v. McKim, 3 Gill (Md.) 366; Williams v. Taylor, 4 Port. (Ala.) 234; Griffin v. Macaulay, 7 Gratt. (Va.) 476; Boyd v. Boyd, 3 Gratt. (Va.) 113; Palmer v. Jones, 1 Vern. 184; Mann v. Ballet, 1 Vern. 44; Howard v. Webster, Sel. Cas. in Ch. 53.

He is under no obligations to take measures against his co-trustee, except upon probable cause. Wood v. Brown, 34 N. Y. 337; State v. Guilford, 18 Ohio 500; Irwin's Appeal, 35 Pa. St. 294.

Unless trustees have made some agreement by which they have expressly agreed to be bound for each other, or have by their own voluntary co-operation or connivance enabled each other to accomplish some known object in violation of the trust, they cannot be held responsible for the acts of each other. Taylor v. Roberts, 3 Ala. 83; Henson v. Williamson, 74 Ala. 105; Chambers v. Smith, 30 Ala. 368; Latrobe v. Tiernan, 2 Md. Ch. 474.

A trustee is not liable for money

an estate do not sustain the relation of partners, and where one retires he is not liable for purchases made in the course of business by the other trustees after his retirement, even though the purchases be made from one with whom the firm had already had dealings and who knew nothing of the withdrawal of the trustee.<sup>1</sup>

Each trustee must be watchful, and if the exercise of care upon his part might have prevented the waste or injury at the hands of the delinquent trustee, he will be liable for the loss.<sup>2</sup>

received by his co-trustee in the regular discharge of the trust, though he may join in the receipt therefor; but when he joins in a receipt for money which the co-trustee had no right to receive, he will be considered as co-operating in a breach of trust, and will be held liable. *Wallis v. Thornton*, 2 Brock. (U. S.) 422.

A trustee is not responsible for a loss resulting from his having taken unauthorized securities from the solvent estate of a deceased co-trustee in whose hands the fund had been left. *Ormiston v. Olcott*, 84 N. Y. 339, reversing 22 Hun (N. Y.) 270.

A trustee acting for conformity, merely for the purpose of enabling his co-trustee, who has taken upon himself the more responsible duties of an active trustee, to transmit or acquire title, or make collections, is not as a rule responsible for the estate thus coming to the hands of the active trustee; but a trustee who seeks to escape liability on the ground that he had acted merely for conformity should raise that issue in his pleadings, and the burden is upon him to show that the active trustee alone collected and controlled the fund. *Gray v. Reamer*, 11 Bush (Ky.) 113.

1. *Noyes v. Turnbull*, 54 Hun (N. Y.) 26; affirmed in 130 N. Y. 639.

2. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250; *Wayman v. Jones*, 4 Md. Ch. 500; *Com. v. Eagle*, etc., Ins. Co., 14 Allen (Mass.) 344; *Fonte v. Horton*, 36 Miss. 350; *Laroe v. Douglass*, 13 N. J. Eq. 308; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Crane v. Hearn*, 26 N. J. Eq. 378; *Weetjen v. Vibbard*, 5 Hun (N. Y.) 265; *Matter of Cozzens' Estate* (Surr. Ct.), 15 N. Y. Supp. 771; *Graham v. Davidson*, 2 Dev. & B. Eq. (N. Car.) 155; *Evans' Estate*, 2 Ashm. (Pa.) 470; *Hilles' Estate*, 13 Phila. (Pa.) 402; *Pim v. Downing*, 11 S. & R. (Pa.) 66; *McMurray v. Montgomery*, 2 Swan (Tenn.) 374; *Hale v. Adams*, 21 W. R. 400; *Williams v. Nixon*, 2 Beav. 475;

*Dix v. Burford*, 19 Beav. 409; *Egbert v. Butter*, 21 Beav. 560; *West v. Jones*, 1 Sim. N. S. 205. See also *Walker v. Walker*, 88 Ky. 615; *Tichenor v. Tichenor*, 43 N. J. Eq. 163.

One of several trustees cannot remain passive, if he knows of irregular conduct on the part of his associates, without rendering himself liable for such irregularities. *Matter of Niles*, 113 N. Y. 547.

Co-trustees authorizing one of their number to receive and control the trust fund are liable for any loss or defalcation of such trustee, resulting from their negligence in failing to take security, or look after the fund. *State v. Guilford*, 15 Ohio 593. But this would be rather the liability of the principal for the agent. *Home v. Pringle*, 8 Cl. & F. 264; *Toplis v. Hurrell*, 19 Beav. 427.

A sole trustee suffered the fund to be intermingled with a fund for which he was also joint trustee with another, and the whole to be controlled by the co-trustee, and he was held responsible for the property so misapplied, to a person who was *cestui que trust* in both funds, though such *cestui que trust* had discharged the co-trustee in ignorance of the mingling of the funds by the several trustees. *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1.

It is a duty of one of two trustees to collect the purchase-money from his co-trustee, who contracted for the purchase of part of the trust property before his appointment. If he fails to do this, and suffers it to lie in the hands of the other, knowing that he is abusing the trust by failing to apply the money to the payment of debts due from his *cestui que trust*, the trustees are jointly responsible. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250.

Where trustees sold land, taking notes for the purchase-money payable to themselves jointly, and one of them took the notes for collection and collected the money and applied it to his

The rule is general that each is liable only for his own acts and responsible only for what property has been turned over to him. If he consents to his co-trustee's misapplication of the funds or puts them into the co-trustee's hands, he makes the acts of such co-trustee his own and extends his responsibility thus far.<sup>1</sup>

own use for twelve years, when he became insolvent, it was held that his co-trustee was liable for his default. *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263; 31 Am. Dec. 576.

It is the duty of a trustee to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him; and if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property, and its application in the manner required by the trust. *Crane v. Hearn*, 26 N. J. Eq. 378. See also *Hill on Trustees* 314; *Perry on Trusts*, § 417; and the cases of *Laroe v. Douglas*, 13 N. J. Eq. 308; *Smith v. Pettigrew*, 34 N. J. Eq. 216; *Crane v. Howell*, 35 N. J. Eq. 374.

In *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263; 31 Am. Dec. 576, the court, by Turley, J., said: "A trustee is liable for an abuse of trust by his co-trustee: 1. When the money has been received jointly. 2. When a joint receipt has been given, unless it be shown by satisfactory proof that the joining in the receipt was necessary or merely formal, and that the money was, in fact, paid to his companion. 3. When the moneys were in fact paid to his companion, yet so paid by his act, direction or agreement." And see *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 405; *McMurray v. Montgomery*, 2 Swan (Tenn.) 377.

In *Mucklow v. Fuller*, Jac. 198, and *Candler v. Tillet*, 22 Beav. 257, the executor was held liable for failure to collect from a co-executor.

Where a trustee appropriated the amount of the securities returned to him by his co-trustee, together with other moneys received by him belonging to the trust fund, to the purchase of lands in the State of *Ohio*, it was held that it was no objection to the liability of the co-trustee for the amount of the securities lost through his negligence, that the party injured made no attempt to enforce the specific lien which might have existed against the land purchased by the bankrupt

trustee. *Evans' Estate*, 2 Ashm. (Pa.) 470.

1. *Ames v. Armstrong*, 106 Mass. 15; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; 9 Am. Dec. 298; *Manahan v. Gibbons*, 19 Johns. (N. Y.) 427; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17; 11 Am. Dec. 383; *Croft v. Williams*, 88 N. Y. 384; *Paulding v. Sharkey*, 88 N. Y. 432; *Adair v. Brimmer*, 74 N. Y. 564; *Munford v. Murray*, 6 Johns. Ch. (N. Y.) 1; *Jones' Appeal*, 8 W. & S. (Pa.) 143; 42 Am. Dec. 282; *McMurray v. Montgomery*, 2 Swan (Tenn.) 374; *Sparhawk v. Buell*, 9 Vt. 41; *Joy v. Campbell*, 1 Sch. & Lef. 328; *Moses v. Levi*, 3 Y. & Coll. 359.

In *Ames v. Armstrong*, 106 Mass. 15, the court, by Ames, J., said: "Co-executors, even though numerous, are regarded in law as but one person. The acts of one, within the scope of his authority in the administration of the estate, are the acts of all, with this qualification, that at common law each was responsible only for such assets as came to his own hands. Under ordinary circumstances, one of two or more executors was not to be held accountable for waste or other misconduct on the part of an associate. The misplaced confidence of the testator in the integrity or capacity of one of the number was not allowed to operate to the prejudice of another. But even according to the common law, whenever any part of the estate, by any act or agreement of one executor, passes or is intrusted to the custody of a co-executor, they are thereby rendered jointly responsible. In such a case it would be inferred that there had been a joint possession or custody, and that one executor, having power and opportunity to make it secure, had yielded the control to the other."

In *Stowe v. Bowen*, 99 Mass. 194, the court, by Colt, J., said: "As a general rule, co-trustees are responsible for their own acts. They may, by agreement to that effect or by co-operation with or connivance in the act of another in violation of the trust, become themselves in one sense responsible for the act of a co-trustee. In the dis-

The liability of trustees who unite in a breach of the trust is joint and several; that is to say, the *cestui que trust*, in seeking relief against the breach of trust, may proceed against all the trustees or against any one of them.<sup>1</sup>

In the execution of private trusts, then, the concurrence of all the acting trustees is requisite to the validity of any act involving the conduct thereof. With public trusts and those of a *quasi* public character the rule is different, and a majority of the trustees may exercise the powers intrusted to all.<sup>2</sup> But the terms of the trust itself may confer upon a majority of the trustees the authority to act.<sup>3</sup>

Renunciation by one or more of the trustees devolves upon the remaining trustees the performance of the duties of the trust, and the trust is as valid in the one accepting its provisions as if the one renouncing had never been named as trustee.<sup>4</sup> and the trustee who has renounced the trust cannot be held responsible

charge of their trust, they must join in giving receipts and discharges for money paid them; but such joint receipts are open to explanation, and those only into whose actual possession and control the money has come, will be liable for its subsequent misapplication. It is said that this does not apply to executors whose concurrence in acts relating to the estate is not necessary." *Citing Kip v. Deniston*, 4 Johns. (N. Y.) 23; *Leigh v. Barry*, 3 Atk. 584; *Sadler v. Hobbs*, 2 Bro. C. C. 117. See also *Hall v. Boyd*, 6 Pa. St. 270; *Stell's Appeal*, 10 Pa. St. 149; *Wilson's Appeal*, 115 Pa. St. 95; *Fesmire's Estate*, 134 Pa. St. 676; 19 Am. St. Rep. 676; *Worth v. M'Aden*, 1 Dev. & B. Eq. (N. Car.) 199; *Ducommun's Appeal*, 17 Pa. St. 268; *Griffin v. Macaulay*, 7 Gratt. (Va.) 476; *Sadler v. Hobbs*, 2 Bro. C. C. 117; *Fellows v. Mitchell*, 1 P. Wms. 81; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 324; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *In re Fryer*, 3 Kay & J. 317; *Terrell v. Matthews*, 11 L. J. Ch. N. S. 31; *Adair v. Shaw*, 1 Sch. & Lef. 272.

1. *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9.

2. The rule, requiring a power to be exercised in strict conformity with the authority by which it is conferred, does not apply to business of a public or judicial nature. In such case, a power, intrusted to several, may be exercised by a majority. *Sloo v. Law*, 3 Blatchf. (U. S.) 459; *Chambers v. Perry*, 17 Ala. 726; *Beall v. State*, 9 Ga. 367; *Hill v. Josselyn*, 13 Smed. & M. (Miss.) 597;

*McCready v. Guardians of the Poor*, 9 S. & R. (Pa.) 94; 11 Am. Dec. 667; *Com. v. Canal Com'rs*, 9 Watts (Pa.) 470; *State Road, etc.*, 60 Pa. St. 330; *Allegheny County v. Lecky*, 6 S. & R. (Pa.) 170; 9 Am. Dec. 418; *First Nat. Bank v. Mount Tabor Tp.*, 52 Vt. 87; 36 Am. Rep. 734; *Atty. Gen'l v. Shearman*, 2 Beav. 104; *Younger v. Welham*, 3 Swanst. 180; *Atty. Gen'l v. Scott*, 1 Ves. 413; *Wilson v. Dennison*, Ambl. 82; *Wilkinson v. Malin*, 2 Tyrw. 544; *Atty. Gen'l v. Cuming*, 2 Y. & Coll. C. C. 139.

The acts of trustees of corporations are within the latter rule; thus, upon any matter within their competency, the act of a majority of a board of trustees is the act of the corporation for which they act. *Ex p. Greenville Academies*, 7 Rich. Eq. (S. Car.) 471. And viewers to assess damages. *Baltimore Turnpike Case*, 5 Binn. (Pa.) 481.

In *Wilkinson v. Malin*, 2 C. & J. 636; 2 Tyrw. 544, the trust was to apply funds "toward the repairs of the church of W., the payment of the fifteenths and relief of the poor of W., buying of armor and setting forth soldiers, and repairing Sawbridge bridge within the parish," and this was held a trust of a public nature, so that the act of a majority of the trustees was valid.

3. *Crane v. Decker*, 22 Hun (N. Y.) 452.

4. *Taylor v. Benham*, 5 How. (U. S.) 273; *Shockley v. Fisher*, 75 Mo. 502; *Scull v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 694; *Matter of Stevenson*, 3 Paige (N. Y.) 420; *King v. Donnelly*, 5 Paige (N. Y.) 46; *Matter*

for any subsequent misconduct of his co-trustee.<sup>1</sup> And the death of one of the trustees has the same effect as to the survivors that renunciation has.<sup>2</sup>

8. **Contracts of the Trustee.**—While it is true that the contracts entered into by the trustee as such are as distinct from his individual acts as though they were the transactions of two persons, yet, as we have seen, an individual liability is imposed upon the trustee to faithfully perform all obligations which he may have entered into on behalf of the trust, and he must look to the trust estate for his protection and reimbursement.<sup>3</sup> And the fact that the contract was executed in his trust capacity and that the contractee recognized the existence of the trust by accepting such obligation will make no difference. The contractual authority of a trustee is limited by the terms of the trust.<sup>4</sup> The scope of this authority, the various powers which he may exercise,<sup>5</sup> the extent to which he may charge the trust estate by his acts,<sup>6</sup> and the limitations within which he may deal with the *cestui que trust*,<sup>7</sup> as well as rights of third persons arising out of the trustee's acts, are considered elsewhere in this article.<sup>8</sup>

9. **Sales by the Trustee**<sup>9</sup>—a. **POWER OF SALE.**—The power to sell is not ordinarily an incident to the execution of the trust, nor is it to be exercised, in the absence of authority expressly conferred by the trust instrument or by the order of

of Van Schoonhoven, 5 Paige (N. Y.) 560; Niles v. Stevens, 4 Den. (N. Y.) 403; Burrill v. Sheil, 2 Barb. (N. Y.) 468; Matter of Reynolds, 11 Hun (N. Y.) 44; Matter of Crossman, 20 How. Pr. (N. Y. Supreme Ct.) 354; Zebach v. Smith, 3 Binn. (Pa.) 69; 5 Am. Dec. 352; Williams v. Otey, 8 Humph. (Tenn.) 563; 47 Am. Dec. 635; Crewe v. Dicken, 4 Ves. 100; Nicolson v. Wordsworth, 2 Swanst. 365; Flanders v. Clarke, 1 Ves. 9; Adams v. Taunton, 5 Madd. 435; Worthington v. Evans, 1 Sim. & S. 165. But compare Blanton v. Mayes, 58 Tex. 422. In this case an estate was devised to A, B, and C, and the survivor of them, upon certain trusts, *inter alia*, to "manage" and "control" the estate until the heirs should arrive at the age of twenty-one, and then to divide the same, with the accumulations, among them. No express power to sell was given, nor could such power fairly be implied from the language of the will. A, B, and C were also named as executors. B and C renounced the trusts. A qualified, and alone sold and conveyed the land for the purpose of reinvesting for an income. It was held that A could give no title, he not being the survivor of B and C, and that, moreover, the will

conferring no power to sell at all, the sale and conveyance for that reason were void.

1. Clagett v. Hall, 9 Gill & J. (Md.) 80.

2. Peter v. Beverly, 10 Pet. (U. S.) 532; Golder v. Bressler, 105 Ill. 419; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 20; 7 Am. Dec. 513; Burr v. Sim, 1 Whart. (Pa.) 266; 29 Am. Dec. 48; Jones v. Price, 11 Sim. 557; 10 L. J. Ch. N. S. 195; 5 Jur. 719.

3. See *supra*, this title, *Nature of the Trustee's Estate*.

4. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Scope and Limitations*.

5. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Scope and Limitations*.

6. See *supra*, this title, *Nature of the Trustee's Estate*.

7. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—The Duty of Good Faith*.

8. See *infra*, this title, *Rights and Liabilities of Third Parties*.

9. See valuable note on this subject in Tyler v. Herring, 67 Miss. 169; 19 Am. St. Rep. 266.

As to the purchase of trust property by the trustee, see *supra*, this title, *The*



court, unless plainly demanded by the urgent necessities of the case.<sup>1</sup>

Unless a sale of the trust property is absolutely forbidden by the instrument of trust, the assent of all parties interested may

*Duty of Good Faith—Buying at His Own Sale.* See also SALES, vol. 21, p. 445.

1. See POWERS, vol. 18, pp. 877, 938, under which subject the power of sale is discussed at length. See also *Foscue v. Lyon*, 55 Ala. 440; *Kent v. Plumb*, 57 Ga. 207; *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Matter of Roe*, 119 N. Y. 509; *Howard v. Thornton*, 50 Mo. 291; *St. Louis v. Priest*, 88 Mo. 612.

The legislature has the power to authorize the sale of real estate held by an executor as trustee, for the benefit of the testator's children for their lives, then to go to the issue of such children in fee, when it appears that such issues are minors, that the real estate is not only unproductive, but costly to them, and that it is for their best interest that it should be sold, and a conveyance in fee executed by the executor under such authority is valid and binding, and the purchasers will hold the real estate, both as against the issues *in esse* at the time of the sale, and as against those subsequently born. *Leggett v. Hunter*, 19 N. Y. 445.

Where land was conveyed in trust, to pay the debts of the grantor out of the rents and profits, and then for the support of himself, his wife and children, and at his death to be divided among his children, it was held that the trustees had no authority to sell for the payment of the debts, or for any other purpose, however urgent the necessity. *Mundy v. Vawter*, 3 Gratt. (Va.) 518.

It is a clear violation of duty for a trustee to contract to sell at a certain time, under a penalty binding on him personally. *Ricketts v. Montgomery*, 15 Md. 46.

A trustee, for a sale to pay debts, who sells without absolute necessity, under a palpable disadvantage, will be liable for the full value of the property sold. *Hunt v. Bass*, 2 Dev. Eq. (N. Car.) 292; 24 Am. Dec. 274. But it was held in *Porter v. Schofield*, 55 Mo. 56, that a trust deed, binding the trust estate for the payment of the debts of the *cestui que trust*, without express words, confers on the trustee an implied power to sell for that purpose.

An insolvent debtor appointed trustee

to manage his property for the mutual benefit of all his creditors, upon an agreement by the creditors to take a certain percentage of their demands, upon the payment of which the property was to be returned to the debtor; "otherwise said property to be sold for the benefit of all parties creditors hereto, and divided *pro rata*" between said creditors. It was held that the power to sell was given to the trustees, and that presumptively the trustees were accountable only for the actual proceeds of sale. *Luigi v. Luchesi*, 12 Nev. 306.

**Power of Sale Construed.**—Where a will devised a lot of ground, with buildings, "to the trustees of the Presbyterian church in Hopkinsville, and to their successors, in fee-simple . . . to be used and enjoyed by said church and their ministers as a parsonage," it was held, that the trustees could, with the consent of the legislature, convey in fee simple, there being no limitation of use, the abandonment of which would act as a forfeiture. *Littell v. Wallace*, 80 Ky. 252.

Where realty is conveyed in trust for the use of a married woman, and the trustee is empowered to sell the land upon her written request, and at her request he conveys the land in trust to secure her debt, neither she nor her husband are necessary parties to the deed, nor is the husband a necessary party to his wife's written request. *Norvell v. Hedrick*, 21 W. Va. 523.

Where land was conveyed upon various trusts, with the power to sell free from the said trust, and was reconveyed to the grantor, with the intention of annulling the said trust, and he reconveyed it to the trustees, to hold it for the same uses as by the first conveyance, it was held that the trustees' power to sell was revived, and that they could convey a perfect title. *Salisbury v. Bigelow*, 20 Pick. (Mass.) 174.

Where property is conveyed in trust, with power to the trustee to use the proceeds in payment of debts of the grantor, the trustee has implied power to sell and convey. *Vallette v. Bennett*, 69 Ill. 632.

**When Sale Will Be Ordered.**—Where a

justify a sale, even though no special authority therefor has been conferred.<sup>1</sup> And a sale made irregularly or improperly may be given the force and effect of a regular and legal transaction by receiving the assent or ratification of all parties in interest.<sup>2</sup>

It has been held in *Vermont* that the trustee who holds the legal title has full power to sell the trust property to whomso-

tract of land was given in trust for the sole and separate use of a married woman for life, the remainder in trust for her children living at her death, the court of equity will not decree a sale thereof, with a view to a reinvestment of the proceeds, on the ground that the land is valuable principally for its timber, and yields no present rents and profits. *Troy v. Troy*, 1 Busb. Eq. (N. Car.) 85.

The legislature may authorize a trustee of the legal estate in the land to convert it into money, for the purpose of distributing the proceeds among the parties entitled. *Kerr v. Kitchen*, 17 Pa. St. 433.

The legislature cannot authorize a trustee to sell the trust property to discharge debts incurred by him without authority, if the rights of remaindermen will be prejudiced. *Martin's Appeal*, 23 Pa. St. 433.

The necessary repairs of the buildings upon a farm, devised in trust for life with remainder over, are a charge upon the estate of the life tenant, during its continuance; and the trustee of the life tenant is justified in applying, from time to time, such portion of the rent as may be necessary to make such repairs. The trustee has, however, no power to sell the interest of the life tenant in any portion of the farm, to make such repairs, nor will a court of equity authorize him to do so; the life tenant being *sui juris*, and there being no restraint upon his alienation of his estate. *Thurston v. Thurston*, 6 R. I. 296.

Land devised in trust to pay the income, during the life of the testator's sons and the survivor of them, to them and the heirs of those who should die first, and, on the survivor's decease, to convey the land to their heirs, may, under authority of the legislature, be sold, upon giving security to invest the proceeds upon the same trust. *Clarke v. Hayes*, 9 Gray (Mass.) 426.

A trustee may sell trust property to pay the expenses of litigation sustained for its protection, and this, too, without authority from the court. *White v. Dinkins*, 19 Ga. 285.

A court of equity will confirm a trustee's sale of land made to pay off an incumbrance upon the trust property, and will charge him with the proceeds. *Morrison v. Bowman*, 29 Cal. 337.

A power to sell will be implied where it is necessary to the proper execution of the trust. *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 216, *note*; *Vallette v. Bennett*, 69 Ill. 632; *Winston v. Jones*, 6 Ala. 550; *Curling v. Austin*, 2 D. & S. 129; *Ames v. Ames*, 15 R. I. 12; *Stall v. Cincinnati*, 16 Ohio St. 170; *Eidsforth v. Armstead*, 2 Kay & J. 333; *Blatch v. Wilder*, 1 Atk. 419; *Barker v. Devonshire*, 3 Mer. 310.

1. *Robinson v. Fidelity Trust, etc., Vault Co.* (Ky. 1889), 11 S. W. Rep. 806; *Pownall v. Myers*, 16 Vt. 408; *Norvell v. Hedrick*, 21 W. Va. 523.

It is competent for the trustee, provided there is no restriction upon his powers in the deed, and no limitations over the children or third persons, to sell the trust property by, and with the consent and approbation of the *cestui que trust*. *Arrington v. Cherry*, 10 Ga. 429.

A testator devised certain lands in trust for A, to be held by a trustee until she became of age or married, and upon her marriage to be settled to her separate use, so that neither the land, nor its proceeds nor profits, should be liable for her husband's debts or contracts. Upon her marriage, it was held that she, her husband, and the trustee could, by a conveyance of the property, give a good title in fee. *Averett v. Lipscombe*, 76 Va. 404.

2. See *infra*, this title, *Rights and Remedies of the Beneficiary; Waiver and Estoppel*.

A purchaser, under a defective execution of a power by a trustee, cannot resist payment on the ground of such defect, where the *cestui que trust* is the only person entitled to object to the sale, and is a party to the suit for the purchase-money affirming the sale. *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175.

ever he chooses.<sup>1</sup> Where the deed of trust authorizes a sale, the trustee will not be enjoined from making the sale on the ground that great financial depression prevails, and that therefore the property cannot bring its true value.<sup>2</sup> And it has been held that the court may order a sale if in its judgment such an order will benefit the trust.<sup>3</sup>

A sale improvidently made is just ground for equitable relief; for the court will not permit the highest interests of the trust to suffer or be sacrificed by any misconduct of the trustee.<sup>4</sup> No greater title can be required of him than by the terms of the trust has been conferred upon him.<sup>5</sup> Thus, if he hold for the life of another, he cannot convey a fee.<sup>6</sup> And if his trust is to sell realty to pay debts, his power to sell is limited to that purpose and he cannot exercise it after the debts have been satisfied.<sup>7</sup>

He is not bound to warrant the title against any acts save his own and the acts of those claiming under him.<sup>8</sup> But he must convey the legal title.<sup>9</sup> This he cannot do by a deed which purports only to convey the right, title, and interest of the *cestui que trust* therein.<sup>10</sup> And whatever rights the trustee had in the property inure to the benefit of his vendee upon completion of the sale.<sup>11</sup>

1. *Blaisdell v. Stevens*, 16 Vt. 179. And see *Pownal v. Myers*, 16 Vt. 408; *Mitchell v. Stevens*, 1 Aik. (Vt.) 16.

2. *Muller v. Stone*, 84 Va. 834; 10 Am. St. Rep. 889.

3. *Aleman v. Wensinger*, 40 Cal. 288.

The court will direct a sale or mortgage of the estate, if the purposes of a trust cannot be accomplished without the most serious delays and inconveniences, and this, though a power is only given to raise money for these purposes in a different way. *Conkling v. Washington University*, 2 Md. Ch. 497.

4. *Hill v. Shoemaker*, 1 MacArthur (D. C.) 305.

5. See *Walton v. Follansbee*, 131 Ill. 147.

6. *Rogers v. Pace*, 75 Ga. 436; *West v. Fitz*, 109 Ill. 425.

Where the trustee of a life estate makes a conveyance of the land under an order of the court granted in term upon his *ex parte* petition, the life tenant alone consenting, the remaindermen not being represented or made parties to the proceeding, only an estate for life passes, though the deed purports to convey the fee and the purchaser pays full value. *Lamar v. Pearre*, 82 Ga. 354; 14 Am. St. Rep. 168.

7. Where a testator by his will left all his real estate to trustees with power to sell and to pay certain specific debts, and in the same will devised

all his estate to his children, it was held that, after the debts had been satisfied, the trustees had no power to sell, and any conveyance by them thereafter was void. *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605.

8. *Kirten v. Spears*, 44 Ark. 166; *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Ennis v. Leach*, 1 Ired. Eq. (N. Car.) 416; *Fleming v. Holt*, 12 W. Va. 143.

A trustee required by a court of equity to convey land to the beneficiary, is bound to warrant against persons claiming under himself. *Dwinel v. Veazie*, 36 Me. 509.

In such conveyance, under an *Illinois* decision, a warranty against his own acts is all that should be required of him. *Hoare v. Harris*, 11 Ill. 24.

Where land was conveyed to a trustee, to sell and pay certain debts, and pay the balance to one of the grantors, and the trustee sold such title as was vested in him, without warranty, it was held that the trustee was not liable to the purchaser for any defect in the title to any part of the premises, and that the proceeds in his hands ought not to be refunded to the purchaser. *Sutton v. Sutton*, 7 Gratt. (Va.) 234.

9. *Saunders v. Schmaelzle*, 49 Cal. 59.

10. *Titcomb v. Currier*, 4 Cush. (Mass.) 591.

11. A purchaser at the sale of a trustee in a deed of trust, takes thereby the

If the trustee is entitled to the possession of the property sold, it is his duty to acquire possession before selling.<sup>1</sup> Authority to sell does not imply a power to mortgage;<sup>2</sup> nor does a power to mortgage imply a power of sale.<sup>3</sup>

A power to sell does not carry with it the authority to exchange,<sup>4</sup> although under a power "to sell and exchange" the trustee may make and receive deeds of partition with other joint owners.<sup>5</sup>

A delegation of the power of sale will not be upheld. Such a power involves the exercise of discretion and judgment and can be used by none but the trustee himself.<sup>6</sup>

right to use the name of the grantor in the deed of trust, to enforce by action a right accruing under the deed to such grantor. *Alexander v. Schreiber*, 13 Mo. 271.

1. *Hall v. Harris*, 11 Tex. 300.

2. See *POWERS*, vol. 18, p. 940; *Patapasco Guano Co. v. Morrison*, 2 Woods (U. S.) 395; *Hubbard v. German Catholic Congregation*, 34 Iowa 31; *Dolan v. Baltimore*, 4 Gill (Md.) 394; *Tyson v. Latrobe*, 42 Md. 325; *Paine v. Barnes*, 100 Mass. 470; *Hoyt v. Jaques*, 129 Mass. 286; *Stokes v. Payne*, 58 Miss. 614; 38 Am. Rep. 340; *Ferry v. Laible*, 31 N. J. Eq. 567; *Constant v. Servoss*, 3 Barb. (N. Y.) 128; *Waldron v. McComb*, 1 Hill (N. Y.) 111; *Cumming v. Williamson*, 1 Sandf. Ch. (N. Y.) 17; *Russell v. Russell*, 36 N. Y. 581; 93 Am. Dec. 540; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361; *Head v. Temple*, 4 Heisk. (Tenn.) 34; *Shaftesbury v. Marlborough*, 2 Myl. & K. 111; *Stronghill v. Amstey*, 1 De G. M. & G. 635; *Davey v. Durrant*, 1 De G. & J. 535; *Butler v. Duncomb*, 1 P. Wms. 448; *Page v. Cooper*, 16 Beav. 400; *Devaynes v. Robinson*, 24 Beav. 86; *Eland v. Baker*, 29 Beav. 137. But compare the following cases in which the contrary rule was adopted. *Wayne v. Middleton*, 2 Ga. 383; *Watson v. James*, 15 La. Ann. 386; *Williams v. Woodard*, 2 Wend. (N. Y.) 492; *Pennsylvania Ins. Co. v. Austin*, 42 Pa. St. 257; *Mills v. Banks*, 3 P. Wms. 9; *Allen v. Backhouse*, 2 Ves. & B. 65; *Ball v. Harris*, 4 Myl. & Cr. 264. See also *Wood v. Goodridge*, 6 Cush. (Mass.) 117; 52 Am. Dec. 771.

Under a power to sell lands given by a will, with directions to reinvest the money arising from the sale, the trustee may not mortgage the lands. Such a

mortgage is void. *Bloomer v. Waldron*, 3 Hill (N. Y.) 361.

3. *Drake v. Whitmore*, 5 De G. & S. 619.

4. *Cleveland v. State Bank*, 16 Ohio St. 236; 88 Am. Dec. 445; *Wadsworth Poor School v. McCully*, 11 Rich. (S. Car.) 424; *King v. Whiton*, 15 Wis. 684; *Mauser v. Dix*, 8 De G. M. & G. 703.

Trustees empowered by a deed to sell real estate, cannot exchange it for other real estate. By making such exchange, though with the best intentions, they are responsible to the *cestui que trust* for the full value of the land parted with; for the actual value, if it can be clearly ascertained, otherwise for the utmost value. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; 18 Am. Dec. 250.

5. *Phelps v. Harris*, 101 U. S. 370; *Phelps v. Harris*, 51 Miss. 789; *contra*, see *Brassey v. Chalmers*, 4 De G. M. & G. 528; 16 Beav. 223; *Bradshaw v. Fane*, 3 Drew. 536.

6. It was so held in *Bohlen's Estate*, 75 Pa. St. 304, where a testator gave authority to his executors, "or the survivor of them," to sell certain real estate and invest, etc., "as they shall see proper for the purposes of this my will," and the executors having died, one of the successors, upon his removal to *Europe*, made a power of attorney to the other "to sell or change any or all stocks and loans," and this delegation of power was held to be invalid. But compare *May v. Frazee*, 4 Litt. (Ky.) 391; 14 Am. Dec. 159.

In *Warnecke v. Lembca*, 71 Ill. 91; 22 Am. Rep. 85, where the deed authorized the trustee, "or his legal representative," to sell the property, it was held that this power could not be exercised by the administrator of the trustee, but only by his successor in

If there be several trustees, all should unite in the conveyance, for their interest in the trust estate is an entirety. Where one trustee dies, however, the successors may execute a valid conveyance, unless forbidden by the instrument of trust.<sup>1</sup>

*b. MANNER OF SALE.*—The sale of trust property, like any other act in the execution of the trust, must be conducted according to the manner prescribed by the instrument creating the trust.<sup>2</sup> The trustee may not waive any of its requirements or

trust. See *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293.

The case of *Fuller v. O'Neil*, 69 Tex. 349; 5 Am. St. Rep. 59, was one in which the trustee was given power to sell, and left the conduct of the sale in the hands of an agent. The court, by Willie, C. J., said: "The grantor of the power is entitled to have his directions obeyed, to have the proper notice of the sale given, to have it take place at the time and place and by the person appointed by him. He gives these directions because he thinks that a sale made by the person selected, and under the circumstances stated, will be to his interest, and make his property produce the largest amount of money. Of the prescribed conditions, none is more important than that which requires that the trustee shall in person make the sale. He is chosen because of the confidence the grantor has in his integrity and discretion. . . . The trustee can no more absent himself whilst the sale is going on than he can make it at a time or a place or for a character of consideration different from that authorized in the deed." And to this point the court cites *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Bales v. Perry*, 51 Mo. 449; *Powell v. Tuttle*, 3 N. Y. 396.

In *Brickenkamp v. Rees*, 69 Mo. 426, it was declared to be the trustee's duty to be present during an entire sale made under his deed of trust; otherwise, the sale would be void.

See also *Taylor v. Hopkins*, 40 Ill. 442; *Spurlock v. Sproule*, 72 Mo. 503; *Vail v. Jacobs*, 62 Mo. 130; *Gray v. Veirs*, 33 Md. 18; *Howard v. Thornton*, 50 Mo. 291; *Bales v. Perry*, 51 Mo. 449; *Bradford v. Belfield*, 2 Sim. 264; *Greenham v. Gibleson*, 10 Bing. 363; 25 E. C. L. 163; *Hitch v. Leworthy*, 2 Hare 200; *Townsend v. Wilson*, 1 B. & Ad. 608.

In *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401, the sale was overthrown,

although the trustee was present at the beginning and close of the auction, and had merely stepped across the street meanwhile, leaving the auctioneer in charge. The court said: "It was the duty of the trustee to be present during the crying of the sale, to observe the progress thereof, protect the interests of the parties concerned, to reject fraudulent bids made to frustrate the sale, and, if necessary, to adjourn the sale." And see *supra*, this title, *Delegation of Powers and Duties*.

1. *Golder v. Bressler*, 105 Ill. 419.

2. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Scope and Limitations*. See also *Huntt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63; *Blanton v. Mayes*, 58 Tex. 422; *Quarles v. Lacey*, 4 Munf. (Va.) 251. Or the sale will be set aside and a resale ordered. *Norman v. Hill*, 2 Patt. & H. (Va.) 676. A purchase at an unauthorized and voidable sale must be for a valuable consideration and in good faith, without notice of existing equities, or it will be set aside. *Morgan v. Clayton*, 61 Ill. 35.

One who takes as trustee under a stipulation for partition, cannot convey otherwise than as stipulated. *Haack v. Weicken*, 118 N. Y. 67.

A trust deed recited that the beneficiary had paid certain debts as security for the grantor, the amounts of which were not given, and authorized the trustee to sell to satisfy such as had been paid and should be presented to the grantor. The trustee sold, but on the trial there was no proof that any indebtedness existed, nor that any claim had ever been presented to the grantor as having been paid. It was held that the trustee had no authority to sell, and that his deed passed no title to the purchaser. *Mills v. Traylor*, 30 Tex. 7.

*A Sale Made by a Trustee Prior to the Date.*—Where a deed of trust of lands directs that no sale shall be made prior

conditions, nor alter any of its terms. If he is acting under a broad, general power of sale, the manner of conducting it is left to his discretion, and any ordinary mode that he may consider proper to adopt will meet the approval of the court.<sup>1</sup>

The rules which govern the manner of conducting sales, differ so widely in the various jurisdictions that no principles generally applicable can be announced. Cases illustrating the requirements of different courts as to the notice of sale, parties to the proceeding, and the time, place, and terms of sale, are cited in the notes.<sup>2</sup>

to a certain day, a deed, though joined in by the *cestuis que trustent*, executed before that time, is invalid. But it seems that the trustee may confirm the sale after the appointed time for selling has arrived. *Isham v. Delaware, etc., R. Co.*, 11 N. J. Eq. 227.

The court has no power, upon the petition of the grantor, the *cestui que trust*, and the trustees, to order a sale of real estate held in trust and partly for the benefit of infants, although a state of facts is shown, from which it appears that a sale would be beneficial to the *cestui que trust*, where such a sale would be contrary to the provisions of the grant, and where the remainder-men were uncertain and could not yet be ascertained. *Matter of Turner*, 10 Barb. (N. Y.) 552.

Where property was conveyed in trust to secure the payment of a promissory note, dated Nov. 11th, 1858, the trustee being empowered, if the note was not paid at maturity, to advertise the land for twenty days, and then sell the same and make payment, and upon default the trustee sold the land on Dec. 1st, 1859, the sale was held void as to the maker of the deed, since the sale was not made after the lapse of twenty days from default of payment, such default not occurring until the first minute of Nov. 12th, 1859. *Young v. Van Benthuyssen*, 30 Tex. 762.

As to what recitals contain a sufficient reference to the source of a trustee's power to validate his sale and deed, see *Porter v. Schofield*, 55 Mo. 303.

As to whether the sale should be in gross or in parcels, see *Carter v. Abshire*, 48 Mo. 300; *Sumrall v. Chaffin*, 48 Mo. 402.

Sales made by trustees on mere personal security are at their own risk. *Swoyer's Appeal*, 5 Pa. St. 377.

1. See *POWERS*, vol. 18, p. 944.

In general, see *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596; 60

Am. Rep. 769, and the large number of cases there cited; *Burr v. McEwen*, Baldw. (U. S.) 154; *Mattox v. Eberhart*, 38 Ga. 581; *Crane v. Reeder*, 22 Mich. 322; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441; 9 Am. Dec. 313; *Gray v. Shaw*, 14 Mo. 341; *Rogers v. DeForest*, 7 Paige (N. Y.) 273; *Stall v. Macalester*, 9 Ohio 19; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Huger v. Huger*, 9 Rich. Eq. (S. Car.) 217; *Summers v. Bean*, 13 Gratt. (Va.) 404.

The trustee of real estate under a will, may convey the same in his own name without reciting the trusts. *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602.

A trustee in a deed of trust to pay debts, is not bound to sell within a particular time, but is bound to use his discretion in the matter, in order to obtain the highest price. *Hawkins v. Alston*, 4 Ired. Eq. (N. Car.) 137.

Under an express trust, with power of sale, the trustee is not required to apply to a court to authorize the sale, nor to give a bond for the execution of the trust unless required, nor can the title in the vendee be questioned for want of consideration. *Hes v. Martin*, 69 Ind. 114.

In the absence of extrinsic equities, a sale of real estate in accordance with the terms of a power in a deed of trust, but without the intervention of judicial proceedings, is valid against a subsequent mortgagee. *Lowe v. Grinnan*, 19 Iowa 193.

A conveyance of real estate, made in consideration of personal property or choses in action, is strictly and literally a sale, and may be valid, though it is not a sale for money. *Speigle v. Meredith*, 4 Biss. (U. S.) 120.

2. *Irregularities in the Sale*. — *Notice of Sale*. — In general, see *Burke v. Adair*, 23 W. Va. 139; *Leffler v. Armstrong*, 4 Iowa 482; 68 Am. Dec. 672.

It has been held that a sale without notice will confer a valid title, notwith-

standing a direction of the trustee to sell on notice, and the remedy is against the trustee for the deficiency in price occasioned by his failure to give notice. *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441; 9 Am. Dec. 313. But compare *Henderson v. Calloway*, 8 Humph. (Tenn.) 692, in which it was held that where the trustee in a deed to secure the payment of debts is required to give notice of the time and place of sale to the bargainor, such notice is a condition precedent, and a sale without notice is void and communicates no title. A power of sale must be strictly pursued as to the time and place of notice. *Thornton v. Boyden*, 31 Ill. 200. But a clerical error in a trustee's deed as to the day of posting notice of sale, does not invalidate it. *O'Neil v. Vanderburgh*, 25 Iowa 104.

Where the notice of a sale omitted to state by or to whom the deed of trust was executed, and did not describe, nor identify, nor locate the lands so as to enable one who was not familiar with them to know what lands were to be sold, without first examining the county records, it was held insufficient, and the sale was set aside. *Reeside v. Peter*, 33 Md. 120.

**Time of Publication.**—See generally *Leffler v. Armstrong*, 4 Iowa 482; 68 Am. Dec. 672; *Cushman v. Stone*, 69 Ill. 516; *Graham v. Fitts*, 53 Miss. 307.

Where twenty days' notice of the time and place of sale are required, the publication must continue up to the date of the sale; one insertion is insufficient. *Stine v. Wilkson*, 10 Mo. 75. But where three weeks notice was required, it was held that an advertisement inserted once a week for three weeks, and once on the day of sale, in two daily newspapers, was sufficient. *Johnson v. Dorsey*, 7 Gill (Md.) 269. And where the trust deed required thirty days, by posting the same in three or more public places in the county, it was held that if the notices were put up thirty days before the sale, it was unnecessary that they should remain posted every day up to the sale. *Graham v. Fitts*, 53 Miss. 307.

The law does not contemplate that the notice shall be examined on Sunday, and where notice was required to be posted in three public places, and one of the notices was posted on the inside of the post-office door, which was closed and invisible on Sunday, save for two hours, it was held sufficient. *Graham v. Fitts*, 53 Miss. 307.

Where a notice dated December 7th, gave notice of a sale "on the 28th of December next," it was held that it could not mislead purchasers, and that a sale on the 28th of the same December was valid. *Gray v. Shaw*, 14 Mo. 341.

The naming of an impossible day for the sale will invalidate the notice. *Thacker v. Tracy*, 8 Mo. App. 318.

Where land was given to a trustee to sell "at auction or otherwise, in whole or in parcels, on giving three weeks' notice thereof," he can sell at private sale and without notice. *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441; 9 Am. Dec. 313.

**Place of Publication.**—See generally *Campbell v. Tagge*, 30 Iowa 307; *Pursley v. Hayes*, 22 Iowa 21; *Johnson v. Dorsey*, 7 Gill (Md.) 269.

Where notice is required to be published in a newspaper, without designating any particular one, the trustee, in the absence of fraud, has unlimited discretion in selection of the newspaper. *Singleton v. Scott*, 11 Iowa 589.

Where the deed authorized a sale after twenty days' notice posted on the front door of a certain hotel, a sale made after a notice posted anywhere else than on such door, was held void. *Sears v. Livermore*, 17 Iowa 297; 85 Am. Dec. 564.

Discontinuance of a newspaper in which notice was directed to be published, does not divest the legal title of the trustee. *Tucker v. Silver*, 9 Iowa 261.

Where the notice was published in a locality required by the deed, and all the parties concerned in the sale had actual notice thereof, the publication was held sufficient, although the certified copy of the record of the deed from the recorder's office, made it appear that the notice was to be published elsewhere. *Jones v. Moore*, 42 Mo. 413.

**Contents of the Notice.**—There is no prescribed form for a notice of sale, but the description of the land must be reasonably certain, that there may be no mistake of the land to be sold. *Newman v. Jackson*, 12 Wheat. (U. S.) 570. It is unnecessary to specify the amount of the debt that should be paid. *Winwall v. Ross*, 4 Port. (Ala.) 321. And in the absence of proof that competition was prevented, or that the sale was in any respect prejudiced thereby, a sale will not be vacated because the notice failed to state the name of the parties to the suit in which a decree of sale passed or the several incum-

branches on the property. *Gibbs v. Cunningham*, 1 Md. Ch. 44.

The notice of sale should contain such facts as reasonably to apprise the public of the place, time, and terms of sale, and the property to be sold. But mere inaccuracies and omissions in these respects, not calculated to mislead, and working no prejudice, will not be regarded. *Gray v. Shaw*, 14 Mo. 341; *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234; *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281; *Stephenson v. January*, 49 Mo. 465; *Chesley v. Chesley*, 49 Mo. 540.

**Form of Notice.**—Mere informality in the form of notice, even where a particular form is prescribed by law, will not invalidate the sale. *Boston Safe Deposit, etc., Co. v. Mixer*, 146 Mass. 100. Nor is any special form requisite. *Newman v. Jackson*, 12 Wheat. (U. S.) 570. See generally, note to *Tyler v. Herring*, 67 Miss. 169, in 19 Am. St. Rep. 263.

**Parties.**—The omission to make a prior incumbrancer a party in a bill relating to a trustee's sale, is not sufficient ground for treating the proceedings as a nullity, and the sale void, although it might be error for which the decree would be reversed on appeal. *Speed v. Smith*, 4 Md. Ch. 299.

Where the trustee is seised of the legal estate in fee, and is a party before the court, there is a greater facility in giving a perfect title to the purchaser, although all the parties in interest are not before the court, inasmuch as the decree for sale operates on the fee simple in the trustee, and passes that to the purchaser discharged of the equities of the *cestui que trust*. *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

A trustee was empowered to sell land with "the assent in writing of the said *cestui que trust*." A was the sole *cestui que trust* for his life, and then others took his place, and it was held that his assent alone was necessary to a sale. *Gindrat v. Montgomery Gas-Light Co.*, 82 Ala. 596; 60 Am. Rep. 769.

**Minors.**—Under the *Pennsylvania* Statute, passed to facilitate the alienation of real estate, and providing that a sale of land may be ordered upon the application of a guardian or other interested party, when the land in question is owned by a minor, or when a party interested therein is under a legal disability to convey, it is within the jurisdiction of the orphans' court to order a private sale of

land, on the petition of a trustee, to whom it is devised, for the payment of debts, and then to apply the income to certain persons, with contingent remainders to others, where it appears from the fact that it is an expense to the estate, and unproductive, that the interest of all parties requires its sale, and that an arrangement has been made privately to sell it for a larger sum than had been offered for it at a recently attempted public sale; as the interests of the remainder-men can, under the provisions of the act mentioned, be protected by proper orders governing the application of the purchase-money. *Moorhead v. Wolff*, 123 Pa. St. 365.

A trust estate in which the *cestuis que trustent* are minors, cannot be legally sold on the petition of the trustee, unless the minors are made parties by a representative properly appointed. *East Rome Town Co. v. Cothram*, 81 Ga. 359, following *Hill v. Printup*, 48 Ga. 452.

**Manner and Terms of Sale.**—A trustee appointed to sell to the highest bidder is bound to see that the sale is fairly made and that there is a real competition. *Fairfax v. Hopkins*, 2 Cranch (U. S. C. C.) 134; *Johnston v. Eason*, 3 Ired. Eq. (N. Car.) 330.

A trustee directed to sell at public auction and pay certain debts, has no authority to sell except at public auction, although the grantor's interest may be promoted by a private sale. *Greenleaf v. Queen*, 1 Pet. (U. S.) 138. But where a trustee has advertised the property as prescribed by the decree of sale, without succeeding in making a sale, he may sell at private sale, or otherwise, in his discretion. *Gibson's Case*, 1 Bland (Md.) 138; 17 Am. Dec. 257.

Where a trustee was appointed by a decree to sell property at public sale, and so offered it, but without success, and finally after unusual efforts found a purchaser at private sale, it was held that if the sale was for a fair price and in good faith, it would be ratified by the court. *Tyson v. Mickle*, 2 Gill (Md.) 376.

Where a trustee applied to the court for leave to sell real estate belonging to the trust, and the petition stated that he had been offered seven thousand dollars for the property by A, which was a fair offer, and the court passed the following order: "Read and sanctioned; the petitioner has leave to sell;" it was held that a private sale to



A for seven thousand dollars was legal under the order. *Shacklett v. Ransom*, 54 Ga. 350.

If persons acting in a fiduciary character do acts or make declarations preventing competition at the sale of trust property, or which cause a sacrifice of the same, the sale will be set aside at the instance of a beneficiary injured thereby. *Goodwin v. Mix*, 38 Ill. 115.

The rights of a *bona fide* purchaser, who has conveyed the property to another, will not be vitiated by the fact that the premises included in the deed were sold *en masse*, instead of in parcels, or for only one-third of their value, or when there was only a small attendance at the sale, or that the notice of sale erroneously stated that all the interest was unpaid. *Shine v. Hill*, 23 Iowa 264. And, although a trust deed described the land conveyed as two separate parcels, when it appeared that they constituted but one farm, and with the assent of the beneficiary and by the advice of the trustees were sold together, it was held that the sale in that form was proper. *Kellogg v. Carrico*, 47 Mo. 157. The sale of a trust estate made merely for the purpose of reinvestment may be made under an order of the court without the intervention of a commissioner. *Griffith v. Burton*, 5 Bush (Ky.) 358.

To prevent a person becoming the highest bidder at a sale under a decree when he is wholly unable to comply with his contract, the court may direct that his bid shall not be received and that the trustee report the two highest bidders, so that in case the highest fails to comply with the terms of sale, the next highest may be received and considered as a purchaser. *Murdock's Case*, 2 Bland (Md.) 461; 20 Am. Dec. 381.

A trustee empowered to sell for cash and pay certain debts, cannot, in the event of non-payment, sell on credit, and such a sale will be set aside at the instance of the debtor. *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270.

The terms of a deed of trust required that upon default in the payment of the notes for which the deed was given as security, the trustee should "sell the property for cash." Subsequent to the execution of the deed, and before the sale, several liens were created on the property. At the sale, the purchaser paid a part of the purchase-money in cash, and executed his notes to the owners and holders of the liens for the

respective balances due them over and above the amounts realized by them at the sale, and the lien-holders yielded up all their claim against the maker of the deed of trust. It was held that the notes given were equivalent to cash placed in the hands of the trustee. *Mead v. McLaughlin*, 42 Mo. 198.

After a trustee's sale under a deed forbidding a sale on credit, the creditor for whose benefit the sale is made, may lend the purchaser a portion of the money with which to pay the amount of his bid, and the transaction will not be regarded as a sale upon credit by the trustee. *Waterman v. Spaulding*, 51 Ill. 425.

Where a will directed a sale of slaves to purchasers for their own use, but not to speculators, without prescribing the terms of the sale, a sale on a credit of twelve months was held proper. *Stone v. Hinton*, 1 Ired. Eq. (N. Car.) 15.

**Adjournment of Sale.**—The trustee may adjourn the sale in his discretion to a more favorable time. *Richards v. Holmes*, 18 How. (U. S.) 143; *Judge v. Booge*, 47 Mo. 544; *Sayles v. Smith*, 12 Wend. (N. Y.) 57; 27 Am. Dec. 117; *Jackson v. Clark*, 7 Johns. (N. Y.) 225. See also *Patten v. Stewart*, 26 Ind. 395; *Thornton v. Boyden*, 31 Ill. 200; *Griffin v. Marine Co.*, 52 Ill. 130; *Montgomery v. Barrow*, 19 La. Ann. 169; *Dana v. Farrington*, 4 Minn. 433; *Enloe v. Miles*, 12 Smed. & M. (Miss.) 147.

But, upon adjourning the sale, the trustee is bound to give a new notice for the same length of time required in the first instance, and this whether the deed contains a clause authorizing an adjournment of the sale or not. *Griffin v. Marine Co.*, 52 Ill. 130.

**Power to Correct Error.**—Trustees advertised and sold the whole of a tract of land, and the purchaser, supposing only a part was sold, took a deed of that part. On the discovery of the mistake, it was held that the trustees might convey the rest to him by a second deed. *O'Day v. Vansant*, 3 Mackey (D. C.) 196.

**Requirements as to Resale.**—A bid made at a trustee's sale through a misunderstanding as to the terms of payment, may be retracted by the consent of the trustee, without avoiding the sale, though the sale is finally effected on a lower bid. *Waterman v. Spaulding*, 51 Ill. 425.

Where the sale of trust property by a trustee under a power to sell, is set aside

c. SETTING THE SALE ASIDE.—While the trustee's deed will convey a legal title indefeasible in a court of common law, even though made in violation of his duty,<sup>1</sup> it may be set aside by a

by the supreme court, on the ground that the property was not sufficiently described in the public notice of sale, and the cause is remanded for a re-sale, and the necessary steps have been taken in the court below for that purpose, in conformity with the opinion of the appellate court, the trustee may proceed to resell the property without an order of the circuit court directing such sale. *Reeside v. Peter*, 35 Md. 221.

When the purchaser refuses to complete the contract, it would be improper for the trustee to resell the property on the same day, but he must re-advertise, and sell upon full notice, in order that the bidding may be open to competition, and a fair price be obtained. *Judge v. Booge*, 47 Mo. 544; *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416; *Givan v. Doe*, 5 Blackf. (Ind.) 260; *Williams v. Barlow*, 49 Ga. 530.

**Requirements in the Deed.**—It must be clear and definite in naming the grantee. *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. Car.) 480.

It should recite the trust, or at least call attention to it, by conveying as trustee. *Porter v. Schofield*, 55 Mo. 303.

**There Must Be a Grantee Named.**—A deed executed by a trustee, relinquishing his whole estate in the trust property, but not purporting to convey it to any person, is inoperative. *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. Car.) 480.

But such a recital or reference is not vital to the validity of the deed. *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596; 60 Am. Rep. 769; *Hall v. Preble*, 68 Me. 100; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *South v. South*, 91 Ind. 221; 46 Am. Rep. 591; *Baird v. Boucher*, 60 Miss. 329; *Campbell v. Johnson*, 65 Mo. 439; *Bishop v. Remple*, 11 Ohio St. 277; *Funk v. Eggleston*, 92 Ill. 515; *Orr v. O'Brien*, 55 Tex. 149; *Flux v. Best*, 31 L. T. N. S. 645; 23 Wkly. Rep. 228.

A trustee's sale is not invalidated by a misrecital in the notice of sale and in the deed, of the circumstances which devolved the execution of the trust upon him, where the deed of trust contains no provision requiring a recital of such circumstances. *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638.

It is the established doctrine in *Maryland*, that a sale made by a trustee, under a decree of a court of chancery, is a transaction between the court and the purchaser; and the report of the trustee and the order of the court ratifying the sale, must be regarded as the evidence of the contract between the parties. *Goldsborough v. Ringgold*, 1 Md. Ch. 239.

1. *Bank of U. S. v. Benning*, 4 Cranch (C. C.) 81; *Taylor v. Benham*, 5 How. (U. S.) 272; *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336; *Dawson v. Hayden*, 67 Ill. 52; *Koester v. Burke*, 81 Ill. 436; *Martin v. Clark*, 116 Ill. 654; *Walton v. Follansbee*, 131 Ill. 147; *Prather v. McDowell*, 8 Bush (Ky.) 46; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197; *Hannibal, etc., R. Co. v. Green*, 68 Mo. 177; *Taylor v. King*, 6 Munf. (Va.) 358; *D'Oyley v. Loveland*, 1 Strobb. (S. Car.) 45; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441; 9 Am. Dec. 313; *Varner v. Gunn*, 61 Ga. 54; *Den v. Troutman*, 7 Ired. (N. Car.) 155; *Pownal v. Myers*, 16 Vt. 408; *Blaisdell v. Stevens*, 16 Vt. 179.

The trustee can convey an absolute title at law, whether in compliance with the trust or not, but the party injured by the breach of trust may defeat it in equity. *Taylor v. King*, 6 Munf. (Va.) 358; 8 Am. Dec. 746.

Until a redemption is had the grantee will hold it, and may set it up in defense of an action of ejectment. *Wilson v. South Park Com'rs*, 70 Ill. 46.

But where a trustee, for the separate use of a *feme covert*, executed a deed, purporting to convey the legal title, it was allowed to operate merely as a declaration of the trust, and not to divest the title of the trustee. *Thompson v. McDonald*, 2 Dev. & B. Eq. (N. Car.) 463.

Where property was devised to a trustee, with directions to sell the principal only, for reinvestment in more profitable securities, a *bona fide* conveyance by him in exchange for Confederate bonds, was held to pass title to the purchaser. *Schley v. Brown*, 70 Ga. 64.

The grantee of a trustee is not bound

court of equity upon the application of the beneficiary.<sup>1</sup> The trustee may not impeach his own sale.<sup>2</sup> Nor can the regularity or validity of the transaction be questioned by a stranger,<sup>3</sup> nor impeached collaterally.<sup>4</sup>

"Public policy as well as the stability of rules of property," it is said, "demand that sales, and titles founded thereon, should not be avoided for slight and trivial reasons; but where the power has not been executed in accordance with essential conditions, the sale and deed will be held to be utterly void, both at law and in equity."<sup>5</sup>

While fraud or gross unfairness will vitiate the sale,<sup>6</sup> yet fraud is not to be presumed upon slight grounds; whatever pre-

to show that the conditions of the trust deed have been complied with by the trustee. *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336.

A deed, with the consent of the beneficiary, though to secure a debt, passes the title. *Dykes v. McVay*, 67 Ga. 502.

1. *Prouty v. Edgar*, 6 Iowa 353; *Hazeltine v. Fourney*, 120 Ill. 493. Where the powers conferred on the trustees are not strictly pursued, a court of chancery will set aside their sales. *Stine v. Wilkson*, 10 Mo. 75.

By standing by and assenting to the sale, even though the sale were unauthorized, the *cestui que trust* waives his right to object. *Spencer v. Hawkins*, 4 Ired. Eq. (N. Car.) 288.

2. *Larco v. Casaneuava*, 30 Cal. 560; *Prouty v. Edgar*, 6 Iowa 353; *Parker v. Allen* (Supreme Ct.), 14 N. Y. Supp. 265.

3. *Gary v. Colgin*, 11 Ala. 514; *Herbert v. Hanrick*, 16 Ala. 581; *Larco v. Casaneuava*, 30 Cal. 560; *Lee v. Parker*, 5 Whart. (Pa.) 350; *Coxe v. Blanden*, 1 Watts (Pa.) 533; 26 Am. Dec. 83; *Hunt v. Crawford*, 3 P. & W. (Pa.) 426.

4. *Reid v. Mullins*, 48 Mo. 344; *Quesenberry v. Barbour*, 31 Gratt. (Va.) 491.

5. *Wagner, J.*, in *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281. See also *Dana v. Farrington*, 4 Minn. 433; *Stine v. Wilkson*, 10 Mo. 75; *Thornburg v. Jones*, 36 Mo. 514; *Jackson v. Clark*, 7 Johns. (N. Y.) 217; *Miller v. Hull*, 4 Den. (N. Y.) 104; *Sherwood v. Reade*, 7 Hill (N. Y.) 431; *King v. Duntz*, 11 Barb. (N. Y.) 192.

It constitutes no objection to the validity of a sale that the trustees, in the exercise of a reasonable discretion, sell the land in lots. *Gray v. Shaw*, 14 Mo. 341; *Stall v. Macalester*, 9 Ohio 19.

If the bidder at a sale of trust prop-

erty refuses to accept a deed and pay the money, the trustee may waive his bid and advertise the property again for sale on another day. *Dover v. Kennerly*, 38 Mo. 469.

The fact that a trustee was an alien when the deed was made to him, and when he conveyed the land to the purchaser, furnishes no ground for setting aside his sale and conveyance of the land. *Ferguson v. Franklins*, 6 Munf. (Va.) 305. See also *Escheator v. Smith*, 4 McCord (S. Car.) 452.

The mere fact that a sale occurred on the day of the general state election does not constitute a sufficient ground for setting it aside, *Bank of Commerce v. Lanahan*, 45 Md. 396; nor will the court set aside a trustee's sale merely because it was made after the death of the grantor, *Spencer v. Lee*, 19 W. Va. 179; nor because bankruptcy proceedings have been commenced against the grantor, which have not reached adjudication. The purchaser would have a legal title, available in ejectment. *McGready v. Harris*, 54 Mo. 137.

6. *Clarkson v. Creely*, 35 Mo. 95; *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Obert v. Obert*, 12 N. J. Eq. 423.

Where a trustee sold an undivided interest in real estate for a grossly inadequate price, after a partition had been decreed, and when the precise value would have been known in a few days, the sale was regarded as a nullity. *James v. Gibbs*, 1 Patt. & H. (Va.) 277.

A trustee was about to sell under a trust deed, and upon the request of one of the grantors, that he would postpone the sale to as late an hour as he lawfully could, the latter stating that an injunction against the sale had been applied for, the trustee promised that

sumptions are indulged will be in favor of the fairness and regularity of the proceedings.<sup>1</sup> Thus, it has been held that a report by a trustee of his sale is conclusive as to its terms, when ratified by the court, in the absence of fraud or mistake.<sup>2</sup>

In the absence of fraud, mere inadequacy of consideration is no ground for setting aside a sale,<sup>3</sup> unless the consideration be so grossly inadequate as to indicate fraud or a plain want of judgment and discretion on the part of the trustee,<sup>4</sup> or unless inadequacy of price is accompanied by irregularity or fraud of some sort.<sup>5</sup> But where the sale is to a *cestui que trust*, and is a plain sacrifice of the interests of the trust, it will not be allowed to

he would not sell until one o'clock, but in fact sold the land between eleven and twelve o'clock, after the grantor had left, to the creditor in the trust deed, who was the only bidder, at one-fifth of its value. The grantor returned with the injunction before one o'clock. It was held that the sale was fraudulent and void. *Hoppes v. Cheek*, 21 Ark. 585.

Where trustees are required to sell for cash, a sale to one with whom it is agreed that no cash shall be paid and that he will hold subject to the direction of the trustees, is fraudulent, and will be set aside at the instance of a beneficiary. *Scott v. Sierra Lumber Co.*, 67 Cal. 71.

A trustee who converts into money well-secured bonds belonging to the trust fund, by selling the same at a large sacrifice to a purchaser, with full notice of the trust, is guilty of such manifest impropriety that both he and the purchaser become *prima facie* responsible therefor, and the burden is upon them to show that the necessities of the trust demanded the sacrifice. *Cocke v. Minor*, 25 Gratt. (Va.) 246.

1. *Graham v. Fitts*, 53 Miss. 307.

That a trustee for a creditor knew that the purchaser was bidding for the creditor is not ground for setting aside the sale. *Lucas v. Oliver*, 34 Ala. 626.

The fact that the trustee sold the property at auction at a time when money was scarce and there were but twelve or twenty persons present at the sale, is no evidence of fraud. *Newman v. Meek*, 1 Freem. Ch. (Miss.) 441.

The mere fact that the land conveyed by a deed of trust is sold under the deed, in gross, will not of itself invalidate the sale. There must be some attendant fraud, or unfair dealing, or abuse of confidence reposed in the trustee made manifest, or a court of equity will not lend its aid to divert a

title acquired under such a sale. *Ben-kendorf v. Vincenz*, 52 Mo. 441.

2. *Brown v. Wallace*, 2 Bland (Md.) 585.

3. *Clark v. Freedman's Sav., etc., Co.*, 100 U. S. 149; *Booker v. Anderson*, 36 Ill. 66; *Waterman v. Spaulding*, 51 Ill. 425; *Iles v. Martin*, 69 Ind. 114; *Singleton v. Scott*, 11 Iowa 589; *Carter v. Abshire*, 48 Mo. 300; *Clark v. St. Louis, etc., R. Co.*, 58 How. Pr. (N. Y. Supreme Ct.) 21; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Bassett v. Higgins*, 2 W. Va. 485.

4. *Booker v. Anderson*, 35 Ill. 66; *Hintze v. Stingel*, 1 Md. Ch. 283; *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Warfield v. Ross*, 38 Md. 85; *Horsey v. Hough*, 38 Md. 130; *Meath v. Porter*, 9 Heisk. (Tenn.) 224.

The trustee in a deed given to secure a note, is the agent of the grantor as well as of the beneficiary, and is bound to sell the property at the best possible figure. If he sells for a grossly inadequate price, as where he receives \$4,500 for property worth \$16,000, equity will seize upon any incident of surprise, undue advantage, or other inequitable circumstances, to give relief. *Meath v. Porter*, 9 Heisk. (Tenn.) 224.

The proof of gross inadequacy of consideration must be conclusive, before one who purchases trust property from a trustee who has authority to sell, will be held liable in equity to account to the *cestui que trust* on the ground of fraudulent collusion with the trustee in the purchase, where the sole basis of this claim is an inference of fraud arising from the inadequacy of consideration, and there is no evidence of actual fraud. *Carpenter v. Robinson*, 1 Holmes (U. S.) 67.

5. See FRAUD, vol. 8, p. 635; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283; 30

stand.<sup>1</sup> A beneficiary cannot set aside a sale by his trustee and recover back the property, and yet retain the consideration.<sup>2</sup>

In making the sale the trustee must guard the interests of the trust, and any sale made in violation of the highest interest of the estate will be deemed a breach of trust.<sup>3</sup>

It has been held that the sale will not be set aside for any mere irregularity, where the complainant has lain by for over ten years, and when, in the meanwhile, the value of the property has increased or the circumstances of the parties have changed.<sup>4</sup>

*d. RIGHTS OF THE PURCHASER.*—(See *infra*, this title, *Rights and Liabilities of Third Parties.*)

**XVI. RIGHTS AND REMEDIES OF THE BENEFICIARY**—1. **Nature of the Beneficiary's Estate.**—Much has been said in the preceding pages of this article in reference to the nature of the estate which the beneficiary acquires.<sup>5</sup> The extent of this estate depends, of necessity, upon the limitations put upon it by the deed, will, or other instrument under which the beneficiary holds title. Broadly stated, his is the equitable title, as distinguished from the legal estate which the trustee acquires.<sup>6</sup> In equity he is the absolute owner, just as at law the trustee is.<sup>7</sup>

Unless the duties confided to the trustee are such as to require the custody by him of the trust property, the beneficiary is entitled to the possession of it, and the income arising out of it is his, subject to the payment of expenses incident to the conduct of the trust.<sup>8</sup>

Am. Dec. 525; *Hoppes v. Cheek*, 21 Ark. 585; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; *Towle v. Amba*, 123 Ill. 410; *Hazeltine v. Fourney*, 120 Ill. 493; *Singleton v. Scott*, 11 Iowa 589; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527.

1. In a sale of property as a whole to the *cestui que trust* by a trustee, under a deed of trust to secure a debt, where it clearly appears that the property would have brought a much higher price if it had been sold in lots than as a whole, the court will set aside the sale. *Goode v. Comfort*, 39 Mo. 313.

2. *Fears v. Lynch*, 28 Ga. 249.

3. *Hunt v. Bass*, 2 Dev. Eq. (N. Car.) 292; 24 Am. Dec. 274.

He is bound to use not only good faith, but also every requisite diligence and prudence in conducting the sale. *Johnston v. Eason*, 3 Ired. Eq. (N. Car.) 330.

Where a trustee sells at auction, he is not bound to accept the highest bid; the exercise of a certain discretion will justify him in rejecting a bid, the expense of which might frustrate the very purpose of the sale, even though such bid was nominally the best. *Gray v. Veirs*, 33 Md. 18.

4. See *supra*, this title, *Statute of Limitations—Laches—Lapse of Time*; *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638.

5. See *supra*, this title, *Nature of the Trustee's Estate; Powers, Duties, and Liabilities of the Trustee.*

6. *You v. Flinn*, 34 Ala. 409; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586.

7. *Lewin on Trusts and Trustees*, p. 572; *Croxall v. Shererd*, 5 Wall. (U. S.) 268; *Badgett v. Keating*, 31 Ark. 400.

8. See *supra*, this title, *Nature of the Trustee's Estate—Powers, Duties, and Liabilities of the Trustee—Accounting*; *Lewin on Trusts and Trustees*, p. 674 *et seq.*; *Armstrong v. Paise*, 3 Burr. 1808, 1901; *Atty. Gen'l v. Lord Gower*, Barn. 150; *Brown v. How*, Barn. 354; *Glover v. Stamps*, 73 Ga. 209; 54 Am. Rep. 870; *Ingham v. Burnell*, 31 Kan. 333.

Until the purposes of a trust relating to lands are completed, and the trustee has been paid his reasonable charges and expenses, the beneficiary cannot, under the *North Carolina Code*, recover possession, in a civil action, of lands held by a person under the legal

The trustee so far represents the *cestui que trust*, that in a court of equity the possession by the trustee is deemed to be the possession of the *cestui que trust*.<sup>1</sup>

The equitable estate may be conveyed<sup>2</sup> or mortgaged<sup>3</sup> by the *cestui que trust*, just as the legal title may, unless the settlor's intention, as manifested in the deed of trust, is such as to preclude the beneficiary's parting with the title, or incumbering it. In the latter event, he has no power of alienation, either voluntary or involuntary; for the courts have generally upheld the right of the settlor to provide against alienation by the *cestui que trust*, as well as to provide a protection against the *cestui que*

title. *Matthews v. McPherson*, 65 N. Car. 189.

A conveyance of land to trustees for the use of a church, vests the use in the church, and the chancellor will protect the church in the enjoyment of the use. *Hadden v. Chorn*, 8 B. Mon. (Ky.) 70.

The person for whose benefit a trust is created, and who is to be the ultimate receiver of the money, may sustain a bill in equity to have it paid directly to himself. *Russel v. Clark*, 7 Cranch. (U. S.) 69; *Fausler v. Jones*, 7 Ind. 277.

1. *Hill on Trustees*, § 264; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Green v. Otter*, 3 B. Mon. (Ky.) 102; *Murphy v. Grice*, 2 Dev. & B. Eq. (N. Car.) 199; *Miller v. Bingham*, 1 Ired. Eq. (N. Car.) 423; 36 Am. Dec. 58.

2. *Equitable Estate May Be Conveyed.*—See *Elliot v. Armstrong*, 2 Blackf. (Ind.) 198; *Rogers v. Colt*, 21 N. J. L. 704; *Henson v. Wright*, 88 Tenn. 501; *Dibrell v. Carlisle*, 51 Miss. 785; *Converse v. Noyes* (N. H. 1891), 22 Atl. Rep. 556; *Havens v. Healey*, 15 Barb. (N. Y.) 301; *Bramhall v. Ferris*, 14 N. Y. 51; 67 Am. Dec. 113.

Trustees will not be allowed to recover trust property from the *cestui que trust's* grantee, while the *cestui que trust's* estate continues. *Bowen v. Bower*, 19 Mo. 399.

"The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title." *Lewis v. Hawkins*, 23 Wall. (U. S.) 119.

A use executed may be inherited. *Pierson v. Armstrong*, 1 Iowa 282; 63 Am. Dec. 440. See also *Bowen v. Chase*, 94 U. S. 812; *Newhall v. Wheeler*, 7 Mass. 189.

Unless it is to be collected from the expressions in the will or the purposes and objects of the testator, that his in-

tention was otherwise, trust estates will pass by the usual general words in a will passing other estates. *Jackson v. Delancy*, 13 Johns. (N. Y.) 537; 7 Am. Dec. 403.

By the provisions of a will a certain sum was to be invested in good securities for A, "not to be used—the principal—until she shall arrive at twenty-six years of age, except the income or interest." Certain land of the estate was conveyed to A's father, as her guardian, for her use. It was held that A, on arriving at her majority, might sell and convey her interest in the land; and that a sale to her guardian was not necessarily invalid. *Burford v. Guthrie*, 14 Bush (Ky.) 677.

3. *Equitable Estate May Be Mortgaged.*—A beneficiary, although a *feme covert*, unless restricted by the provisions of the trust, may mortgage the trust estate for supplies furnished to make crops, etc. *Tift v. Mayo*, 61 Ga. 246.

A *cestui* who is entitled to the rents and profits of the land for life, may mortgage such interest. *Perrine v. Newell*, 49 N. J. Eq. 57.

The beneficiary may sell or mortgage the trust estate without the assent of the trustee, unless expressly forbidden in the instrument creating the estate. *Dibrell v. Carlisle*, 51 Miss. 785.

A beneficiary under a will, to whom is given a life support out of the estate conveyed in trust to the executor, has no power to mortgage the estate. *Barnes v. Dow*, 59 Vt. 530.

Rents and profits to which a *cestui que trust* is entitled out of property held by a trustee, are proper subjects of sale, assignment, or pledge to secure debts. *Wilson v. Russ*, 17 Fla. 691. But the trustee must join in the mortgage.

In *Henson v. Wright*, 88 Tenn. 501,

*trust's* creditors. A power of alienation reposed in the beneficiary is not to be transcended; in other words, he is not to convey a larger estate than he acquires.<sup>1</sup>

Under the *New York* statute and decisions, the equitable estate is inalienable, and the beneficiary may neither assign nor mortgage his interest in the trust property,<sup>2</sup> nor anticipate the income therefrom.<sup>3</sup> The insolvency of the beneficiary, or the appointment of a receiver or assignee on behalf of his creditors, cannot deprive him of the right to enjoy the beneficial estate.<sup>4</sup> Creditors can assert no claim against it.<sup>5</sup>

A few early *New York* decisions held that the provisions of a statute of that state which forbids the alienation by a beneficiary

real estate had been conveyed to a trustee to hold for the use of a certain named beneficiary for life, the remainder to be taken, held, and conveyed by the trustee to certain persons designated. This was held to create an active trust with a distinct legal and equitable estate, so that the beneficiary could not mortgage his interests without the trustee uniting with him in the execution of the mortgage.

Where a deed of trust gave the beneficiary, a married woman, full power of disposition of the estate after the death of her husband, and the same power during his life with his assent, a mortgage executed by the husband and wife is a good execution of the power, and conveys the estate. *Campbell v. Low*, 9 Barb. (N. Y.) 585.

Where a testator set apart a fund to be held in trust for the use of a son, the interest to be paid to him semi-annually during life, and at his death the principal to go to his heirs, an assignment to the trustee by the *cestui que trust* of the future income to secure an advancement of money, is valid in the absence of fraud and of any testamentary or statutory restriction of the power of alienation. *Caldwell v. Boyd*, 109 Ind. 447. See also *Wood v. Wallace*, 24 Ind. 226; *Farmers, etc., Bank v. Brewer*, 27 Conn. 600.

1. The settlor conveyed land in trust for his wife during her life, the remainder in trust for her children during minority, the trustee to convey to them on their coming of age. The wife survived the children. Upon her death it was held that the heirs of the grantor took the property, and that a conveyance by the wife was invalid as against them. *Parker v. McMillan*, 55 Mich. 265.

Certain government bonds were deposited by their owner in a bank, accom-

panied by a written declaration of the trust, providing that the owner's wife should enjoy the interest during her life and the owner's heirs succeed to it upon her death. The settlor died, and thereupon for the purpose of making a better investment, the widow and one of the heirs agreed in writing that the bonds should be released from the trust. The widow took possession of these funds and upon her death bequeathed her entire estate to one of the heirs, to the exclusion of the other. It was held that the latter was entitled to recover his interest in the trust fund. *Comer v. Comer*, 24 Ill. App. 526, affirmed 120 Ill. 420.

2. See *supra*, this title, *Nature of the Trustee's Estate*; *Genet v. Foster*, 18 How. Pr. (N. Y. Super. Ct.) 54; *Wood v. Wood*, 5 Paige (N. Y.) 600; 28 Am. Dec. 451; *Clute v. Bool*, 8 Paige (N. Y.) 82; *Hawley v. James*, 16 Wend. (N. Y.) 61; *Coster v. Lorillard*, 14 Wend. (N. Y.) 265; *Irving v. DeKay*, 9 Paige (N. Y.) 521; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Belmont v. O'Brien*, 12 N. Y. 401; *Heermans v. Robertson*, 5 Thomp. & C. (N. Y.) 601; 3 Hun (N. Y.) 469. See also *Crooke v. Kings County*, 97 N. Y. 421; *Kane v. Gott*, 24 Wend. (N. Y.) 641; 35 Am. Dec. 641.

3. *De Graw v. Clason*, 11 Paige (N. Y.) 136; *Scott v. Nevins*, 6 Duer (N. Y.) 676; *Campbell v. Foster*, 35 N. Y. 361; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. (N. Y.) 34; *Noyes v. Blakeman*, 6 N. Y. 567.

4. *Graff v. Bennett*, 2 Robt. (N. Y.) 56. See also *Scott v. Nevins*, 6 Duer (N. Y.) 676.

5. *Stewart v. McMartin*, 5 Barb. (N. Y.) 444; *Campbell v. Foster*, 16 How. Pr. (N. Y. Supreme Ct.) 275; *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 427.

of his interest in an express trust, do not apply to trusts in personal property,<sup>1</sup> but later rulings have overthrown this doctrine.<sup>2</sup>

Under the English rulings, equitable, as well as legal, estates are subject to the payment of the debts of the *cestui que trust*.<sup>3</sup> And this rule has been followed by the *California* Code, and the *Kentucky* statutes and decisions, and the courts elsewhere.<sup>4</sup>

In *England*, a restriction against alienation (except in the case of a married woman) will have no more effect in equitable than in legal interests, but will be rejected as contravening the policy of the law.<sup>5</sup>

Whether or not the trust property can be subjected to the payment of the debts of the *cestui que trust* is still an open question. The weight of authority seems to support the proposition that, unless the instrument of trust provides that the beneficiary's interest shall be kept free from all claims of creditors, whatever interest the *cestui que trust* may possess in the property is liable for the payment of his debts,<sup>6</sup> and this provision has been made in

1. *Titus v. Weeks*, 37 Barb. (N. Y.) 136; *Arnold v. Gilbert*, 5 Barb. (N. Y.) 199; *Cruger v. Cruger*, 5 Barb. (N. Y.) 250; 4 Edw. Ch. (N. Y.) 522; *Scott v. Nevins*, 6 Duer (N. Y.) 676. See also *Kane v. Gott*, 24 Wend. (N. Y.) 641; 35 Am. Dec. 641.

2. *Graff v. Bonnett*, 31 N. Y. 13; 88 Am. Dec. 236; *Campbell v. Foster*, 35 N. Y. 372; *Roosevelt v. Roosevelt*, 6 Hun (N. Y.) 44.

3. *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare 480; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & M. 395; *Young-husband v. Gisborne*, 1 Coll. 400; *Hood v. Oglander*, 34 Beav. 513; *In re Teague's Settlement*, L. R., 10 Eq. 564; *Shaw v. Ford*, 7 Ch. Div. 669; *Wilkinson v. Wilkinson*, 3 Swanst. 515.

4. *Kentucky* Gen. St., ch. 63, art. 1, § 21; *Samuel v. Ellis*, 12 B. Mon. (Ky.) 479; *Eastland v. Jordan*, 3 Bibb (Ky.) 186; *Marshall v. Rash*, 87 Ky. 116; 12 Am. St. Rep. 467; *Graves v. Reed* (Ky. 1889), 12 S. W. Rep. 550; *Parsons v. Spencer*, 83 Ky. 305; *Dickison v. Ogden*, 89 Ky. 162. *Compare* *Pope v. Elliott*, 8 B. Mon. (Ky.) 56; *White v. Thomas*, 8 Bush (Ky.) 661; *Davidson v. Kemper*, 79 Ky. 5; *Battle v. Petway*, 5 Ired. (N. Car.) 576; 44 Am. Dec. 59; *Forbes v. Smith*, 8 Ired. Eq. (N. Car.) 40.

The estate of a *cestui que use* may be taken by attachment, writ of entry, execution, or any other appropriate proceeding at law, without resort to equitable remedies. *Hutchins v. Heywood*, 50 N. H. 491.

Rents devised to a trustee, with directions to pay them to the *cestui que trust* as they fall due, are liable in the hands of the trustee to the payment of the debts of the *cestui que trust*. *Knefler v. Shreve*, 78 Ky. 297.

In *Parsons v. Spencer*, 83 Ky. 305, the decedent had devised certain property in trust for his daughter for life, "not to be liable for debts or liability she may have or hereafter contract." It was held that while the trustee could not be deprived of the possession of the property, the court could require that the income be applied to the satisfaction of the debts of the beneficiary.

See *California* Code Civ. Proc., § 688; *LeRoy v. Dunkerly*, 54 Cal. 460; *James v. Throckmorton*, 57 Cal. 384; *Kennedy v. Nunan*, 52 Cal. 326; *Fish v. Fowle*, 58 Cal. 373. And see *McKeon v. Bisbee*, 9 Cal. 137; 70 Am. Dec. 642; *McWilliams v. Withington*, 7 Sawyer (U. S.) 205; *Girard Life Ins. Co. v. Chambers*, 46 Pa. St. 485; 86 Am. Dec. 513; *Mathews v. Stephenson*, 6 Pa. St. 496.

5. *Lewin on Trusts and Trustees*, p. 693, citing *Snowdon v. Dales*, 6 Sim. 524; *Green v. Spicer*, 1 Russ. & M. 395; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare 480.

6. See article by Horace C. Brannin, on "Liability of Trust Property to Debts," in *Kentucky Law Jour.*, reprinted in 3 *Ohio Law Jour.* 324.

An exhaustive note upon this subject is published with the report of *McIlvaine v. Smith*, 42 Mo. 45; 97 Am.



the statutes in *Indiana*. The cases in support of this proposition and in denial of it will be found in the notes.<sup>1</sup>

Dec. 295. See also *Bates v. Spooner*, 45 Ind. 492; *Cox v. Arnsmann*, 76 Ind. 210; *Palmer v. Stevens*, 15 Gray (Mass.) 343; *Sparhawk v. Cloon*, 125 Mass. 267; *Daniels v. Eldredge*, 125 Mass. 356; *Forbes v. Lothrop*, 137 Mass. 522; *Clute v. Bool*, 8 Paige (N. Y.) 82; *Shyrock v. Waggoner*, 28 Pa. St. 430.

A deviser's intention to place his devise beyond the reach of the devisee's creditors, will not be presumed from the surrounding circumstances, of which the creditor has no record notice, when the terms of the instrument creating the trust do not expressly declare such intention, and the surrounding circumstances do not raise a necessary implication thereof. *Pickens v. Dorris*, 20 Mo. App. 1.

The decedent left a bequest in money to trustees, the income to be paid to his daughter for her separate use upon her receipt thereof. Upon the daughter's death she was to have the power to dispose of the funds "by will or otherwise." It was held that her creditors could reach both the principal and income. *Forbes v. Lothrop*, 137 Mass. 523.

A wife bequeathed to her husband an income conditioned upon his executing a release of his estate by the curtesy, which the husband accordingly executed. This income was held, in *Bank of Commerce v. Chambers*, 96 Mo. 459, to be subject to the claims of his creditors, notwithstanding any testamentary provisions to the contrary. Compare *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358.

In *Dickinson v. Conniff*, 65 Ala. 581, the trustee was also one of the *cestuis que trustent* of the estate. It was held that one who had rendered services to the estate at the trustee's instance, and obtained a judgment at law against him, with an execution returned unsatisfied thereon, might, in equity, reach and subject his interest in the trust estate.

**Trusts for Support Excepted.**—An apparent exception to the rule stated in the text appears in cases where the trust has been created for the support of the beneficiary, and where a clear surplus remains after a reasonable sum has been appropriated for the support of the *cestui que trust*, and in such cases courts of equity have authority to interfere on behalf of judgment credi-

tors and divert a portion of the income to the payment of such debts. *Genet v. Beekman*, 45 Barb. (N. Y.) 382; *Leigh v. Harrison* (Miss. 1892), 11 So. Rep. 604. See also *Bramhall v. Ferris*, 14 N. Y. 47; 67 Am. Dec. 113; *Williams v. Thorn*, 70 N. Y. 279; *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79; *Craig v. Hone*, 2 Edw. Ch. (N. Y.) 569; *Arzbacher v. Mayer*, 53 Wis. 393.

Where a fund has been bequeathed in trust to the testator's son, the income to be applied to the son's use for life, a creditor of the son cannot reach any of such income, unless he shows that the income exceeds the amount necessary for the support of the son in the style to which he has been accustomed, and in which his father has brought him up. *Stow v. Chapin*, 4 N. Y. 496. See also *Henderson v. Zachry*, 80 Ga. 98.

Where an estate was devised in trust, for the sole use of the testator's daughter, a married woman, and her children, during her life, with remainder to her children, it was held that the estate was liable for the payment of articles of merchandise suitable to her condition of life and obtained on the faith of the trust estate. *Campbell v. Brannin*, 8 B. Mon. (Ky.) 478.

1. A court of equity refused to authorize a trustee to sell the trust estate to pay judgments for debts against a profligate and extravagant beneficiary, for whom the property had been devised in trust by his father to have the use and income during life, with remainder over, and this though some of the debts were incurred to the trustee, who lent him money and became his surety. *McKnight v. Wilson*, 2 Jones Eq. (N. Car.) 491.

The equitable assets of a debtor cannot be held for his debts in an action at law. *Patterson v. Lawrence*, 83 Ga. 703.

The *North Carolina Act of 1812*, rendering lands liable to execution against the *cestui que trust*, relates only to those fraudulent trusts in which the trustee has only the formal legal title, and the *cestui que trust* the whole beneficial interest. *Hawkins v. Sneed*, 3 Hawks (N. Car.) 149.

Slaves held by a trustee, to be divided among the children of A who may now be living, and those who

represent any deceased child, as if they were claiming the slaves as next of kin of their father, are not liable to attachment or execution at the instance of a creditor of one of the *cestuis que trustent*. *Gillis v. McKay*, 4 Dev. (N. Car.) 172.

The property cannot be subjected to the payment of debts of the *cestui que trust*, unless it is shown that he did not have sufficient assets to pay them. *Patterson v. Lawrence*, 83 Ga. 703.

A devise of land to trustees in fee, in trust, during the life of a son of the testator, to pay over the profits to him, or to such persons as he should appoint, and, after his death, to convey according to the son's appointment by will, or, in default, to such as would be his heirs if he died intestate, with power to the trustees and son to change the property and reinvest, provided that, if the son should be so relieved from embarrassment as in the opinion of the trustees to render it expedient, they should convey to him in fee, does not vest in the son an estate which can be taken on execution against him. *Vaux v. Parke*, 7 W. & S. (Pa.) 19.

Where the deed creating the trust directs that the rents and profits be applied to the support, maintenance, and education of the children of the beneficiary, such beneficiary has no interest in the trust estate which a court of equity can apply to the discharge of a judgment debt. *Pickrell v. Zell*, 2 MacArth. (D. C.) 65.

Equitable estates are not subject to execution in *Michigan*. *Trask v. Green*, 9 Mich. 358; *Gorham v. Wing*, 10 Mich. 486. Nor in *New Jersey*. *Vancleve v. Grove*, 4 N. J. Eq. 330; *Hogan v. Jacques*, 19 N. J. Eq. 123; 97 Am. Dec. 644; *Lippincott v. Evens*, 35 N. J. Eq. 553; *Hunterdon County v. Henry*, 41 N. J. Eq. 388. Nor in *Alabama*. *Wilson v. Beard*, 19 Ala. 629; *Shaw v. Lindsey*, 60 Ala. 344. And see *Lavender v. Lee*, 14 Ala. 688. Nor in *Ohio*. See also *Douglass v. Houston*, 6 Ohio 156; *Scott v. Douglass*, 7 Ohio 227; *Miner v. Wallace*, 10 Ohio 403; *Haynes v. Baker*, 5 Ohio St. 255.

Under a *Missouri* statute subjecting to execution sale "all real estate whereof defendant for his use was seised in law or equity," only land of which the defendant has seisin is liable. He must possess an actual, equitable interest in the land itself, a vested equitable estate in possession, and not a mere ground of equitable relief against the

trustee or an equitable chose in action. *McIlvain v. Smith*, 42 Mo. 45; 97 Am. Dec. 295; *Brant v. Robertson*, 16 Mo. 149.

In *Broadwell v. Yantis*, 10 Mo. 403, *Napton, J.*, said: "There must be an interest in land which a court of law can protect or enforce in order that it may be subject to the lien of a judgment and execution. A mere equity, unaccompanied with possession, is not such an interest."

A decedent devised an estate to his executor, with instructions to pay out of the income of the estate such sums of money as he should deem expedient for the support of the testator's son. It was held that inasmuch as the son could not enforce the payment of any moneys to him under this devise, his creditors could not subject the equitable interest which he possessed, to the payment of his debts. *Davidson v. Kemper*, 79 Ky. 5. See also *Foster v. Foster*, 133 Mass. 179; *Leavitt v. Bierne*, 21 Conn. 1; *Hall v. Williams*, 120 Mass. 344; *Nixon v. Rose*, 12 Gratt. (Va.) 425; *Keyser v. Mitchell*, 67 Pa. St. 473; *Doswell v. Anderson*, 1 Patt. & H. (Va.) 185; *Holmes v. Penney*, 3 K. & J. 90; *Twopenny v. Peyton*, 10 Sim. 487; *Lucas v. Lockhart*, 10 Smed. & M. (Miss.) 466; 48 Am. Dec. 766.

So, also, it was held in *Banfield v. Wiggins*, 58 N. H. 155, that a legacy bestowed upon a trustee, to be disposed of at the trustee's discretion for the benefit of another, could not be attached by a trustee process in an action against the *cestui que trust*.

A legacy in the hands of an executor upon no other trust than to pay it over to the legatee, is not held in trust within the meaning of the exception in the statute, but may be reached by a judgment creditor by proceedings under the statute. But where a fund is given to executors with directions to invest it and to pay to the legatee during his life the interest and income thereof at such times and in such manner and in such amounts as the executors shall deem prudent, there are present the essential qualities of a trust—confidence, discretion, and active duties to be performed by the trustee—and the principal fund and the interest and income thereof are held in trust within the meaning of the exception in the statute. Neither the principal fund nor the accumulation of interest which the executors have kept back from the

Wherever this equitable interest has been reached by the creditor, it has been through equitable remedies.<sup>1</sup> Thus, garnishment has been held to be an improper method of subjecting the fund to the payment of the beneficiary's debts.<sup>2</sup>

There is no reason why the owner of property who bestows it upon another should not be permitted to impose any reasonable limitation upon its use and enjoyment, and a slight preponderance of authority sustains the settlor's right to provide against the

legatee, they not having deemed it prudent to pay it over to him, can be reached in a court of chancery by a judgment creditor of the legatee for life, and be applied in payment of a judgment under the statute. *Hardenburgh v. Blair*, 30 N. J. Eq. 645. See also *Hardenburgh v. Blair*, 30 N. J. Eq. 42; *Frazier v. Barnum*, 11 N. J. Eq. 316; *Rider v. Mason*, 4 Sandf. Ch. (N. Y.) 352; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Graff v. Bonnett*, 31 N. Y. 9; 88 Am. Dec. 236; *Campbell v. Foster*, 35 N. Y. 361.

It has been held in a large number of cases that a bequest of money in trust for A, "not subject to any debt or debts he may have contracted, but for his comfort and support" is subject to his debts nevertheless, because the condition is void. *Smith v. Moore*, 37 Ala. 327; *Mebane v. Mebane*, 4 Ired. Eq. (N. Car.) 131; 44 Am. Dec. 102; *Gray v. Obear*, 54 Ga. 231; *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295.

No beneficial interest must rest in the trustee. *Blanchard v. Taylor*, 7 B. Mon. (Ky.) 645.

The entire beneficial interest must be in the *cestui que trust*, the collection of whose debt is sought to be enforced. Joint equitable interests cannot be reached on the individual debts of the beneficiary. *Jackson v. Bateman*, 2 Wend. (N. Y.) 570; *Lynch v. Utica Ins. Co.*, 18 Wend. (N. Y.) 236; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Kellogg v. Wood*, 4 Paige (N. Y.) 578; *Gillis v. McKay*, 4 Dev. (N. Car.) 172; *Rice v. Burnett*, 1 Spear's Eq. (S. Car.) 579; 42 Am. Dec. 336; *Coults v. Walker*, 2 Leigh (Va.) 280.

Where the testator devises real estate in trust, the trustee to collect the rents and profits and pay the same to testator's son, "into his own hands and not into another, whether claiming by his authority or otherwise," the intention of the testator is that the income be paid into the hands of his son to the exclusion of all other persons, whether claim-

ing as alienees or as creditors; and such rents and profits, while in the hands of the trustee, cannot be reached by the beneficiary's creditors by any process, either at law or in equity. *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398.

Where property is conveyed in trust for the beneficiary for life with a power of appointment by will, the property does not become subject to the debts of the beneficiary upon his exercise of the power, where the will was thus made only to insure title to one who had previously, in good faith, purchased the property when it was sold under a decree of court. *Patterson v. Lawrence*, 83 Ga. 703.

1. *Lackland v. Smith*, 5 Mo. App. 153. In *Pettit v. Johnson*, 15 Ark. 55, the court, by Walker, J., said: "In all such cases, where the debtor is possessed of an equitable estate, in which there are conflicting interests, upon the determination of which the debtor's real interest must depend, and the creditor seeks to subject it to the payment of his debt, his best, and in most cases his only, remedy is in chancery, where all the parties interested can be heard and the real interest of the debtor ascertained, and where a sale may be had under process so guarded as to protect the interest of the debtor and give assurance to the purchaser of an unincumbered title."

A mortgage given by trustees was foreclosed, and the mortgaged property sold, but, the proceeds of sale not being sufficient to satisfy the decree, an order was given that executions should issue against the trustees for the balance over, to be satisfied out of trust property not covered by the mortgage. It was held that the order and the executions were invalid, on the ground that, when trust property is bound by the trustees within the scope of their authority, it can only be reached by proceeding against it in chancery. *Zehnbart v. Spillman*, 25 Fla. 591.

2. See *Smith v. Towers*, 69 Md. 77;

application to a beneficiary's debts of property which he has given him.<sup>1</sup> But in order to bestow such an estate, the language of the settlor to that end must be unequivocal.<sup>2</sup>

9 Am. St. Rep. 398; *Dodd v. Levy*, 10 Mo. App. 123.

1. *Nichols v. Eaton*, 91 U. S. 725; *Hyde v. Woods*, 94 U. S. 523; *Sprindie v. Shreve*, 9 Biss. (U. S.) 199; *Leavitt v. Beirne*, 21 Conn. 1; *Braman v. Stiles*, 2 Pick. (Mass.) 464; 13 Am. Dec. 445; *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504; *Slattery v. Watson*, 151 Mass. 266; *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358; *Arnwine v. Carroll*, 8 N. J. Eq. 625; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Degraw v. Clason*, 11 Paige (N. Y.) 136; *Holdship v. Patterson*, 7 Watts (Pa.) 547; *Shankland's Appeal*, 47 Pa. St. 113; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Thackara v. Mintzer*, 100 Pa. St. 151; *Brown v. Williamson*, 36 Pa. St. 338; *Stambaugh's Estate*, 135 Pa. St. 585; *Jourlmon v. Massengill*, 86 Tenn. 81; *Van Amee v. Jackson*, 35 Vt. 173; *Roberts v. Hall*, 35 Vt. 28; *White v. White*, 30 Vt. 338; *Nickell v. Handly*, 10 Gratt. (Va.) 336; *Camp v. Cleary*, 76 Va. 140.

Generally as to the power of the settlor to place an equitable estate beyond the reach of the beneficiary's creditors, and to prevent the alienation thereof by the beneficiary, see *Jourlmon v. Massengill*, 86 Tenn. 81, and cases cited. See also *Holdship v. Patterson*, 7 Watts (Pa.) 547; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Shankland's Appeal*, 47 Pa. St. 113; *Leavitt v. Beirne*, 21 Conn. 1; *White v. White*, 30 Vt. 338; *Nickell v. Handly*, 10 Gratt. (Va.) 336; *Pope v. Elliott*, 8 B. Mon. (Ky.) 56; *Campbell v. Foster*, 35 N. Y. 361; *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398; *Garland v. Garland*, 87 Va. 758; 24 Am. St. Rep. 682; *Cooper v. Wyatt*, 5 Madd. 489; *Rex v. Robinson*, Wightw. 393; *Shee v. Hale*, 13 Ves. 406; *Brandon v. Robinson*, 18 Ves. 432. In all of the cases last cited, the authority of the settlor to thus dispose of the trust estate has been recognized. But compare dissenting opinion by Alvey, C. J., and Bryan, J., in *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 404. And in the following cases the English rule is followed and the right

to apply trust property to the satisfaction of the beneficiary's debts is upheld, regardless of the settlor's provision against such application. *Nichol v. Levy*, 5 Wall. (U. S.) 441; *Smith v. Moore*, 37 Ala. 327; *Taylor v. Harwell*, 65 Ala. 13; *Samuel v. Ellis*, 12 B. Mon. (Ky.) 479; *Mandlebaum v. McDonell*, 29 Mich. 78; *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295; *Hallett v. Thompson*, 5 Paige (N. Y.) 583; *Mebane v. Mebane*, 4 Ired. Eq. (N. Car.) 131; 44 Am. Dec. 102; *Tillinghast v. Bradford*, 5 R. I. 205; *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46; 55 Am. Dec. 654.

A debtor's beneficial interest in property bequeathed to a trustee for the use and benefit of the debtor and his family, but not to be liable for his debts, cannot be subjected in equity by his creditors. *Hill v. McRae*, 27 Ala. 175; *Pope v. Elliott*, 8 B. Mon. (Ky.) 56.

2. *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320.

It will not be presumed where the intention is not expressed in the instrument or necessarily implied therefrom. *Pickens v. Dorris*, 20 Mo. App. 1; *Overman's Appeal*, 88 Pa. St. 276.

It has been held that a settlor cannot put his own property in the hands of trustees for his own use, free from the claims of creditors. See *SPEND-THRIFT TRUSTS*, vol. 23, p. 5.

In *Maryland Grange Agency v. Lee*, 72 Md. 161, a testatrix devised certain real estate to her sons in trust for the support and education of their families, the land in no event to be liable for their debts. It was held that the crops grown upon the real estate so devised, were also exempt from the claims of the creditors.

This right to provide against alienation and cut off the claims of creditors of the *cestui que trust*, is expressly conferred by statute in *New York*. *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616. See also *Steib v. Whitehead*, 111 Ill. 252; *Hardenburgh v. Blair*, 30 N. J. Eq. 42; *Arzbacher v. Mayer*, 53 Wis. 380.

In *Wales v. Bowdish*, 61 Vt. 23, decedent devised an estate in trust for her brother to use and occupy for life, and on his death to be "conveyed to whom

But this exemption of the beneficiary's property from application to the payment of his debts, must not be made an instrument of fraud. Thus, he cannot invest his individual property in improving the land and thus create a trust in the improvements to the prejudice of his creditors.<sup>1</sup>

The settlor may settle the property in such a manner that it may not be aliened by the beneficiary or the right to its income taken from him,<sup>2</sup> and this is done legally by a proviso that the estate shall not take effect unless the *cestui que trust* is free from debt, or that the estate shall terminate whenever the beneficiary shall become a bankrupt, or when a creditor's bill shall be filed against him, or an execution issue against his interest in the property.<sup>3</sup>

So various are the terms and limitations put upon estates in trust that it would be impossible to formulate any doctrine which

and in the manner he shall direct." This was held to vest in him an interest which existing creditors could not reach. And see generally SPENDTHRIFT TRUSTS, vol. 23, p. 5.

1. Woodruff v. Johnson, 8 N. J. Eq. 729; 55 Am. Dec. 247.

2. Hall v. Williams, 120 Mass. 344; Foster v. Foster, 133 Mass. 179; Broadway Nat. Bank v. Adams, 133 Mass. 170; 43 Am. Rep. 504; Baker v. Brown, 146 Mass. 369; Slattery v. Wason, 151 Mass. 266; Wallace v. Campbell, 53 Tex. 229; Johnston v. Zane, 11 Gratt. (Va.) 552; Markham v. Guerrant, 4 Leigh (Va.) 284; Garland v. Garland, 87 Va. 758; 24 Am. St. Rep. 682; Kearsley v. Woodcock, 3 Hare 185; Joel v. Mills, 3 Kay & J. 458; Large's Case, 2 Leon. 82; Churchill v. Marks, 1 Coll. 441; Sharp v. Cossent, 20 Beav. 470; Shee v. Hale, 13 Ves. 404; Lewes v. Lewes, 6 Sim. 304; Cooper v. Wyatt, 5 Madd. 482; Lockyer v. Savage, 2 Str. 947; Yarnold v. Moorhouse, 1 Russ. & M. 364; Stephens v. James, 4 Sim. 499; *Ex p.* Oxley, 1 B. & B. 257.

Provisions against the alienation of real estate are not encouraged by the courts. It has been held in a number of cases that trusts cannot, in general, be created for the purpose of preventing the alienation of the beneficial interest. See Perry on Trusts 386; Story's Eq. Jur. 974 A; 3 Williams on Executors 1374; Mandelbaum v. McDonell, 29 Mich. 78; *In re Teague's Settlement*, L. R., 10 Eq. 564; the *Michigan* case citing and reviewing the oldest authorities upon this point.

It has also been held, however, that the power of alienation may be sus-

pended for a limited period by the creation of a trust, or alienation to a particular person can be prohibited. See McKinster v. Smith, 27 Conn. 628; Stewart v. Brady, 3 Bush (Ky.) 623; Lippincott v. Ridgway, 10 N. J. Eq. 164; Attwater v. Attwater, 18 Beav. 330; *In re Teague's Settlement*, L. R., 10 Eq. 564; *In re Cunyngame's Settlement*, L. R., 11 Eq. 324.

3. Nichol v. Levy, 5 Wall. (U. S.) 433; Easterby v. Keney, 36 Conn. 18; Marshall v. Rash, 87 Ky. 119; 12 Am. St. Rep. 467; White v. Thomas, 8 Bush (Ky.) 661; Bramhall v. Ferris, 14 N. Y. 41; 67 Am. Dec. 113; Hallett v. Thompson, 5 Paige (N. Y.) 583; Dick v. Pitchford, 1 Dev. & B. Eq. (N. Car.) 480; Tillinghast v. Bradford, 5 R. I. 205; Greene v. Wilbur, 15 R. I. 251; Bridge v. Ward, 35 Wis. 687; White v. Chitty, L. R., 1 Eq. 372; Cox v. Fonblanque, L. R., 6 Eq. 482; Lloyd v. Lloyd, L. R., 2 Eq. 722; Trappes v. Meredith, L. R., 9 Eq. 229; Hatton v. May, 3 Ch. Div. 148; Hunt-Foulston v. Furber, 3 Ch. Div. 285; Sharp v. Cossent, 20 Beav. 470; Manning v. Chambers, 1 De G. & S. 282; Oldham v. Oldham, L. R., 3 Eq. 404.

Judge Redfield, in his work on Wills (2 Redfield on Wills, p. 668), says: "There is no question but the testator may bequeath property for the mere purpose of benefiting the donee personally, and provide that no creditor or purchaser shall take any interest or benefit of the same. . . . But it is now settled that if such is the clearly declared purpose of the testator, the bequest will fail, upon the legatee or devisee becoming insolvent or bank-

would determine the scope of the respective estates of the trustee and the beneficiary, and adapt itself to all cases. Instances are given in the notes which show the construction placed by different courts, with respect to the respective estates of trustee and *cestui que trust*, upon various trusts created.<sup>1</sup>

rupt, even where it occurs during the life of the testator. Either a life or an absolute estate by bequest may be so framed as to cease upon the happening of a particular event," and this language is quoted with approval in *Bridge v. Ward*, 35 Wis. 687.

1. An insolvent debtor conveyed his property to a creditor, who in turn conveyed it in trust to be managed solely for his benefit, but to be reconveyed to the debtor after the trust was executed. It was held that the status of the debtor was that of a *cestui*, who could demand an account, an enforcement of the trust, etc. *Loud v. Winchester*, 52 Mich. 174.

A trust in land created for a wife and her children, vests in the children at her death. *U. S. Bank v. Ennis, Wright* (Ohio) 605.

Under a conveyance made in trust for a married woman and her infant children, the legal estate will not vest in them, although the conveyance prescribes no duties to be performed by the trustee. *Dean v. Long*, 122 Ill. 447.

A man conveyed property in trust for the separate use of his wife and children, born or to be born, and the survivors or survivor of them, and authorized the trustees to sell any part of the estate, on the request of the mother alone, holding the proceeds, etc. It was held, that the wife had a life estate, and that, at her death, it passed to the children or child who survived her. *Rogers v. Payne*, 14 B. Mon. (Ky.) 135.

Lands were conveyed to the mother, in trust for her daughter and her heirs and assigns; but if her daughter should die under age, and without issue, then for the sole use of the grantee in fee. On the death of the mother, leaving her daughter a minor, and her sole heir at law, the whole legal and equitable estate was held to vest in the daughter. *Matter of DeKay*, 4 Paige, (N. Y.) 403.

A conveyance in trust for a woman and her children, she having children at the time, nothing appearing on the face of the deed to show a contrary intention, was held to vest an estate in

the mother, and the children then born, and in one *en ventre sa mere* as tenants in common; but that children born afterwards were not entitled to come in. *Gay v. Baker*, 5 Jones Eq. (N. Car.) 344; 78 Am. Dec. 229.

Where a husband and wife united in a deed of her property in trust for their use during their joint lives, and, in case of the death of the wife before the husband, without issue, to the use of the husband in fee, it was held that where the wife died and left a child that survived her a few days, the husband did not take a fee. *Huston v. Hamilton*, 2 Binn. (Pa.) 387.

A devise of lands in trust for the use and benefit of testator's married daughter, with direction to the trustee not to pay any part of the proceeds to the husband, but providing that any "receipts or writings witnessing the payment of such proceeds to his daughter, shall be a sufficient discharge of such trustee," entitles the daughter to receive and dispose of the proceeds, at least, for the support of herself and children. *Gill v. Claggett*, 4 Md. Ch. 153.

Where, by an ante-nuptial agreement, property of the wife is conveyed to a trustee for her separate use, subject to her disposition by written directions to the trustee, she cannot afterwards, by parol gift, pass the legal title to another without the co-operation of the trustee; and the donee, in such a case, cannot maintain replevin for the property so given him. *Daniel v. Daniel*, 6 B. Mon. (Ky.) 230.

Where the contrary does not appear on the face of the instrument of trust (a woman and her children being beneficiaries thereunder), the estate vests in the woman, her children then born, and one *en ventre sa mere* as tenants in common, but none vests in her children subsequently begotten. *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399.

In *Ward v. Funsten*, 86 Va. 359, the settlors had requested that the funds be invested and applied "in such a way as will best promote the interest of the family," and the court ordered the investment of the funds for the benefit of

a widow and her children during her life, and until the youngest child should come of age, and all the female children should marry and be provided with homes. The widow died, the children all attained their majority, and all the daughters but one married, she having a home with her aunt. It was held that the trust was absolute, and that the unmarried daughter must receive the entire income.

In *Warner v. Morse*, 149 Mass. 400, a testator, after bequeathing all his estate (consisting of personal property) to his wife absolutely, revoked by a codicil "so much of said legacy as gives to my said wife N. my property forever, she to hold said property during her life. I give and bequeath at her decease the said property to J. and her son H., for their use and behoof forever." It was held that the widow took a life estate, remainder to J. and her son.

Under a gift of the rents, issues, and profits of each undivided fourth of a fund, in trust to be applied (each of said parts), to the several uses of four several *cestuis que trustent*, during their respective lives, and, after their deaths, the said several portions, the use whereof is so limited to them respectively, to their respective children, the children of any of such original *cestuis que trustent* dying, are entitled to the immediate possession of the property limited by the will to the use of their parent. *Pennington v. Rutherford*, 26 N. J. Eq. 313.

Where a fund was placed in trust, to be held for the benefit of a certain person during his life, and at his death the entire fund to be paid over to another person specified, it was held that such specified person could not be considered as deriving title from the beneficiary, whose estate was a mere life estate in the fund. *Hullin v. Faure*, 15 La. Ann. 622.

A testatrix devised specified property to a trustee, for the benefit of her three sons during their lives, remainders in trust for their children, if they should have any, if none, to each other; other specified property for her three daughters, with the same remainders and a clause for separate use; the residue of her estate to the same trustee, for the use of the six, "in the same way and manner, and under the same and like uses and trusts, as are hereinbefore set forth." One son died without issue. It was held that the sur-

viving brothers and sisters took equal shares in his estate. *Lipman's Appeal*, 30 Pa. St. 180; 72 Am. Dec. 692.

Real estate passed by will to a trustee in fee to pay over the income, no time being limited, the interest of one of the *cestuis que trustent* to terminate in the event he should ever become insolvent and his share to be paid over to the others. In a certain contingency the trustee was to turn over the estate to the *cestuis que trustent* in fee. The beneficiaries were held to have taken an equitable estate in fee. *Greene v. Wilbur*, 15 R. I. 251.

The holder of a fee conveyed in trust for his life, with power of disposition at his death, may dispose of the entire property conveyed in trust by deed; the life estate and reversion merging in him. *Warner v. Sprigg*, 62 Md. 14.

A beneficiary becoming the purchaser of the trust estate at a public sale, acquires the same title that a stranger would. *State Bank v. Macy*, 4 Ind. 362.

A conveyance in trust to the use of certain children, provided they attain the age of twenty-one, gives them only a contingent interest during minority. *Megowan v. Way*, 1 Metc. (Ky.) 418.

Where a fund was bequeathed in trust for the equal use and benefit of testator's daughters for life, at their death in trust for the use of their children, and provided that in case either daughter should die without issue, her share to go to her sisters, but if she left issue, to such issue, the daughters were held to take as tenants in common during their respective lives and not as joint tenants for life. *Dunn v. Bryan*, 38 Ga. 154.

A devise of property in trust for the use of testator's daughters, "in equal proportion, share and share alike, and not subject to the debts, contracts, or sale of their present or future husbands," gives each daughter a separate estate in her share, free from the control of her husband. *Nix v. Bradley*, 6 Rich. Eq. (S. Car.) 43.

Where property was devised in trust for the testatrix's daughters during their natural lives, remainder to the heirs of their bodies forever, it was held that the children of the daughters in being at the death of the testatrix took vested interests, which passed to their representative at their death, and that when other children were born from time to time, the estate in remainder

**2. Rights and Remedies as Against the Trustee—*a.* IN GENERAL.**

—The beneficiary is entitled to enforce in a court of equity the performance of every duty enjoined upon the trustee, such as the exercise of diligence and good faith in the care of the trust property, its preservation from waste, loss, or destruction, the proper

would open and vest severally in such children. *Ward v. Saunders*, 3 Sneed (Tenn.) 387.

Where the right of a beneficiary to a trust estate is immediate and absolute, there being no statutory limitation and no continuing duty to be performed with it by the trustee, the court will decree the life estate to be conveyed to those entitled. *Turnage v. Greene*, 2 Jones Eq. (N. Car.) 63; 62 Am. Dec. 208.

A husband conveyed a life estate in certain realty to his wife, providing in the deed of trust that upon her death, in case she survived him, one-half of the lands "shall inure and belong to my devisees, and in default of devisees, to the heirs-at-law" of the wife; and "the remaining one-half shall inure and belong to the devisees, and in default of devisees, to the heirs-at-law" of the grantor. He died, leaving no will, and afterward his wife died, distributing her property equally by will among the three defendants. It was held that the plaintiff, who was the husband's niece and heir-at-law, was a tenant in common with the three defendants, and acquired by inheritance a one-half interest, the defendants receiving the other half. *Ohmer v. Boyer*, 89 Ala. 273.

By a trust deed, a trustee was instructed to pay the income upon certain bonds to A, providing further that, "should said A die, the said trust herein declared shall inure to the benefit of her heirs, and if she has no children, the same shall revert to my estate." It was held that A acquired a mere equitable life estate by this deed, and had no right, upon the birth of a child, to take the corpus of a trust estate absolutely. *Fowler's Appeal*, 125 Pa. St. 388.

In *Bennett v. Garlock*, 79 N. Y. 302; 35 Am. Rep. 517, real estate was conveyed to trustees, their heirs and assigns, in trust, to sell enough to pay certain debts and then to lease and support certain *cestuis que trustent* for life; the residue to be held for the benefit of the settlors' heirs at the expiration of the life estate, and reserving in the settlors the power to direct where the residue

should go. The trustees were given the power of sale in their discretion upon the request of the settlors. It was held that under this deed the *cestuis que trustent* took no estate, but simply a right to enforce the performance of the trust in equity.

Under a conveyance of property in trust for the settlor during life, with directions to the trustee at her death to pay a stated sum to one person, and to convey a certain share of personal property to another, the sum and share vests immediately in the beneficiaries; and, in the event of their death during the life of the grantor, their interests will pass to their legal representatives. *Eldredge v. Greene*, 17 R. I. 17.

In *Davidson v. Kemper*, 79 Ky. 5, the testator devised his estate to his executors, to be held for the use and benefit of his son, with full discretionary power to control and dispose of the same; the executors to pay him in their discretion not to exceed the income of the estate; the son to have no power to sell or incumber any part of the estate or the income or profits, and no part of the estate or income to be liable for his debts. It was held that the powers delegated to the executors were personal, that the son had no estate independent of their will, and inasmuch as the trust was not enforceable by the beneficiary, the estate could not be taken to satisfy his debts.

A mortgage to trustees recited that its purpose was to secure to A the income of certain money for life, and after her death, this income was to be paid to such persons as she might name, or, in case she should name no one, then to her heirs. A deed of conveyance was also executed to the same trustees, directing the application of the land and profits to A's use for life, the land, after her death, to be conveyed to such persons as she might indicate. Authority was conferred upon the trustees to sell the land, if they considered it advisable, and the same directions were given in regard to the trustees as the mortgage contained. It was held that A's interest was merely a life estate in the



investment of the funds, and a strict accounting of all receipts and profits, actual and possible.<sup>1</sup>

income, and that she had no right to the *corpus* of the trust estate. *Pillot v. Landon*, 46 N. J. Eq. 310.

1. *Sortore v. Scott*, 6 Lans. (N. Y.) 271; *Featherston v. Richardson*, 68 Ga. 501; *Lexington L., etc., Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412; 66 Am. Dec. 165. Upon this subject generally, see *supra*, this title, *Powers, Duties, and Liabilities of the Trustee*.

Where a trustee pledges the trust property as collateral for his own debt, which property, by an arrangement by the debtor and creditor, is agreed to be given up, equity will enforce this agreement for the benefit of the *cestui que trust*, upon a bill brought by the latter for this purpose. *Wheeler v. Brown*, 26 Ill. 369.

Where one of two trustees begins cutting wheat claimed by the other, the *cestui* may seek relief in equity. *Kerr v. Hill*, 27 W. Va. 576.

A beneficiary, though his interest is merely a contingent remainder, may maintain a bill in equity against the trustee and life tenant to have that interest protected. *Clarke v. Deveaux*, 1 S. Car. 172.

A trustee will be compelled by a court of equity to distribute funds in accordance with the trust deed, and upon his failure to do so, he will be made personally liable. *Robertson v. Sublett*, 6 Humph. (Tenn.) 313; *Constant v. Matteson*, 22 Ill. 546.

In *Kintner v. Jones*, 122 Ind. 148, the court, by Mitchell, C. J., said: "The obligation which arises when a mere power is conferred, is not to be confounded with the duty imposed where the power is coupled with an express or implied trust. Mere naked powers are purely discretionary, and the donee of such a power is not subject to the compulsory power of a court of chancery. Where, however, the power is coupled with a trust for the benefit of third parties, or in the execution of which third parties are interested, it becomes imperative and its execution may be coerced." In this case the deed of trust contemplated the sale of the property conveyed, and the distribution of the proceeds by the trustee without being reimbursed for services rendered. Upon a suit being brought to compel the trustee to make a sale of the property so held in trust, the supreme court said: "While the power

to sell was, in some sense, discretionary with the trustee, so far as respects the right to determine the fair value and terms of sale, she was not, after having paid the debts and made the improvements specified out of the rental or profits of the property, authorized arbitrarily or capriciously to refuse to make a sale at a fair price. Her duty was to offer the property for sale within a reasonable time after the debts were paid, and to use all reasonable diligence to obtain the best price. Having, as appears from the complaint, not only failed to do this, but repudiated the trust and asserted an absolute right to the whole estate, the complaint made a case for the intervention of the chancery powers of the court." *Citing Irvine v. Dunham*, 111 U. S. 327; *Cavender v. Cavender*, 114 U. S. 464.

The decedent made a will by which he constituted his surviving partner and his bookkeeper trustees, with instructions to withdraw his interest from the firm, and invest it in a certain specified manner. Instead of doing this, they continued to conduct the business for their own profit, and to use the funds of the trust estate in continuing the business. It was held that the beneficiaries had the right to demand the withdrawal from the partnership assets of all the trust property, although the trust estate had become so much confused with other property as to be indistinguishable, and that their rights in the trust estate were superior to those of the general creditors of the new firm. *Hooley v. Gieve*, 9 Abb. N. Cas. (N. Y.) 8; 9 Daly (N. Y.) 104.

A court of equity will interfere where the trustee is wanting in necessary care and diligence in the execution of a trust, or omits to act when required by duty to do so. *Jones v. Dougherty*, 10 Ga. 273. Thus, where the trustee refuses to make the affidavit and take the steps necessary to a trial of the right of the property, the beneficiary may resort to a court of equity to have the trust enforced. *Robinson v. Maulden*, 11 Ala. 977. See *Duncan v. Simmons*, 2 Stew. & P. (Ala.) 356.

A court of equity will aid a beneficiary, not only against the trustee, but all persons claiming benefit from his acts. *Bush v. Bush*, 1 Strobb. Eq. (S. Car.) 377.

Where the trustee has put the trust funds into his own business, the beneficiary has the option of demanding either the profits of the business or legal interest.<sup>1</sup> It is the beneficiary's right to insist that the purposes of the trust be fully accomplished, and that the duties imposed and the uses declared be respected and performed.<sup>2</sup>

A bill will lie to compel a trustee to apply the fund to the purposes for which the trust was created. *Wilson v. John's Island Church*, 2 Rich. Eq. (S. Car.) 192.

Where property was devised to a trustee for the benefit of the testator's intemperate son, with a provision that the trustee, if he should deem it prudent, might give the control of it to the son, it was held that the trustee, having declared his belief that the son had reformed and might be trusted with the control of the property, a court of equity would direct him to deliver it to the son. *Cochran v. Paris*, 11 Gratt. (Va.) 348.

Where a trustee to whom property was conveyed to secure creditors, refused to act, one or more of the creditors secured may file a bill to have the trust executed. *Reynolds v. Bank of Virginia*, 6 Gratt. (Va.) 174.

Though a trustee will not be compelled by a court of equity to take upon himself the burden of a trust, yet having once voluntarily assumed it, the court will compel a faithful execution of it for the preservation of rights depending upon and derivable from it. *Cooper v. McClun*, 16 Ill. 435.

In *Crawford v. Ginn*, 35 Iowa 543, the evidence indicated that the defendant bid off and acquired the title to the land in controversy at a sheriff's sale, under an arrangement with the judgment creditor that it should be acquired and held by him as security for sums advanced in payment of his bids at the sale, and for certain other claims. It was held that the plaintiff was entitled to have the trust enforced according to its terms, and certain of the land remaining unsold in the defendant's hands after his reimbursement, conveyed to the plaintiff, with a full account of their rents and profits.

Trustees may be compelled by a court of equity to execute the trust assumed by a corporation according to the scheme prescribed. But unless specially conferred by statute, the court has no power to sequester the funds of a corporation and deprive it of them, and

dispose of them as it may judge to be equitable and just among those beneficially interested. *Savings Inst. v. Makin*, 23 Me. 360.

Where a trustee, with the authority to sell on the written request of the beneficiary, if he should consider a sale to be to her advantage, and the right to require her to file a petition in equity praying for the sale before he would make it, refused to sell upon a written request, though admitting the sale to be necessary, and a petition was filed, it was held that equity could decree the sale, not under the power in the deed, but under the equitable power of a chancellor to compel a trustee to perform his duty. *Walker v. Symser*, 80 Ky. 620.

Where the whole beneficial interest in land directed to be converted into money, belongs to the person for whose use it is given, the trustee will not be compelled to execute the trust against the wishes of the *cestui que trust*, but the latter will be permitted to take the land before the conversion has actually been made. But where there are other *cestuis que trustent* who take otherwise than as heirs-at-law, the trustee will be compelled to execute the trust created by the will. *Fluke v. Fluke*, 16 N. J. Eq. 478.

If the mortgage of a railroad creates a trust, and provides that the power of sale is to be executed by the trustee on certain contingencies, he may be controlled, restrained, and directed by a court of equity, at the suit of a party standing in the relation of *cestui que trust*; the rule for his guidance being derived from the instrument itself. *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141.

1. *Bond v. Lockwood*, 33 Ill. 212.

2. Where land on which a meeting-house stands is inclosed as a meeting-house green, and conveyed to that use, it would be a breach of the trust to abandon that use of it, though the house continues to stand and has been put to no other use; but destruction by casualty would not be a breach, while the intention to rebuild is entertained in

*b.* INJUNCTION.—The breach of any of these duties may be prevented by injunction.<sup>1</sup> Thus, the trustee will be enjoined from conveying the trust property in violation of his duty, and from mortgaging or incumbering it.<sup>2</sup> An injunction will be granted to prevent the disposition of the fund by a trustee shown to be insolvent,<sup>3</sup> or by one proven to be of bad habits or bad character.<sup>4</sup>

*c.* PERSONAL PENALTIES UPON THE TRUSTEE—REMOVAL—WITHHOLDING COMPENSATION.—The beneficiary's rights may be protected by an order of court removing the trustee,<sup>5</sup> or by withholding any compensation from him for his services,<sup>6</sup> in case he has been unfaithful, or by a suit against the trustee personally, either at law or in equity.<sup>7</sup>

good faith. *Howe v. School Dist. No. 3*, 43 Vt. 282. Where there had been no such breach of trust, it was held, in the same case, that the complainants, having shown a legal or equitable title to a pew in the church, were entitled to enjoin the defendant school district from converting the meeting-house into a schoolhouse; the district having acquired the right of the original grantor, and having taken a quitclaim from the only surviving grantee.

1. See INJUNCTIONS, vol. 10, pp. 914, 915; *Lewin on Trusts and Trustees*, p. 855 *et seq.*; *Perry on Trusts*, § 816; *St. Luke's Hospital v. Barclay*, 3 Blatchf. (U. S.) 259; *Jenkins v. Jones*, 2 Giff. 99; *Atty. Gen'l v. Foundling Hospital*, 2 Ves. Jr. 42; *Balls v. Strutt*, 1 Hare 146; *In re Chertsey Market*, 6 Price 279; *Ludlows v. Greenhouse*, 1 Bligh (U. S.) 57; *Scott v. Becher*, 4 Price 346; *Mansfield v. Shaw*, 3 Madd. 100; *Gladdon v. Stoneman*, 1 Madd. 143, note; *Webb v. Shaftesbury*, 7 Ves. 487; *Atty. Gen'l v. Liverpool*, 1 Myl. & C. 171; *Reeve v. Parkins*, Jac. & W. 390; *Anonymous*, 6 Madd. 10; *Dance v. Goldingham*, L. R., 8 Ch. 902.

Thus, one holding land in trust will be enjoined from parting with his control over it. *Hunt v. Freeman*, 1 Ohio 490. A sale by the trustees will be enjoined while the title is in dispute and the full value cannot probably be obtained. *Faulkner v. Davis*, 18 Gratt. (Va.) 651; *Lane v. Tidball*, Gilm. (Va.) 130. The sale of property covered by a deed of trust, under an execution in favor of a third person without regard to the trust, may be enjoined. *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; 68 Am. Dec. 729. A trustee may be enjoined from asserting a claim in violation of his trust. *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485.

But a legitimate exercise of a discretionary authority will not be enjoined. *Caperton v. Landcraft*, 3 W. Va. 540.

2. See INJUNCTIONS, vol. 10, p. 914.

3. See *Perry on Trusts*, § 816; *Mansfield v. Shaw*, 3 Madd. 100; *Scott v. Becher*, 4 Price 346; *Taylor v. Allen*, 2 Atk. 213.

But it has been held in *Illinois* that this ground alone will not suffice, but that it must appear that the trustee has become insolvent since his appointment, or that there is danger that he will misapply the proceeds of the sale. *Tooke v. Newman*, 75 Ill. 215.

4. *Everett v. Prythergch*, 12 Sim. 365.

5. See *supra*, this title, *Resignation and Removal of Trustee*.

6. See *supra*, this title, *Accounting—Compensation of the Trustee*.

7. See *infra*, this title, *Procedure—Jurisdiction*.

If A deposits money in bank in trust for B, and A's executor draws it out, B may sue him. *Anderson v. Thompson*, 38 Hun (N. Y.) 394.

*At Law*.—*Baker v. Biddle*, Baldw. (U. S.) 394; *Bennett v. Preston*, 17 Ind. 291; *McCollister v. Willey*, 52 Ind. 382; *Farrelly v. Ladd*, 10 Allen (Mass.) 127; *Chase v. Perley*, 148 Mass. 294; *Johnson v. Johnson*, 120 Mass. 465; *Catlin v. Birchard*, 13 Mich. 110.

*Assumpsit*, debt, account, or detinue, may be brought against a trustee named in a will, to compel an account of his receipts and disbursements. *Bredin v. Dwen*, 2 Watts (Pa.) 95.

The trustee is answerable for damages, as on an implied *assumpsit* to the *cestui que trust*, that he will execute the trust. *Newhall v. Wheeler*, 7 Mass. 189.

*In Equity*.—*Hukill v. Page*, 63 Biss. (U. S.) 183; *Hearne v. Hearne*, 55 Me. 445; *Dorsey v. Garey*, 30 Md. 489;

The *cestui que trust*'s right to control the funds, or a portion of them, may be enforced by an order requiring the trustee to pay them into court for his benefit.<sup>1</sup> And such an order will be granted where it is apparent that the trustee is misapplying the funds in such a way as to endanger the safety of the trust.<sup>2</sup>

If the trustee has been guilty of any misconduct in relation to the trust, by a misapplication of the funds or an unauthorized investment, or by dealing with the trust property for his personal advantage, the *cestui que trust* may at his option either confirm the trustee's acts or compel him to account therefor.<sup>3</sup>

*d. RECEIVER.*—Another remedy of the *cestui que trust* for relief from the trustee's maladministration, and the prevention of

Brooks *v.* Brooks, 11 Cush. (Mass.) 18; Peabody *v.* Harvard College, 10 Gray (Mass.) 283.

B received from A a claim to be collected and paid to C, with whom B agreed so to do. Upon B's failure to pay after collecting, it was held that C could sue him at law for money had and received, or in equity to enforce the trust. Miller *v.* Lake, 24 W. Va. 545.

A *cestui que trust* is not required to establish his debt by an action at law, in order to compel an enforcement of the trust, or to protect the trust property from unlawful interference. Spelman *v.* Freedman, 130 N. Y. 426.

As a general rule, the enforcement of a claim against the trustee must be accomplished by a court of equity, and not at law. But this rule has its exceptions. Arms *v.* Ashley, 4 Pick. (Mass.) 70; Buttrick *v.* King, 7 Met. (Mass.) 20; Rogers *v.* Daniel, 8 Allen (Mass.) 343.

So long as the trust remains open, the *cestui que trust* cannot maintain an action at law against the trustee. His only remedy is in equity. Johnson *v.* Johnson, 120 Mass. 465; Davis *v.* Coburn, 128 Mass. 377.

1. Perry on Trusts, §§ 825-827; Freeman *v.* Fairlee, 3 Mer. 29; Dubless *v.* Flint, 4 Myl. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 77; Ross *v.* Ross, 12 Beav. 89; Whitmarsh *v.* Robertson, 4 Beav. 26; Bartlett *v.* Bartlett, 4 Hare 631; Rogers *v.* Rogers, 1 Anstr. 174; Hammond *v.* Walker, 3 Jur. N. S. 686; Score *v.* Ford, 7 Beav. 336.

A trustee filed a bill for a settlement of his accounts, and upon the commissioner finding a certain sum to be in his hands, the court issued an order requiring him to show cause why he should not pay it into court, and upon his failure to show cause, it was held that

the court could direct the payment of this sum by the trustee, even though it did not appear that he had abused his trust, or that the fund was in danger. Grinnan *v.* Long, 22 W. Va. 693.

2. Contee *v.* Dawson, 2 Bland (Md.) 264; Clagett *v.* Hall, 9 Gill & J. (Md.) 81; Hosack *v.* Rogers, 9 Paige (N. Y.) 468; Nokes *v.* Sheppings, 2 Ph. 19; Johnson *v.* Aston, 1 Sim. & S. 73; Rothwell *v.* Rothwell, 2 Sim. & S. 217; Richardson *v.* Bank of England, 4 M. & C. 184; Wyatt *v.* Sharratt, 3 Beav. 499; Boschetti *v.* Power, 8 Beav. 98; Bourne *v.* Mole, 8 Beav. 177; Fulter *v.* Jackson, 6 Beav. 424; Ross *v.* Ross, 12 Beav. 89; Meyer *v.* Montriou, 4 Beav. 343; Hinde *v.* Blake, 4 Beav. 597; Vigrass *v.* Binfield, 3 Madd. 62; Marryatt *v.* Marryatt, 23 L. J. Ch. N. S. 876; Talbot *v.* Marshfield, 2 D. & S. 285; Freeman *v.* Fairlee, 3 Mer. 39; Collis *v.* Collis, 2 Sim. 366; Widdowson *v.* Duck, 3 Mer. 494; Bartlett *v.* Bartlett, 4 Hare 631.

Where a trustee disposes of a trust fund pending an application to have it brought into court, he is guilty of contempt. Waterman *v.* Waterman, Taney (U. S.) 362.

3. Dodge *v.* Stevens, 94 N. Y. 215; Brazel *v.* Fair, 26 S. Car. 370. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—The Duty of Good Faith—Buying at His Own Sale.*

If either the trustee or a third person comes into the possession of lands or other property, by an illegal appropriation of the trust funds which he has knowingly procured to be made, the beneficiary can elect either to take the property or pursue his remedy *in personam*. Treadwell *v.* McKeon, 7 Baxt. (Tenn.) 201. Compare Miller *v.* Birdsong, 7 Baxt. (Tenn.) 531.

Where a trustee has made an improper

further injury to the trust, is in the appointment by the court, upon the application of the beneficiary, of a receiver, who shall take temporary charge of the trust property under the direction of the court.<sup>1</sup> But the appointment of a receiver is an extreme measure and is seldom resorted to.<sup>2</sup>

e. THE RIGHT TO AN ACCOUNTING.—The beneficiary may demand of his trustee an accounting and the right to a personal and judicial examination into his conduct of the trust,<sup>3</sup> and in some cases, after a settlement, he may claim the right to a restatement of the account and the payment of any balance found due upon such corrected statement.<sup>4</sup>

To this end he is entitled to an inspection of all books, vouchers and papers connected with the trust,<sup>5</sup> unless there be a dispute as to whether the fiduciary relationship exists or not;<sup>6</sup> and he may demand a full explanation of the accounts.<sup>7</sup>

f. FOLLOWING THE TRUST PROPERTY.—If the property has

investment, the *cestui que trust* has the option of taking the fund and the profits during the whole period, subject to all the losses of the business, or taking the fund or legal interest thereon. *Baker v. Disbrow*, 18 Hun (N. Y.) 29, affirmed in 79 N. Y. 631.

1. See *RECEIVERS*, vol. 20, pp. 46, 47, 395. See also *Perry on Trusts*, §§ 818-820; *Lewin on Trusts and Trustees*, p. 982 *et seq.*; *Chautauqua County Bank v. White*, 6 N. Y. 237; 57 Am. Dec. 442; *Gunn v. Blair*, 9 Wis. 352; Anonymous, 12 Ves. 5; *Middleton v. Dodswell*, 13 Ves. 266; *Howard v. Papera*, 1 Madd. 142; *Richards v. Perkins*, 3 Y. & C. 299; *Evans v. Coventry*, 5 De G. M. & G. 911; *Bainbrigge v. Blair*, 3 Beav. 421; *Everett v. Prythergch*, 12 Sim. 367.

If the trust is endangered by the insolvency or bankruptcy of the trustee, a receiver may be appointed. See *supra*, this title, *Who May Be a Trustee—Bankrupts and Insolvents*. See also

*Lewin on Trusts and Trustees*, p. 982; *Scott v. Becher*, 4 Price 346; *Mansfield v. Shaw*, 3 Madd. 100; *Havers v. Havers*, Barn. 23; *Gladdon v. Stoneman*, 1 Madd. 143, note; *Langley v. Hawk*, 5 Madd. 46; *In re Hopkins*, 19 Ch. Div. 61.

A receiver may be appointed if the trustees are unable to agree on a course of conduct, or are unwilling to act together. *Hart v. Denham*, W. N. 1871, p. 2. See *Swale v. Swale*, 22 Beav. 584. Or if the trustee refuses to act, *Wilson v. Russ*, 17 Fla. 691; or if he dies, *Wilson v. Russ*, 17 Fla. 691.

The fact that one appointed trustee

in a deed is insolvent and untrustworthy, will not defeat or invalidate the deed, but the court may appoint a receiver, and administer the trust according to the provisions of the deed. *Cohn v. Ward*, 32 W. Va. 34.

Pending proceedings for the removal of a trustee, a receiver may be put in charge if the emergency demand it. *Calhoun v. King*, 5 Ala. 523; *Jones v. Dougherty*, 10 Ga. 273; *Poythress v. Poythress*, 16 Ga. 406; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160. See also *Rogers v. Ross*, 4 Johns. Ch. (N. Y.) 388; 8 Am. Dec. 575.

2. *Middleton v. Dodswell*, 13 Ves. 268; *Barkley v. Reay*, 2 Hare 306; *Lewin on Trusts and Trustees*, p. 984; *Hathornwaite v. Russell*, 2 Atk. 126; *Browell v. Reed*, 1 Hare 434. See *RECEIVERS*, vol. 20, p. 306.

3. See *supra*, this title, *Powers, Duties, and Liabilities of Trustees—Accounting*; *Perry on Trusts*, § 821.

4. *Howard v. Patterson*, 72 Me. 57.

5. *Perry on Trusts*, §§ 822, 823; *Ottley v. Gilby*, 8 Beav. 602; *Newton v. Askew*, 11 Beav. 152; *Devaynes v. Robinson*, 20 Beav. 42; *Gray v. Haig*, 20 Beav. 219; *Wynne v. Humberston*, 27 Beav. 421; *Horton v. Brocklehurst*, 29 Beav. 504; *Talbot v. Marshfield*, 2 D. & S. 285; *Hardwicke v. Vernon*, 14 Ves. 510; *Airey v. Hall*, 12 Jur. 1043; *Smith v. Barnes*, L. R., 1 Eq. 65; *Bugden v. Tylee*, 21 Beav. 545.

6. *Perry on Trusts*, § 823; *Brown v. Oakshott*, 12 Beav. 252; *Devaynes v. Robinson*, 20 Beav. 42; *Wynne v. Humberston*, 27 Beav. 421.

7. *Kingsbury v. Powers*, 131 Ill. 182.

wrongfully passed beyond the control of the trustee, by unauthorized sale or otherwise, it is the beneficiary's right to follow it wherever he can identify it and claim it on behalf of the trust. In the hands of any but an innocent holder of the property, the fiduciary character clings to it. It remains charged with the equitable interests of the beneficiary and subject to his equitable rights and demands.<sup>1</sup> And the same is true where it

**1. Following Trust Property.**—See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Confusion of Funds—Conversion*; Perry on Trusts, § 828; Flint on Trusts, § 318; article from London Law Times upon "Improper Conversion of Trust Property—Right to Follow Property," Chic. Leg. News 285. Also, article by Samuel Williston on "The right to Follow Trust Property," in 2 Harvard Law Rev. 28; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Yerger v. Jones*, 16 How. (U. S.) 36; *Veil v. Nutchel*, 4 Wash. (U. S.) 105; *May v. LeClaire*, 11 Wall. (U. S.) 217; *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Cook v. Tullis*, 18 Wall. (U. S.) 341; *Bayne v. U. S.*, 93 U. S. 642; *U. S. v. State Nat. Bank*, 96 U. S. 30; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305; *Jones v. Shaddock*, 41 Ala. 262; *Parker v. Jones*, 67 Ala. 234; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *Carey v. Brown*, 62 Cal. 373; *First Nat. Bank v. Hummel*, 14 Colo. 259; 20 Am. St. Rep. 257; *Martin v. Greer*, 1 Ga. Dec. 109; *Hargroves v. Batty*, 19 Ga. 130; *Bazemore v. Davis*, 55 Ga. 504; *Gilman v. Hamilton*, 16 Ill. 225; *Rusk v. Newell*, 25 Ill. 211; *School Trustees v. Kirwin*, 25 Ill. 63; *Atty. Gen'l v. Illinois Agr. College*, 85 Ill. 516; *McCormas v. Long*, 85 Ind. 549; *Gray v. Ulrich*, 8 Kan. 112; *Allen v. Russell*, 78 Ky. 112; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7; 16 Am. Dec. 367; *Mason v. Waite*, 17 Mass. 560; *Le Breton v. Peirce*, 2 Allen (Mass.) 8; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Wood v. Stafford*, 50 Miss. 370; *St. Louis Union Soc. v. Mitchell*, 26 Mo. App. 206; *Coggswell v. Griffith*, 23 Neb. 334; *Bailey v. Inglee*, 2 Paige (N. Y.) 278; *Cheshire v. Cheshire*, 2 Ired. Eq. (N. Car.) 569; *McLaughlin v. Fulton*, 104 Pa. St. 161; *Bomar v. Mullins*, 4 Rich. Eq. (S. Car.) 80; *Garrett v. Garrett*, 1 Strobb. Eq. (S. Car.) 96; *Tur-*

*ner v. Petigrew*, 6 Humph. (Tenn.) 438; *Vance v. Kirk*, 29 W. Va. 344; *In re Hallett's Estate*, 13 Ch. Div. 753. See also *Seymour v. Freer*, 8 Wall. (U. S.) 202; *Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 454.

**Principle of Rule.**—In *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332, the court, by Alvey, C. J., said: "The principle upon which trust funds may be traced, when attempted to be misapplied, or where they have been converted into other property, or become mixed with other funds belonging to the trustee or fiduciary, is a very plain one, and all the difficulty that is found to exist, is in matters of fact, and in identifying the fund. So long as a trust fund can be traced, the court will always attribute the ownership thereof to the *cestui que trust*, and will not allow the right to be defeated by the wrongful act of the trustee or fiduciary in mixing or confusing the trust fund with funds of his own, or even those of a third party. The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him. And it can make no manner of difference whether the fund be traced into a bank account, the possession of an individual, or into the hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established, and no superior rights of innocent third parties have intervened."

It was held in *Re Greene's Estate* (Surr. Ct.), 20 N. Y. Supp. 94, that if money comes into the hands of a person as a trust fund, and is deposited by him, together with other funds, in bank in his own name, and the trustee dies insolvent, leaving a larger sum than the amount of the trust fund to his credit, the beneficiary may follow the trust fund into the money left on deposit, and recover the amount thereof, as against the personal representatives of the trustee.

A father gave to his married daugh-

ter \$3,000, which she loaned to her husband, who, as security therefor, mortgaged his land to the father. The land was sold under foreclosure, and the mortgage became the purchaser, and afterward sold the land. In his will, after directing the payment of his debts, the father charged his daughter with cash advanced, \$3,000. It was held, that the daughter had an equity to follow the proceeds of the mortgaged land, and was entitled to recover the value thereof from her father's estate. *Lindsay v. Williams*, 2 Duv. (Ky.) 475.

Property held in trust does not pass to the representatives of the trustees discharged of the trust, but, when it can be distinguished, inures to the benefit of the *cestui que trust*. *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119; 7 Am. Dec. 478.

It is only when the trust fund can be traced and identified that the beneficiary will be allowed to follow it into the hands of third persons, and recover it from them in equity. *Parker v. Jones*, 67 Ala. 234.

**When not Distinguishable—Rights of Creditors.**—If the trustee has so appropriated it to his own use that it is indistinguishable from his own funds, his creditors are entitled to reach the trust money as his. *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152. Compare *Kerr v. Blodgett*, 16 Abb. Pr. (N. Y.) 137; 25 How. Pr. (N. Y.) 303.

**Instances of Who Are and Who Are not Innocent Holders.**—Under this rule, no one is an innocent holder as against the *cestui que trust*, who acquires title from the trustee with notice of the trust. *Kitchen v. Bradford*, 13 Wall. (U. S.) 413; *Jones v. Shaddock*, 41 Ala. 262; *Parker v. Jones*, 67 Ala. 234; *Bates v. Kelly*, 80 Ala. 142; *Hill v. Coolidge*, 33 Ark. 626; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *Eversdon v. Mayhew*, 65 Cal. 163; *Gilbert v. Sleeper*, 71 Cal. 293; *Barwick v. White*, 2 Del. Ch. 284; *Gale v. Harby*, 20 Fla. 171; *Kent v. Plumb*, 57 Ga. 207; *Planter's Bank v. Prater*, 64 Ga. 609; *Willis v. Foster*, 65 Ga. 82; *Carmichael v. Foster*, 69 Ga. 372; *Union Mut. L. Ins. Co. v. Spaid*, 99 Ill. 249; *Aynsworth v. Haldeman*, 2 Duv. (Ky.) 565; *Joor v. Williams*, 38 Miss. 546; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Minton v. Pickens*, 24 S. Car. 592; *Hurst v. Marshall*, 75 Tex. 452. See also *Wells v. Francis*, 7 Colo. 396; *Page v. Page*, 8 N. H. 187; *Dey v. Dey*, 26 N. J. Eq. 182; *Barksdale v. Finney*, 14 Gratt. (Va.) 338.

One who acquires property with notice, either actual or constructive, that his grantor holds title as trustee, stands in his grantor's shoes, and holds the property charged with the trust. *Jones v. Shaddock*, 41 Ala. 262; *Cavagnaro v. Don*, 63 Cal. 227; *Webster v. French*, 11 Ill. 254; *School Trustees v. Kirwin*, 25 Ill. 62; *Stewart v. Chadwick*, 8 Iowa 463; *Ryan v. Doyle*, 31 Iowa 53; *Tobin v. Helm*, 4 J. J. Marsh. (Ky.) 288; *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Isom v. First Nat. Bank*, 52 Miss. 902; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Shepherd v. McEvers*, 4 Johns. Ch. (N. Y.) 136; 8 Am. Dec. 561; *Coble v. Nonemaker*, 78 Pa. St. 501; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296; *Lincoln v. Purcell*, 2 Head (Tenn.) 143; 73 Am. Dec. 196; *Heth v. Richmond*, etc., R. Co., 4 Gratt. (Va.) 482; 50 Am. Dec. 88. See also *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Fast v. McPherson*, 98 Ill. 496.

A court of equity will enforce a trust against all persons coming into possession of the trust property with notice of the trust, in the same manner and with like force and effect as against the original trustee. *Lathrop v. Bampton*, 31 Cal. 17; *Shibla v. Ely*, 16 N. J. Eq. 181.

An individual creditor of an executor who receives the assets of a testator's estate in payment of his debt, with notice of their character and the relation of the debtor to the estate, may be required to pay them to the estate. *Austin v. Willson*, 31 Ind. 252.

Where a husband and wife convey the land of the wife by a deed absolute on its face, but really in trust for the wife, and the trustee, by the connivance of the husband, conveys to a stranger, who has no notice of the trust, the husband, afterward purchasing the property, will hold the same as trustee for his wife. *Church v. Church*, 25 Pa. St. 278.

One purchasing notes taken by a guardian for the sale of his ward's real estate, and made payable to him as guardian of A, B, and C, takes with notice of the trust, and acquires no title, if the sum received from the notes be misappropriated by the guardian. *Strong v. Strauss*, 40 Ohio St. 87.

It is no defense to a bill filed against the agent of a trustee, who received money arising from the sale of the trust property, made by collusion with him, to follow the funds in his hands, that he had paid the money over on

liabilities incurred for the trustee. *Bennett v. Merritt*, 6 Jones Eq. (N. Car.) 263.

Where the committee of a lunatic assigned bonds belonging to the latter in payment of a personal debt, and the assignee had notice of the trust, the bonds were held subject to the trust in his hands, and he was held estopped to make any defense which could not be made by the assignor. *Edmunds v. Venable*, 1 Patt. & H. (Va.) 121.

A party knowingly receiving trust property in payment of his own claims against the trustee, is liable to account for the same to the beneficiary. *Towle v. Mack*, 2 Vt. 19. But see *Swoope v. Trotter*, 4 Port. (Ala.) 27.

One who receives property, knowing it to have been transferred by a trustee in disregard of the trust, takes it subject to the right of the trustee, as well as of the beneficiary, to reclaim possession. *Zimmerman v. Kinkle*, 108 N. Y. 282.

Where one, by mistake, acquires a legal title to real estate, knowing the equitable title to be in another, he holds as a trustee for the latter, and so would his grantee with notice. *Smith v. Walser*, 49 Mo. 250; *Ryan v. Doyle*, 31 Iowa 53.

Where an executor misapplies the assets of the estate by investing them in his own business, his partner, who has notice of the trust, becomes himself a trustee of the fund, and is liable in equity to the beneficiary. *Trull v. Trull*, 13 Allen (Mass.) 407.

Where school funds of a certain district were, without authority, deposited in a bank to the treasurer's individual account, but with notice to the banker that they were school funds, the latter became a trustee of the school district, and his insolvent estate in the hands of an assignee is subject to the repayment of such moneys in preference to all other creditors. And in such case the specific moneys need not be identified in the hands of the assignee. *Boyer Independent Dist. v. King*, 80 Iowa 497.

The holder of the equitable title to lands at the time they are conveyed by the holder of the legal title, may question the interest conveyed by such deed for the purpose of establishing the trust; and one purchasing with knowledge of the trust, takes no greater interest than his grantor had, and will hold as trustee for the equitable owner. *Gray v. Ulrich*, 8 Kan. 112.

Where land was conveyed by an ab-

solute deed in trust for a married woman, and was afterward sold on execution against the trustee, it was held that, upon proof that the purchaser had notice of the trust and had agreed by parol to convey to the beneficiary upon being reimbursed, it would be ordered that the land should stand as security for the money paid by him. *Pearson v. Daniel*, 2 Dev. & B. Eq. (N. Car.) 360.

In *Davenport Plow Co. v. Lamp*, 80 Iowa 722; 20 Am. St. Rep. 442, the treasurer of one corporation was induced by the president of another to discount a note executed by it to the first-named corporation and to pay it the proceeds, which were thereupon used in its business under the promise of such president that the money should be paid by a certain time. The president knew that the treasurer with whom he was dealing had no right to act thus. It was held that the money advanced in this way became a trust fund in the hands of the company so receiving it, to be paid out, in the event of the company's insolvency, to the real owners, to the exclusion of other creditors of the company.

In *Hollembaek v. More*, 44 N. Y. Super. Ct. 107, one partner had contributed to the capital of a firm to which he belonged, certain funds which at the time were trust funds; but the other partners were ignorant of that fact. It was held, upon suit brought by the *cestui que trust*, that only the individual interest of the partner misapplying the trust funds could be held to answer to the demands of the beneficiary, and that this must be ascertained by an accounting and settlement as between the partners.

In *Bunton v. King*, 80 Iowa 506, it was held that township funds deposited by the clerk of the township in his own name in a bank which afterward failed, could be recovered from the assignee of the bank, where they were known to the bank to be trust funds.

If one standing in no fiduciary relation to another, appropriates trust funds of the latter, knowing them to be such, and purchases real estate therewith, equity will fasten a lien thereon, and sell it to satisfy the trust fund. *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 445.

In *Rusk v. Newell*, 25 Ill. 211, Rusk sent money to Newell, to be by him delivered to the plaintiff's agent, to be applied to a specific purpose. Newell delivered the money to the agent and took



his receipt for it. He then received from the agent the same money in payment of a debt due him from the agent. Here the identical money came into defendant's hands. He knew it was the plaintiff's money when he received it, and knew it was being misapplied when he received it from the agent to pay the agent's debt due to him. It was held that he was chargeable with the trust. See *Mason v. Waite*, 17 Mass. 558; *Neely v. Rood*, 54 Mich. 134; 52 Am. Rep. 802.

If the holder of land in trust conveys it to another by an absolute deed, who takes without notice of the trust, and it afterward passes through several owners to the first holder, he will hold it in trust as before. *Church v. Church*, 25 Pa. St. 278.

Whoever receives property, knowing it to be the subject of a trust, and to have been transferred by the trustee in violation of his duty, takes it, subject to the right, not only of the *cestui que trust*, but also of the trustee, to reclaim possession or recover for its conversion. *Wetmore v. Porter*, 92 N. Y. 76; *Zimmerman v. Kinkle*, 108 N. Y. 287.

The mere fact that one of the grantors in the deed absolute remained in possession of the property, is not sufficient to render effective a secret unrecorded trust between the grantor and grantee, as against subsequent *bona fide* creditors of the grantee. *Hoffman v. Gosnell*, 75 Md. 577.

Where a trustee, holding a legal title, mortgages the land without consideration, and the mortgagee assigns it of record to a *bona fide* assignee for value, the rights of such assignee being unaffected by the want of consideration between the mortgagor and the mortgagee, one who fails to record a prior trust agreement under which he has an interest in the land, must suffer the loss. *Burgess v. Bragaw*, 49 Minn. 462.

**Presumption of Notice.**—The use of the word "trustee" in the conveyance, or any recital which would put the purchaser of trust property upon inquiry, will create a presumption of notice against him. *Brannon v. May*, 42 Ind. 92; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Wilson v. McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347; *Shaw v. Spencer*, 100 Mass. 389; 1 Am. Rep. 115; 97 Am. Dec. 107; *Bancroft v. Consen*, 13 Allen (Mass.) 50; *Trull v. Trull*, 13 Allen (Mass.)

407; *Sturtevant v. Jacques*, 14 Allen (Mass.) 523.

Whoever buys land, while there is a *cestui que trust* in possession, will be presumed to have had notice of the trust. *Pell v. McElroy*, 36 Cal. 268; *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 434. But *contra*, see *Scott v. Gallagher*, 14 S. & R. (Pa.) 333; 16 Am. Dec. 508.

It has been held, however, that a purchaser of a legal title from a trustee must have positive, direct and express notice of the trust to affect the title. *Yocum v. Morris*, 3 Phila. (Pa.) 414; *Conner v. Tuck*, 11 Ala. 794.

One who purchases, *bona fide* and for value, from the trustee, without notice of the trust, will be protected, even as against the *cestui que trust*. *Waring v. Lewis*, 53 Ala. 630; *War-nock v. Harlow*, 96 Cal. 298; *Hathorn v. Maynard*, 65 Ga. 168; *Prevo v. Walters*, 5 Ill. 35; *Emonds v. Termehr*, 60 Iowa 92; *Carter v. Manufacturer's Nat. Bank*, 71 Me. 448; 36 Am. Rep. 341; *Wyse v. Dandridge*, 35 Miss. 672; 72 Am. Dec. 149; *Paul v. Fulton*, 25 Mo. 156; *Streitz v. Hartman*, 26 Neb. 33; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; 11 Am. Dec. 441; *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291; *Christmas v. Mitchell*, 3 Ired. Eq. (N. Car.) 535; *Thomson v. Gilliland*, Add. (Pa.) 296; *Lee v. Tiernan*, Add. (Pa.) 348; *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Hudnall v. Wilder*, 4 McCord (S. Car.) 294; 17 Am. Dec. 744; *Henderson v. Dodd*, 1 Bailey Eq. (S. Car.) 138; *Ex p. Williams*, 18 S. Car. 299; *Whale v. Booth*, 4 T. R. 625.

Where one purchases from a trustee, for a fair price, certain lots belonging to the trust, which the trustee has power to sell under the deed, and without knowledge of any intended diversion of the sum paid from the purposes of the trust, he is not guilty of fraud in so doing, nor will he be liable to make good to the trust estate the amount afterward paid by it to repossess the lots, which meanwhile have passed into other hands. *Pennsylvania Ins. Co. v. Austin*, 42 Pa. St. 257.

Although a purchaser from a trustee may have known of the trust, yet if he also had notice that his grantor held the claim which bound the trust estate, and received a deed from the trustee, under authority of the chancellor, conveying a portion of the trust estate in equity, he would stand upon the same footing as an innocent purchaser. *Iverson v. Saulsbury*, 65 Ga. 724.

Where a conveyance from a trustee bears nothing upon its face to indicate that the sale is made in violation of the power contained in the deed of trust, one who subsequently purchases without actual notice of any irregularity in the trustee's sale, will be protected as an innocent purchaser. *Streitz v. Hartman*, 26 Neb. 33.

The objection that a trustee has purchased at his own sale is of no avail to impeach the title of one who has purchased from the trustee in good faith and for value. *Farrar v. Payne*, 73 Ill. 82.

An action will not lie on behalf of the beneficiaries of a trust fund against the surviving members of a firm, to charge them with trust funds invested by the trustee in land which he subsequently sold to the firm, where the evidence does not show that the firm had notice of the trust when it purchased the land. *Morgan v. Johnson*, 87 Ga. 383.

Where a wife refused to join her husband in a mortgage of land held by him in implied trust for her, to secure his debts, it was held that she could not quiet her title as against the mortgagee, unless he had notice of the trust. Her residence on the land with her husband and family would not be such notice. *Paulus v. Latta*, 93 Ind. 34.

An innocent purchaser from trustees, vested with the title as well as the power to sell, will be protected from the effect of irregularities in the compliance with the directions of the power, which might have been of consequence, if the power were not coupled with the title. *Rowan v. Lamb*, 4 Greene (Iowa) 468.

Where a trustee for a *feme covert* bought land with the trust fund, and allowed the beneficiary's husband to take the title thereto in his own name; and the said husband conveyed the land to a third party, who had advanced him money, and who had no knowledge or notice of the trust, and became his tenant, it was held that the beneficiary could not enforce the trust against said third party. *McCaskill v. Lathrop*, 63 Ga. 96.

Authority to third persons to transfer stock, expressing that it was given on receipt of full consideration, if coupled with a secret trust, does not charge the purchaser with the trust, unless he can be proven to have had knowledge of such trust. The breach of trust, if any, is chargeable to the

persons having authority to transfer. *Foster v. Ambler*, 24 Fla. 519.

Where the *cestui* seeks to pursue trust funds invested by the trustee in land or other property, and title taken in his own name or in the name of a stranger with notice, it is wholly immaterial whether the money was paid at the time of the purchase or afterward. *Whaley v. Whaley*, 71 Ala. 159.

Where a trustee had misapplied the trust fund by using it or allowing it to be used in payment for real estate purchased and conveyed to a third person, who was not a *bona fide* purchaser for value without notice of the trust, the money, upon a suit by the *cestui que trust*, was allowed to be followed into the land purchased, and the land was held charged with the trust. *Veile v. Blodgett*, 49 Vt. 270.

Trust funds converted by a trustee to his own use may be followed by the beneficiary so long as he can identify them, whatever change of form they may have undergone, unless they have passed into the hands of an innocent purchaser for value; but trust funds of a third person converted by the treasurer of a corporation to his own use, and by him placed in the treasury of the corporation for value, in the usual course of business and without notice, may be recovered from the corporation in the same manner as from its treasurer. *St. Louis Union Soc. v. Mitchell*, 26 Mo. App. 206.

**Identification Necessary.**—But identification is essential, even with specific funds in trust. *In re Janeway*, 4 Nat. Bank. Reg. 100; *In re Hosie*, 7 Nat. Bank. Reg. 601; *Bank of Commerce v. Russell*, 2 Dill. (U. S.) 215; *Pharis v. Leachman*, 20 Ala. 663; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172; *Portland, etc., Steamboat Co. v. Locke*, 73 Me. 370; *Fowler v. True*, 76 Me. 43; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *Thompson's Appeal*, 22 Pa. St. 16. Except personally as against the trustee, however. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Confusion of Funds—Conversion*; *Perry on Trusts*, § 828; *Hall v. Otis*, 77 Me. 122.

In *Neely v. Rood*, 54 Mich. 134; 52 Am. Rep. 802, the court, by Champlin, J., said: "It is essential to the assertion of a beneficial title in a trust fund that it can be clearly traced into the hands of the party to be charged, though no more than proof of substantial identity is required." The identical pieces of

money need not be shown. *School Trustees v. Kerwin*, 25 Ill. 63.

In *North Dakota Elevator Co. v. Clark* (N. Dak. 1892), 53 N. W. Rep. 175, it is held that when the property of one person is mingled indistinguishably with the mass of property of the one receiving it, or when, as in case of money, it is paid out by him, the right to pursue it is lost, because identification is impossible. "Mere enrichment of the estate or extinguishment of debts will not make the owner of the property a preferred creditor." But compare *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *Van Alen v. American Nat. Bank*, 52 N. Y. 1.

In *Illinois Trust, etc., Bank v. First Nat. Bank*, 15 Fed. Rep. 858, an effort had been made by proceedings in equity to follow the trust funds where the real identification had been completely lost. The court, by Wallace, J. said: "The *cestui que trust*, under such circumstances, must be able to point out his fund, or the proceeds which are specifically derived from it, and trace it through its transformations, so as to show that it is not a fund or product to which all other creditors have an equal right to resort. From the nature of the fund, and the manner in which it was appropriated, that cannot be done here. Money ordinarily has no earmark; it is not ordinarily the subject of replevin or detinue. . . . Accordingly the cases hold that if a trustee has converted a trust fund into money and mingled the proceeds with his other moneys, so they are indistinguishable, the *cestui que trust* cannot follow his fund into the hands of an assignee in bankruptcy, or of an executor of such trustee, but must occupy the position of a general creditor of an estate." Citing *Whitecomb v. Jacob*, 1 Salk. 160; *Trecothick v. Austin*, 4 Mason (U. S.) 29; *Ex p. Mordaunt*, 3 D. & C. 351; *Kip v. Bank of N. Y.*, 10 Johns. (N. Y.) 63; *Bank of Commerce v. Russell*, 2 Dill. (U. S.) 215. Compare *Planter's Bank v. Prater*, 64 Ga. 609. In this case the trustee conveyed trust lands by an absolute conveyance to A, to secure the trustee's negotiable notes for his individual indebtedness. The notes were transferred for value, before maturity, to a bank by delivery without indorsement, and judgment was taken on them by A for the use of the bank. Execution issued and was levied on the land, which had been reconveyed to the trustee for this purpose.

The bank knew nothing of the trust. Upon suit brought by the *cestuis que trustent*, the levy was enjoined.

In *Thompson's Appeal*, 22 Pa. St. 16, the court, by Lewis, J., said: "Whenever a trust fund has been converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the *cestui que trust*. So long as it can be identified, either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser, for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." See also *Illinois Trust, etc., Bank v. First Nat. Bank*, 15 Fed. Rep. 858; *St. Louis, etc., R. Co. v. Johnston*, 27 Fed. Rep. 244.

The rule seems to be well settled that the right to follow the trust fund fails as soon as its means of ascertainment and identification fail, and the courts have required strict proof of the identity of the fund or property in controversy, holding in *Holmes v. Gilman*, 138 N. Y. 369, that, "The right to follow and appropriate, ceases only when the means of ascertainment fail. It is a question of title." See *Pharis v. Leachman*, 20 Ala. 662; *Goldsmith v. Stetson*, 30 Ala. 164; *Roache v. Caraffa*, 85 Cal. 436; *Neely v. Rood*, 54 Mich. 134; 52 Am. Rep. 802; *Phillips v. Overfield*, 100 Mo. 466. See also *In re Hosie*, 7 Nat. Bank. Reg. 601; *In re Coan, etc., Mfg. Co.*, 12 Nat. Bank. Reg. 203; *North Dakota Elevator Co. v. Clark* (N. Dak. 1892), 53 N. W. Rep. 175.

**Preference as Between Trust Creditor and General Creditor**—In this connection the question as to whether a trust creditor, in the case of a debtor's insolvency, is entitled to a preference as against a general creditor or not, is an interesting one, and has often arisen in our courts. A leading case supporting the doctrine that a trust creditor is entitled to a preference, is that of *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287, which was followed by the *Wisconsin* courts in *Francis v. Evans*,

has gone into the possession of a mere volunteer.<sup>1</sup> So if a judgment

69 Wis. 115, and *Bowers v. Evans*, 71 Wis. 133.

In *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287, the plaintiff had left with his banker, H., for collection, a draft upon a New York bank. H. sent the draft to a Chicago bank and received credit for the amount, and afterward made drafts upon such bank, which were cashed. Before payment to the plaintiff, H. made an assignment for the benefit of his creditors. At that time, nothing was due him from the Chicago bank. The court held that the proceeds of the draft were a trust fund in the hands of H., and that, as against other creditors, the plaintiff might enforce full payment from the assets in the hands of the assignee, although the trust fund could not be traced to any specific property. The decision was rendered by Cole, Chief Justice, and sustained by Justices Lamb and Orton, a dissenting opinion being rendered by Justices Taylor and Cassoday. These same judges dissented in the opinion in *Francis v. Evans*, 69 Wis. 115, and *Bowers v. Evans*, 71 Wis. 133, employing the following language: "It seems to us that the decision in *McLeod v. Evans*, 66 Wis. 401, goes further than any other well-considered adjudication of an appellate court. While we bow to the rule thus affirmed by the majority of the court as a binding authority, which must be followed while it remains, yet we do not concede the logic of the reasons given, nor the application of the authorities cited in support of it."

The *Wisconsin* rule thus announced by a divided bench, has been criticised by the supreme court of *Massachusetts* in *Little v. Chadwick*, 151 Mass. 109, and by the *Texas* court in *Continental Nat. Bank v. Weems*, 69 Tex. 489; 5 Am. St. Rep. 85, 93.

A better rule seems to be that announced in the leading *New York* case of *Matter of Cavin v. Gleason*, 105 N. Y. 256. In the case last named, upon an accounting in bankruptcy or insolvency, it is held that a trust creditor is not entitled to preference over general creditors of an insolvent, merely on the ground of the nature of the claim; and that to authorize such a preference, some specific, recognized equity founded on some agreement or relation of the debt to the assigned property, must be shown, which en-

titles the claim, according to equitable principles, to preferential payment. See also *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *Holmes v. Gilman*, 138 N. Y. 369; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *Price v. Ralston*, 2 Dall. (U. S.) 60; *School Trustees v. Kirwin*, 25 Ill. 63; *Union Nat. Bank v. Goetz*, 138 Ill. 127; *Weatherell v. O'Brien*, 140 Ill. 145; 33 Am. St. Rep. 221; *Goodell v. Buck*, 67 Me. 514; *Portland, etc., Steamboat Co. v. Locke*, 73 Me. 370; *Mutual Accident Assoc. v. Jacobs*, 141 Ill. 261; 33 Am. St. Rep. 302; *Mills v. Post*, 7 Mo. App. 519; *Duguid v. Edwards*, 32 How. Pr. (N. Y. Supreme Ct.) 254; *Thompson's Appeal*, 22 Pa. St. 16; *Illinois Trust, etc., Bank v. First Nat. Bank*, 15 Fed. Rep. 858; *Illinois Trust, etc., Bank v. Smith*, 21 Blatchf. (U. S.) 275; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172; *Etna Powder Co. v. Hildebrand*, *Indiana Super. Ct.*, decided April 17th, 1894.

1. *Perry on Trusts*, § 828; *Lee v. Simpson*, 37 Fed. Rep. 12; *Cobb v. Knight*, 74 Me. 253; *Barr v. Cabbage*, 52 Mo. 404; *Hazeltine v. Fournery*, 120 Ill. 493; *Lyford v. Thurston*, 16 N. H. 399; *Coble v. Nonemaker*, 78 Pa. St. 501; *Kennedy v. Baker*, 59 Tex. 151; *Pye v. George*, 2 Salk. 680; *Saunders v. Dehew*, 2 Vern. 271; *Mansell v. Mansell*, 2 P. Wms. 679; *Langton v. Anstreyl*, L. R., 2 Ch. 30; *Burgess v. Wheate*, 1 Ed. 219; *Spurgeon v. Collier*, 1 Ed. 55; *Bourslet v. Savage*, L. R., 2 Eq. 134.

A volunteer to whom an estate in trust has been conveyed, is bound by the trust, although he had no notice of it, and if the grantee of such an estate for full value have notice of the trust, he is bound just as the grantor is bound. *Sadler's Appeal*, 87 Pa. St. 154.

Where a husband conveyed to his wife, instructing her that she was to convey to any one to whom he might sell, or in case he did not sell, then to him, a trust was created which equity would enforce against her heirs. *Bartlett v. Bartlett*, 15 Neb. 593.

To entitle the purchaser of trust property to protection, it must appear that the consideration was wholly or partially paid before notice of the trust. *Paul v. Fulton*, 25 Mo. 156.

Upon a parol promise by the wife to hold the devise in trust for their children, and convey to them so much as she

creditor of the trustee has come into possession of the property, it still remains subject to the trust.<sup>1</sup>

In a recent case, where the trustee had died seised of the legal title to trust lands, and his heirs, in ignorance of the trust and believing the property to be their own, had erected valuable improvements thereon, it was held that the *cestui que trust* who sought to charge the estate with the trust must reimburse the heirs their outlay in improvements, and pay the costs of suit and be held to a strict proof of his claim.<sup>2</sup>

It has even been said, that anyone coming into possession of trust property, whether by suit or otherwise, will do so subject to the trust, so far as the rights of the beneficiary are concerned.<sup>3</sup> But this is too broad.

If a trustee has deposited his beneficiary's moneys in his own name in a bank to which he owes money, and the bank, in ignorance of the trust ownership, applies such deposit to the payment of his debt, such application will not stand, and the fund, if traced, may be reclaimed by the *cestui que trust*.<sup>4</sup> Of course such an application made with notice of the equities will be set aside.<sup>5</sup>

Indeed, a standard author says that, "If the trust money or its substitute can be traced into the bank, the owner can claim it, if it is still there. It has been transformed into the shape of

should not use in her and their support, the decedent devised all his property to his wife, who took immediate possession. Subsequently, she conveyed a valuable portion to a stranger, who took without notice of the trust; and on her death devised and bequeathed another portion, and all the personalty to her second husband, who took possession of that, and also of the proceeds arising from the first conveyance. It was held that the children of the first husband could recover of the second husband a conveyance to them of the real estate, and compel him to account. *Socher's Appeal*, 104 Pa. St. 609.

1. *Shryock v. Waggoner*, 28 Pa. St. 430.

The rule that one who purchases from a trustee with notice of the trust shall be charged with the same trust in respect to the property as the trustee from whom he purchased, does not apply to public sales of trust estates in accordance with the provisions of the deed. *Wood v. Augustine*, 61 Mo. 46.

But it has been held that a purchaser at a sheriff's sale takes the land free from secret trusts of which no notice is given till after the acknowledgment of the sheriff's deed. *Smith v. Painter*, 5 S. & R. (Pa.) 223; 9 Am. Dec. 344.

2. *Rines v. Bachelder*, 62 Me. 95.

3. *Coffee v. Crouch*, 28 Mo. 106.

4. *Morse on Banks and Banking* (3d ed.), § 590, citing *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Buttett v. First Nat. Bank*, 38 Mich. 630. To the same effect, see *Overseers of the Poor v. Bank of Va.*, 2 Gratt. (Va.) 544; 44 Am. Dec. 399; *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *Frith v. Cartland*, 2 Hem. & Mil. 417; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31; 53 Am. Rep. 150. See also *Loring v. Brodie*, 134 Mass. 453.

In *Pennell v. Deffell*, 4 De G. M. & G. 372, the court, by Lord Justice Bruce, said: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust, as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs."

5. *Holden v. New York, etc., Bank*, 72 N. Y. 286.

a debt due the trustee, and is practically in the same position as substituted property actually in the hands of the trustee." The fund thus wrongfully deposited by the trustee is in a situation analogous to property that has been stolen, and may be followed by its owner wherever found.<sup>1</sup>

If it has been converted into money, or exchanged for other property, the *cestui que trust* is at liberty to claim the thing received in exchange, if it can be identified, and the trust, if divested from the trust property in its original form, attaches to

1. Morse on Banks and Banking (3d ed.), § 590; Pennell v. Deffell, 4 De G. M. & G. 372; *In re Hallett's Estate*, 13 Ch. Div. 696; Ingraham v. Maine Bank, 13 Mass. 208; Atlantic Bank v. Merchants' Bank, 10 Gray (Mass.) 548; Merrill v. Bank of Norfolk, 19 Pick. (Mass.) 32; Loring v. Brodie, 134 Mass. 453; Armour Cudahy Packing Co. v. First Nat. Bank (Miss. 1892), 11 So. Rep. 28; Van Alen v. American Nat. Bank, 52 N. Y. 1; Overseers of the Poor v. Bank of Va., 2 Gratt. (Va.) 544; 44 Am. Dec. 399. See also Eyrich v. Capital State Bank, 67 Miss. 60; Frazier v. Erie Bank, 8 W. & S. (Pa.) 18.

Where a commission agent used the specific proceeds of the sales of goods on consignment, and deposited other moneys to make up the amount so used, it was held that this deposit, being substituted for the original proceeds, became impressed with the trust and subject to the same equities. Baker v. New York Nat. Exch. Bank, 100 N. Y. 31; 53 Am. Rep. 150; People v. City Bank, 96 N. Y. 32.

In Vail v. Durant, 7 Allen (Mass.) 408; 83 Am. Dec. 695, the court, by Merrick, J., said: "If the defendants, upon the sale of the goods consigned, had taken a note therefor, and had retained possession of it until the proceedings in insolvency were commenced, the plaintiffs, upon relieving them from their liabilities, might have claimed and recovered the note as their own; and, therefore, as they had already realized the money, and as no suggestion had been made that it was kept separate, or could be identified or distinguished from their other moneys, it is impossible that the assignment of the debtors' whole estate, or that any part of the proceedings in insolvency, could operate as a misappropriation of it. . . . For the balance still in their hands, the plaintiffs may prove its amount as a debt due to them against the estate in insolvency."

In defining the peculiar relations existing between the factor and his principal, the court, in the above case, said: "In the usual and ordinary course of business, a factor does not and is not required to keep the money received upon the sale of goods of different consignors in separate and distinct parcels, but mingles all in a common mass, and with the like funds of his own from whatever source derived. In such case he becomes at once a debtor to his principal, and is liable to an action for the balance shown to be due by his account of sales."

In the recent case of Little v. Chadwick, 151 Mass. 109, the court, by Allen, J., said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under the circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own, and in such case the *cestui que trust* can only come in and share with the general creditors. . . . There is no means of ascertaining, as a matter of fact, that the trust money, if it ever was trust money, is now represented by any property in the hands of the assignee."

The rule in *Maine* is not so broadly stated as it has been by the supreme court of *Massachusetts*. In Houghton v. Davenport, 74 Me. 590, it was held that the mere mingling of trust money by the trustee with his own funds, by depositing the different moneys in bank in his individual name, with nothing done by the banker to distinguish the trust money from the individual money,

the property or money received, and the latter remains subject to the claims of the beneficiary.<sup>1</sup>

does not necessarily prevent an identification of the trust fund. The court said: "Equity will disentangle the account and give to the *cestui que trust* the portion belonging to him."

1. Perry on Trusts, § 828; Yerger v. Jones, 16 How. (U. S.) 36; Piatt v. Oliver, 3 McLean (U. S.) 27; May v. LeClaire, 11 Wall. (U. S.) 217; Goldsmith v. Stetson, 30 Ala. 164; Cook v. Tullis, 18 Wall. (U. S.) 332; U. S. v. State Nat. Bank, 96 U. S. 30; South Park Com'rs v. Kerr, 13 Fed. Rep. 502; Dow v. Berry, 18 Fed. Rep. 121; Wheat v. Moss, 16 Ark. 255; Dyer v. Jacoway, 42 Ark. 186; Elgin Lumber Co. v. Langman, 23 Ill. App. 250; Breit v. Yeaton, 101 Ill. 242; McCrory v. Foster, 1 Iowa 271; MacGregor v. MacGregor, 9 Iowa 65; Englar v. Offutt, 70 Md. 78; 14 Am. St. Rep. 332; Dows v. Kidder, 84 N. Y. 131; Causidiere v. Beers, 2 Keyes (N. Y.) 198; Cobb v. Dows, 10 N. Y. 341; Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75; Wood v. Stafford, 50 Miss. 370; Morrison v. Kinstra, 55 Miss. 71; Farmers', etc., Bank v. Kimball Milling Co., 1 S. Dak. 388; Moffit v. McDonald, 11 Humph. (Tenn.) 457; Pennell v. Deffell, 4 De G. M. & G. 372; Taylor v. Plumer, 3 M. & S. 562; *In re Hallett's Estate*, 13 Ch. Div. 753. See also Martin v. Greer, 1 Ga. Dec. 109; Alwood v. Mansfield, 59 Ill. 496; Grange Mill Co. v. Western Assur. Co., 118 Ill. 396; Cheshire v. Cheshire, 2 Ired. Eq. (N. Car.) 569.

So long as money, or other property held in trust, can be traced or identified, it belongs to the original owner if he elects to claim it, and equity will follow it through any number of transmutations, and preserve it for the owner, either in its original or its substituted form. Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75.

Where a husband converted chattels left to his wife for life, then to her children, into money, it was held that the children could pursue the money in the husband's hands. Hunter v. Yarborough, 92 N. Car. 68.

A beneficiary may follow the trust fund into lands purchased with it by the trustee, whether the contract of the purchase be executory or executed. Brothers v. Porter, 6 B. Mon. (Ky.) 106.

Where a trustee has borrowed money, and with it purchased other property, and added it to the trust, and repaid the borrowed money out of the proceeds and profits of the trust property, the property thus purchased will belong to the beneficiaries in the trust. Butler v. Hicks, 11 Smed. & M. (Miss.) 78.

Where, pending a suit against him for breach of trust, a trustee fraudulently sells the trust estate, and assigns the securities taken for the purchase-money, the beneficiary may, at his election, take the land or the securities. Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441.

In Covar v. Cantelou, 25 S. Car. 35, the testator bequeathed certain money in trust for A, and upon her death to be divided among "her children and their heirs forever." Under an order of court, a portion of this trust fund was invested in real estate, and thereafter, the real estate was sold on the petition of A and the trustee. The children were not parties to the proceeding. It was held that they might follow the funds into the land, and upon A's death, recover the land by a suit brought in their own names.

In Pennell v. Deffell, 4 De G. M. & G. 372, the court, by Lord Justice Turner, said: "As between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to, or affected by, the trust." *Approved* by Lord Ellenborough in Taylor v. Plumer, 3 M. & S. 562, and by Jessell, M. R., in *In re Hallett's Estate*, 13 Ch. Div. 753.

Property purchased with a fund which includes sums of money held under different trusts, the title thereto being taken as under one of the trusts only, is chargeable with the same trusts that attached to the fund, as against those who deal in it with a knowledge of its fiduciary character. Leake v. Watson, 58 Conn. 332.

If a trustee, after mingling trust money with his own, separates from

But the *cestui que trust*, who would claim the property so purchased, is held to a strict proof that the funds applied therefor were trust funds, unless the deed conveying the land recites the trust in some way.<sup>1</sup>

The fund resulting from a sale of real estate under a power is treated as realty in equity,<sup>2</sup> unless it clearly appears that the settlor intended that it should be converted into and remain personalty.<sup>3</sup>

The *cestui que trust* is not bound to follow the trust property, for he has the alternative remedy of enforcing an individual liability against the trustee.<sup>4</sup> The exercise of this right precludes his afterwards pursuing the fund. In other words, his remedy is an

the common fund a proper portion of it as the property of the beneficiary, and with such portion of the fund purchases real estate in his own name, the trust attaches to the money thus set apart, and to the real estate purchased therewith. *Houghton v. Davenport*, 74 Me. 590.

The indorsement of a note, which upon its face is payable to one person for the use of another, cannot impart to the indorsee a right to receive the money due thereon, for his own benefit; but the indorsement is a breach of trust on the part of the payee, which entitles the *cestui que trust* to assert his right to the proceeds of the note in a court of equity. *Eldridge v. Turner*, 11 Ala. 1049.

1. *Roberts v. Broom*, 1 Harr. (Del.) 57; *Ferris v. Van Vechten*, 73 N. Y. 113.

One who, by way of defense to a mortgage claim on property, pleads that the mortgagor had no authority to create the lien, the property being purchased with funds held by him as trustee, will be required to establish the latter fact by the clearest and most satisfactory proof. The mere report to the court, by the trustee, that the trust funds have been so invested, will not be considered sufficient to trace the trust funds into the property, if the trustee afterward asserts individual ownership therein. *Suter v. Ives*, 47 Md. 520.

2. *Hovey v. Dary*, 154 Mass. 7.

3. *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Holland v. Cruft*, 3 Gray (Mass.) 163; *Hammond v. Putnam*, 110 Mass. 232; *Martin v. Sherman*, 2 Sandf. Ch. (N. Y.) 341.

In *Hammond v. Putnam*, 110 Mass. 232, the court, by Morton, J., said: "Embarrassing cases have often arisen in

which the testator has directed the conversion of real into personal, or personal into real estate, for certain purposes, which purposes in whole or in part, cannot be carried into effect. . . . But the general principle is applied in all the cases, that wherever the intention of the testator is clear to convert real into personal estate, the law will regard it as converted to that extent at the death of the testator, and he who takes under the will takes it with the character which the will has impressed upon it."

4. *Oliver v. Piatt*, 3 How. (U. S.) 333; *Flagg v. Mann*, 3 Sumn. (U. S.) 84; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *Roberts v. Mansfield*, 38 Ga. 452; *Gray v. Perry*, 51 Ga. 180; *Bradley v. Luce*, 99 Ill. 234; *Long v. Fox*, 100 Ill. 43; *Breit v. Yeaton*, 101 Ill. 242; *Haxton v. McClaren*, 132 Ind. 235; *MacGregor v. MacGregor*, 9 Iowa 65; *Bartlett v. Hamilton*, 46 Me. 435; *School Dist. v. First Nat. Bank*, 102 Mass. 174; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Isom v. First Nat. Bank*, 52 Miss. 902; *Calhoun v. Burnett*, 40 Miss. 59; *Barr v. Cabbage*, 52 Mo. 404; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Freeman v. Cook*, 6 Ired. Eq. (N. Car.) 379; *McAllister v. Com.*, 30 Pa. St. 536; *Norman v. Cunningham*, 5 Gratt. (Va.) 72; *Hawkins v. Hawkins*, 1 D. & S. 75.

But a third party may not, for his own protection, require the *cestui que trust* to pursue the proceeds of trust funds into other investments. *Barr v. Cabbage*, 52 Mo. 404.

The *cestui que trust* cannot both hold and enjoy the proceeds of the trust property, and at the same time recover the trust property itself from the one who paid full value therefor. Equity will give him no aid in such an effort. *Bonner v. Holland*, 68 Ga. 718.



alternative and not a cumulative one,<sup>1</sup> although the contrary has been held in one instance.<sup>2</sup> In any event, if a part of the purchase-money has been paid him, he cannot hold the trustee for conversion unless he is willing to refund.<sup>3</sup> He may elect whether to claim the property thus purchased or to demand the repayment of the purchase-money.<sup>4</sup>

He may pursue the land in the purchaser's hands and demand a reconveyance upon payment of the purchase-money.<sup>5</sup> And having recovered the property in this way, he would still have an action against the trustee for a reimbursement of the money thus advanced.

When the trustee has conveyed the trust property to an innocent holder for value, so as to put the property beyond the reach of the *cestui que trust*, the trustee must answer to the *cestui que trust* for the loss sustained.<sup>6</sup>

1. See *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450; *Fears v. Lynch*, 28 Ga. 249.

A *cestui que trust* having elected to hold his trustee personally responsible for an improper investment of trust funds, and having obtained his decree accordingly, cannot then follow the property into the investment and hold that also. *Barker v. Barker*, 14 Wis. 131.

In *Naltner v. Dolan*, 108 Ind. 500; 58 Am. Rep. 61, the court, by Mitchell, J., said: "Whenever a trustee, unless properly authorized to do so, puts the fund into such a shape as to invest himself with a legal title to it, the *cestui que trust* has his election, either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner as on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee, or legal representative, to claim it as the fund of the depositor, the *cestui que trust* has the option to do likewise." To this proposition, that court cites the following cases: *Merket v. Smith*, 33 Kan. 66; *School Dist. v. First Nat. Bank*, 102 Mass. 174; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642; *Jackson v. Bank of U. S.*, 10 Pa. St. 61; *McAllister v. Com.*, 30 Pa. St. 536.

If a trustee invest the trust funds in property, the *cestui que trust* may either take the property, or hold the trustee for the money. He may even

have the property sold to purchase the fund, and charge the trustee with the deficit, if any. *Cooper v. Cooper*, 61 Miss. 676.

One who purchases trust property for a valuable consideration with notice of the trust, is held to be a trustee for the present beneficiary interested, and the *cestui que trust* may follow the property thus transferred, or may hold the trustee for the proceeds, or claim the property purchased by the trustee with the proceeds of the sale. *Isom v. First Nat. Bank*, 52 Miss. 902.

2. If a trustee has paid trust money without right to one who knows the facts, the beneficiary may pursue either or both. If the beneficiary pursues both, the trustee will be treated as surety of the person receiving the funds. *Vance v. Kirk*, 29 W. Va. 344.

3. A *cestui que trust* who has received an equivalent for his interest in trust property, cannot maintain an action against the trustee for conversion thereof, without tendering a return of such equivalent. *Graves v. Pinchback*, 47 Ark. 470.

4. *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441; *Kaufman v. Crawford*, 9 W. & S. (Pa.) 134; 42 Am. Dec. 323. See also *Blaisdell v. Stevens*, 16 Vt. 179.

5. *Tobin v. Helm*, 4 J. J. Marsh. (Ky.) 288.

6. *Adams v. Lambard*, 80 Cal. 426.

Where land is conveyed by deed absolute upon its face, but actually intended as a mortgage, and the grantee therein conveys the land to an innocent purchaser, the mortgagor can recover from the mortgagee the value of the land at the time of the trial, less

g. RIGHT TO REIMBURSEMENT.—The *cestui que trust* is entitled to reimbursement of the expenses which he has incurred in good faith in attempting to protect and preserve the trust estate, and he may require the trustee to repay him out of the income of the estate first, or in case the income fails, out of the capital.<sup>1</sup>

h. OTHER RIGHTS.—The *cestui que trust* is entitled to a decree of court establishing the existence of the trust and declaring what are its limitations, as well as to a judicial construction of the instrument by which the trust is created.<sup>2</sup>

When the purposes of the trust have been accomplished, the *cestui que trust* may demand a conveyance to himself of the property, real and personal, and a decree of court declaring the trust at an end.<sup>3</sup> And he may not be compelled to wait an unreasonable period of time before he is entitled to a decree establishing this right.<sup>4</sup>

He may appeal to the courts to set aside wrongful acts of the

the debt, with interest. *Boothe v. Feist*, 80 Tex. 141.

Where the trustee of land has sold it to *bona fide* purchasers without notice of the trust, the beneficiaries, whose interest takes effect at the death of the trustee, he having had an estate for life, are entitled to recover from his estate the value of the land at the time of his death, excluding permanent improvements made since the sale. *Norman v. Cunningham*, 5 Gratt. (Va.) 63.

1. Taxes paid by a *cestui que trust* are a lien upon the land, and may be paid out of the trust fund. *Gary v. May*, 16 Ohio 66.

One of several *cestuis que trustent*, who, at the request of the trustee, furnished the necessary money to preserve the trust fund, is entitled to be reimbursed out of the fund for all sums so advanced. *Frierson v. Branch*, 30 Ark. 453; *Rogers v. Vaughan*, 31 Ark. 62.

2. See *infra*, this title, *Procedure*. See also, *supra*, *Construction of Trusts*; *Walden v. Skinner*, 101 U. S. 577; *Patterson v. Pullman*, 104 Ill. 80.

During his last illness and ten days before his death, the decedent executed and delivered a deed of certain of his real estate to his son A, upon A's parol agreement that the farm was to be held as a home for the family, consisting of twelve children besides A, who alone was of age, and divided among them when the youngest should come of age. The family continued thereafter to occupy the farm, paying the taxes and the interest on a mortgage

thereon, and making permanent improvements. A neither promised nor paid any consideration, was never in possession of any of the farm, and never received any of the rent or profits thereof. It was held that, upon his repudiating the trust and claiming to be the sole owner, one of the children could maintain an action to have him adjudged a trustee, and to compel him to convey to them their respective shares in the farm. *Moyer v. Moyer*, 21 Hun (N. Y.) 67.

A *cestui que trust*, having a vested interest, though not a right to immediate enjoyment of the trust fund, may file a bill to have the trusts declared, or to remove the trustee for misconduct. *Cooper v. Day*, 1 Rich. Eq. (S. Car.) 26.

Where the administratrix of her husband took a deed of a burial lot, paid for with the funds of the estate, to herself, it was held, upon a bill filed by three of her six children, that she was compellable to execute a declaration of trust in favor of all, subject to her legal interest. *Stewart's Appeal*, 81\* Pa. St. 323.

But compare *Baylies v. Payson*, 5 Allen (Mass.) 473, where it is said that a bill in equity does not lie merely for the purpose of declaring a trust, even though the defendant denies the existence of the trust; but if he is about to leave the country, the trust may be declared, and the bill retained for further direction.

3. See *infra*, this title, *Procedure*; also, *infra*, this title, *Termination of the Trust*.

4. It was held in *McDonald v.*

trustee so long as property rights of innocent third parties have not vested.<sup>1</sup> Thus, it has been held that a lease made on terms unfavorable to the trust, and in violation of the duties imposed on the trustee, will be set aside and the execution of a new one ordered in compliance with the terms of the trust.<sup>2</sup> If the trustee, by collusion with a tenant in possession, has conspired to defeat the rights of persons entitled to a reversionary interest by fraudulently obtaining a decree, the decree will be vacated.<sup>3</sup>

The beneficiary under a deed of trust may purchase at a sale made in pursuance of the trust as effectually as any creditor may purchase the property of his debtor at a judicial sale, and the trustee may bid for the beneficiary at his instance, without impairing the validity of the sale.<sup>4</sup>

**XVII. RIGHTS AND LIABILITIES OF THIRD PARTIES.**—Those who deal with a trustee upon the faith of the trust estate which he represents, are bound at their peril to know the extent of the trustee's powers.<sup>5</sup> It is only when they have had no notice of the

McDonald, 92 Ala. 537, that where the complaint was not filed until eight years after the death of the testatrix, and the assets largely exceeded the debts, that the creditors could not, by unnecessarily delaying their collections, nor could the trustee, by neglecting to discharge obligations which it was in his power to meet, indefinitely postpone the assertion by the *cestuis que trustent* of their rights and interests in the property.

1. See *supra*, this title, *Sales by the Trustee—Setting the Sale Aside*.

2. *Griffen v. Ford*, 1 Bosw. (N. Y.) 123.

3. *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438.

4. *Felton v. LeBreton*, 92 Cal. 457.

He may purchase as freely as a third person, but he does not become a trustee for parties interested, without a repayment to him of the purchase-money. *Walker v. Brungard*, 13 Smed. & M. (Miss.) 723.

5. See *supra*, this title, *Rights and Remedies of the Beneficiary—Following the Trust Property*; *Owen v. Reed*, 27 Ark. 122; *Gunnell v. Cockerill*, 79 Ill. 79; *Fesmire's Estate*, 134 Pa. St. 67; 19 Am. St. Rep. 676; *Vernon v. Board of Police*, 47 Miss. 181.

If a trustee holds land under a power to sell only upon the happening of a certain event, which is made a condition precedent to a conveyance, one who purchases from him must ascertain at his peril whether this condition has been fulfilled. And this is so, although the deed contains a recital that

the condition has been performed. So, where the trustees had power of sale, to be exercised only in case there should be a deficiency of income for certain purposes, if conveyed, reciting this condition and a deficiency under it. In the absence of proof of such deficiency, it was held that their conveyance was void. *Griswold v. Perry*, 7 Lans. (N. Y.) 98.

A purchaser under a trust deed containing a power of sale, is charged with notice of any defects and irregularities that may attend the sale. He is bound to know whether the sale was made upon proper notice, and at a time and in the manner required by the power contained in the deed. But as to later and remote purchasers, the rule is different. If there is nothing upon the face of the deed, indicating that the sale was made in violation of the power contained in the deed of trust, a subsequent purchaser, who has no actual notice of any irregularity in the trustee's sale, will be protected as an innocent purchaser. *Gunnell v. Cockerill*, 79 Ill. 79.

One who knows that he is dealing with trust funds, is held to a knowledge of the character of the trust, whether he advise himself of its precise nature or not. *Gale v. Harby*, 20 Fla. 171.

Where the grantor in a deed of trust of personal property is to retain possession until default, a sale by him afterward passes only his right of possession, and the vendee acquires no right adverse to the rights of the trustee. And a sale by the trustee, under the deed, is not the sale of a mere chose in

trust, either actual or constructive, that they are to be protected in the possession of trust property, or in the enjoyment of rights acquired through dealings with the trustee.<sup>1</sup>

Under the rule that a trustee purchasing at his own sale takes the property charged with the trust just as before, one who buys of such trustee thereafter is presumed to be cognizant of his grantor's wrongdoing, and cannot claim title as an innocent holder.<sup>2</sup> The purchaser from one who has purchased with notice of the trustee's breach of trust in the application of the proceeds of the sale is not to be charged with the notice of his vendor, if himself innocent of such breach.<sup>3</sup>

As we have seen, the trustee's application of trust funds to the payment of his own debts or in any way to his own use, is highly improper. A creditor receiving trust funds thus misapplied, or anyone coming into the possession of trust property with a knowledge of its character, stands in the trustee's shoes, and must account as trustee for everything so received.<sup>4</sup>

action, and passes the property to his vendee, who may maintain an action in his own name to recover the property. *Foster v. Goree*, 5 Ala. 424.

Under 1 N. Y. Rev. Stat. 729, § 60, a *cestui que trust* may bring a bill in equity against his trustee, who has executed a lease with an inadequate rent, under a power to lease only at the best procurable rent, to compel him to make a new lease at a full rent, regardless of the old lease. *Griffen v. Ford*, 1 Bosw. (N. Y.) 123.

A double responsibility rests upon a trustee in dealing with one whom he knows to be also a trustee, as any dealings between them in wrong of the latter's trust, render them both responsible in equity. *Heath v. Waters*, 40 Mich. 457.

1. A *bona fide* purchaser from the trustee will be protected from the demands of the *cestui que trust*. If he has no knowledge, either actual or constructive, of the trustee's wrong, he cannot be liable for it. See *supra*, this title, *Rights and Remedies of the Beneficiary*.

2. *Winter v. Truax*, 87 Mich. 324; 24 Am. St. Rep. 160.

3. *Claiborne v. Holland*, 88 Va. 1046.

4. See *supra*, this title, *Rights and Remedies of the Beneficiary*; *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430; *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595; 40 Am. Rep. 218; *Union Mut. L. Ins. Co. v. Spaulds*, 99 Ill. 249; *Cain v. Cox*, 23 W. Va. 594; *Keane v. Roberts*, 4 Madd. 357; *In re Gross*, L. R., 6 Ch. 632.

Where a trustee has wrongfully sold the trust property to himself, a purchaser from him, with notice of the fraud, is a participator in the breach of trust, and incurs a like liability with the fraudulent trustee. *Barksdale v. Finney*, 14 Gratt. (Va.) 338.

One who sells land to a trustee, taking therefor trust money and a mortgage for a part of the purchase-price, being thus a party to a breach of trust, must, on foreclosing, account for the trust money, before applying the proceeds of the foreclosure to the satisfaction of his mortgage. *Bomar v. Gist*, 25 S. Car. 340.

One who held certain shares of corporate stock in trust, obtained a loan from a bank, pledging these shares as security for the debt. The stock certificates indicated the trust upon their face, and bore the name of the *cestui que trust*. The trustee, finding himself unable to repay the sum borrowed, directed the bank to sell the stock. This the bank did, reimbursing itself out of the proceeds. The bank was held liable to the trust for the amount of the stock, the trustee having meantime become insolvent. *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430.

In *Johns v. Williams*, 66 Miss. 350, it was held that *cestuis que trustent* might maintain an action for the cancellation of a lease executed by their trustee in satisfaction of his private debt to the lessee.

A testamentary trustee who held the estate for the testator's children, wrongfully executed a deed of trust of

land to secure a loan made to him individually, and afterward, in his account as guardian, took credit for the amount. Suit was brought by the wards to cancel the deed of trust, and it was held that they would not be required to refund to the purchaser under the deed of trust. *Price v. Estill*, 87 Mo. 378.

Before a stranger to a trust fund can be charged as a trustee, by reason of being a party to the misapplication of the funds, the fund being used in the payment of a private debt of the original trustee, it must appear, not only that the person sought to be charged knew that the fund was a trust fund, but also that the debt was, at the time of its payment, of such a nature that the fund could not lawfully be used to pay it. *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595; 40 Am. Rep. 220.

In the case last cited, a municipal treasurer borrowed from a bank, professedly to pay warrants in anticipation of the collection of taxes, and gave the bank his individual note secured by collaterals. The money was placed to his credit as treasurer, a large portion was drawn out on his checks as treasurer, and the sums thus used he repaid to the bank with money which had come in from the collection of taxes. It was held that the acceptance of such payment by the bank did not render it liable to the town, as for money received from a trustee in breach of his trust. *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595; 40 Am. Rep. 218.

A mortgage given in misapplication of trust funds was also in part security of a guardian and his ward, who had notice of the misapplication. It was held not enforceable, even for the benefit of the ward to the extent of the sum due her. *Dunham v. Milhous*, 70 Ala. 596.

**Ignorance of the Trust Excuses.**—A, who held stock upon a secret trust, dealt with it as his own, assigning it to B, who in turn transferred it to C, neither B nor C having any notice, actual or constructive, of the trust, and it was held that the beneficiaries could not be heard to object to the transfers. *Borland v. Clark*, 26 Kan. 349.

**Extent of Notice Required Under the Rule—What Constitutes.**—Though the delivery of a gift, together with a deed, to a father for the benefit of the daughter, vests the title in the daughter, third parties are not chargeable with

notice of her title, where the property is retained in the possession and control of the father in apparent right of ownership. *Lewis v. Castleman*, 27 Tex. 407.

Where creditors of the husband take a mortgage executed by the wife, her trustee, and the husband, of the wife's trust property, they are chargeable with notice of the conditions on which, by the trust deed, the wife may convey. *Swift v. Castle*, 23 Ill. 132.

A trustee, to secure his personal indebtedness to A, transferred, as collateral, an overdue mortgage note belonging to the trust estate. A knew nothing of the trust. It was held that, while A might not have been chargeable with notice, had the note not been past due, the fact that the note was overdue rendered him chargeable. *Turner v. Hoyle*, 95 Mo. 337.

A took a mortgage, which was recorded, in which he was described as "trustee as aforesaid." He borrowed money of B, B knowing that the money was for A's personal use, and assigned the mortgage to B as security, erasing the words "trustee as aforesaid." The note accompanying the mortgage, and which was assigned with it, made no mention of A's being trustee. B did not examine the record, and his attention was not attracted to the words "trustee as aforesaid," and he had no actual knowledge that A was trustee. It was held that B was, nevertheless, chargeable with notice of the fact. *Smith v. Burgess*, 133 Mass. 511.

A, who owned bonds, deposited them with a trust company, taking a non-negotiable receipt in the name of her son as "trustee." She authorized her son to pledge the receipt for a certain sum specified on his own account, but he pledged it for a larger sum. It was held that the person to whom it was pledged could only hold it for the sum named by A, the use of the word "trustee" being sufficient to put the pledgee upon inquiry. *Swan v. Produce Bank*, 24 Hun (N. Y.) 277.

Where a trustee was authorized by the court to make a sale of certain land and simultaneously invest the purchase-money in a mortgage on the same land, and he sold for cash, it was held that a subsequent purchaser was chargeable with notice of the terms of the order, and that the lien for the purchase-money was not lost by the execution of the deed by the trustee. *Dickinson v. Worthington*, 4 Hughes (U. S.) 430.

So, if the one dealing with the trustee knows that he is about to misapply the proceeds of the transaction, he deals at his peril; the rule being that the innocent purchaser is not bound to see to the application of the proceeds of the sale, while the purchaser with notice of the contemplated wrong is bound by reason of that knowledge, and takes the property subject to all equities.<sup>1</sup>

An executrix who was a life-tenant, under the will, of certain stock of the estate, assigned such stock as collateral security for the indebtedness of some of the remainder-men. It was held that such assignment was an abuse of the trust, and the assignees who received the stock, as stock of the estate standing in the name of the testator, were bound to ascertain whether the executrix had the right so to transfer the stock. Failing to do so, they could not claim protection as holders in good faith and without notice. *Prall v. Hamil*, 28 N. J. Eq. 66. See also *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *Dey v. Dey*, 26 N. J. Eq. 182; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; 11 Am. Dec. 441; *Pendleton v. Fay*, 2 Paige (N. Y.) 202.

One who was trustee of a land company with power to sell, and also as a stockholder in the company, beneficially interested in the land, executed a deed describing himself as trustee, and the land as a part of the town which his trust deed proposed should be laid off on the property of the company, and for a full description referred to a plat of the town then on file. It was held that this showed that he was executing the deed as trustee, and was not merely conveying his beneficial interest. *Hannibal, etc., R. Co. v. Green*, 68 Mo. 169.

1. *Wright v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 66; *Hutchins v. State Bank*, 12 Met. (Mass.) 421; *Shaw v. Spencer*, 100 Mass. 392; 1 Am. Rep. 121; *Foster v. Dey*, 27 N. J. Eq. 600; *Prall v. Hamil*, 28 N. J. Eq. 66; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; 11 Am. Dec. 441.

Although a deed of trust authorizes the trustee to raise money on a mortgage of the trust property, one who lends money with knowledge of the intention of the trustee to apply it to his own use, takes but a voidable title under the mortgage given to him as security. *Union Mut. L. Ins. Co. v. Spaide*, 99 Ill. 249.

The purchaser is bound to see to the proper application of the purchase-money, where money arising from the

sale of lands by a trustee, is required to be used for a definite and limited purpose. *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520.

The purchaser of promissory notes executed to trustees, and indorsed by them as trustees, must see to the application of the purchase-money. *Jackson v. Davis*, 4 MacArthur (D. C.) 334.

Where the trust under which property is held, prohibits the trustee from selling or mortgaging it, except for the benefit of the *cestui que trust*, one who purchases from the trustee or accepts a mortgage from him, will be required to look to the application of the purchase-money or the proceeds of the mortgage. But, where the trustee holds the property in trust for his wife and her heirs, the fee-simple is hers in equity, and the conveyance in which they both join, whether by deed or mortgage, will be held to be executed in compliance with the trust, and imposes upon the purchaser or mortgagee no duty in reference to the application of the proceeds. *Wagner v. Blanchet*, 27 N. J. Eq. 356.

Without notice or knowledge of the intended misapplication of the proceeds, he is not liable; nor is he bound to see to the application of the purchase-money. *Dawson v. Ramser*, 58 Ala. 573; *Carpenter v. McBride*, 3 Fla. 292; 52 Am. Dec. 382; *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595; 40 Am. Rep. 220; *Cherry v. Greene*, 115 Ill. 591; *Norman v. Towne*, 130 Mass. 52; *Mason v. Bank of Commerce*, 90 Mo. 452; *Hunt v. State Bank*, 2 Dev. Eq. (N. Car.) 60; *Redheimer v. Pyron*, *Spear's Eq. (S. Car.)* 134. See also *Jones v. Clark*, 25 Gratt. (Va.) 656; *Rutledge v. Smith*, 1 Busb. Eq. (N. Car.) 283; *Colt v. Lasnier*, 9 Cow. (N. Y.) 342; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376.

One purchasing at a sale made under a decree of court, is not bound to see to the application of the purchase-money. *Coombs v. Jordan*, 3 Bland (Md.) 284.

Where executors were authorized to sell to pay debts, "if in their opinion it should become necessary," a purchaser,

The courts have even held that under certain circumstances the one who deals with a trustee as purchaser or in a similar capacity, must supervise the trustee's subsequent disposal of the purchase-money and answer for its misapplication, whether he be a party to the wrong or not.<sup>1</sup>

acting in good faith, is not bound to see that there was a necessity, or that the purchase-money is properly applied. *Davis v. Christian*, 15 Gratt. (Va.) 11.

The purchaser of land made in trust to secure a debt, is not bound to see to the application of the purchase-money. *Gardner v. Armstrong*, 31 Mo. 535. And see *Conover v. Stothoff*, 38 N. J. Eq. 55.

The purchaser of land is not bound to see to the application of the purchase-money, where the will directs a sale and investment of the proceeds in protective property. *Keister v. Scott*, 61 Md. 507.

A *bona fide* purchaser is not bound to see to the application of the purchase-money of land directed to be sold at private or public sale, and the proceeds held in trust. *Nicholls v. Peak*, 12 N. J. Eq. 69.

Where land was granted in trust to a wife for life with remainder to her husband, with a provision for resale and reinvestment, it was held that a purchaser was not bound to see to the due application of the proceeds. *Lining v. Peyton*, 2 Desaus. Eq. (S. Car.) 375.

Where a testator directed his executors to sell land and retain the proceeds, the interest on which they were to pay annually to A during her life, and the principal after her death to her children, a *bona fide* purchaser from the executors, who had paid the purchase-money, was held not bound to see that it was applied to the purpose of the trust. *Hauser v. Shaw*, 5 Ired. Eq. (N. Car.) 357.

A testator gave to his wife a life estate in the residue of his property. In another clause of his will, she was appointed executrix, "with full power to transfer any real estate that she may deem proper." It was held that her power to sell not being qualified, and the application of the purchase-money not having to be made until her death, the purchasers were under no obligation to see to its application. *John v. Barnes*, 21 W. Va. 498.

Under a devise of an estate charged with the payment of an annuity, with

power in the devisee "to sell and convey any of my real property which may be to the interest of my estate," it was held that no duty devolved upon a purchaser to see to the application of the purchase-money to the payment of the annuity. [Hinton, J., *dissenting*.] *Hughes v. Tabb*, 78 Va. 313.

Where A bought county land on credit of the county commissioner, and in good faith, before the expiration of the credit, paid drafts drawn on him by the commissioner, it was held that he was not bound to see to the application of the money so paid. *Jacks v. State*, 44 Ark. 61.

Bank officers are not chargeable with knowledge that a depositor is committing fraud upon a trust estate. Nor are they bound to inquire, simply because a depositor draws upon a trust account payable to himself, and transfers funds from a trust account to his own private account; nor is the bank bound to see to the application of a loan properly made to such depositor upon the security of a trust estate, the declared purpose of the borrower being legal and proper, and there being nothing which should excite the suspicion of the bank officers in the matter. *Goodwin v. American Bank*, 48 Conn. 550.

A grantor conveyed to his wife for her use for life, a deed, providing that the property conveyed should be used by the grantor's children and by the grantee as a home, and divided among the children upon her death, with power in her "at any time in her discretion to sell and convey the said property by deed, provided the proceeds of such sale are invested in other real estate for the uses expressed." It was held that a *bona fide* purchaser from the wife would acquire a good title, and not be required to see to the application of the proceeds. *Guill v. Northern*, 67 Ga. 345.

1. Where property held in trust for a wife is sold, it is the duty of both the trustee and the purchaser to see that the fund is paid over to the trustee, and reinvested as directed by the terms of the trust; and if the purchaser contracts with the husband, and pays him the purchase-money, in violation of

**XVIII. WAIVER AND ESTOPPEL.**—By waiver and estoppel the *cestui que trust* may forfeit his right to an enforcement of the trust in court. Long-continued acquiescence in the trustee's misconduct or questionable conduct,<sup>1</sup> where the *cestui que trust* has slept on his rights, open approval of such misconduct at the time,<sup>2</sup> or subsequent ratification thereof,<sup>3</sup> may estop him in a court of equity from demanding relief against his trustee.

the provisions of the deed, and upon the written authority of the wife the trustee conveys to him the title, such sale or conveyance is a fraud upon the power, and a breach of trust, and upon application of the wife will be set aside. *Cardwell v. Cheatham*, 2 Head (Tenn.) 14. See also *Colesbury v. Dart*, 61 Ga. 625; *Forbes v. Peacock*, 12 Sim. 521; *Lloyd v. Baldwin*, 1 Ves. 173.

1. *Hume v. Beale*, 17 Wall. (U. S.) 336; *Villines v. Norfleet*, 2 Dev. Eq. (N. Car.) 167; *Ames Iron Works v. West*, 24 Fed. Rep. 313; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Mulford v. Minch*, 11 N. J. Eq. 16; 64 Am. Dec. 472; *Follansbe v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691; *Dublin's Case*, 38 N. H. 459. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Buying at His Own Sale*; see *supra*, this title, *Statute of Limitations—Laches—Lapse of Time*. Compare *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326.

It does not lie in the mouth of a *cestui que trust*, while competent to judge of his own interests, to complain of acts as breaches of trust, which were occasioned by his own neglect or misrepresentations. *Vreeland v. Van Horn*, 17 N. J. Eq. 137.

Acquiescence for a long time in an improper sale and purchase by a trustee, will disable the *cestui que trust* from coming into equity to set it aside. *Mitchell v. Berry*, 1 Metc. (Ky.) 602.

Where trust funds were fraudulently used by a trustee to purchase stock in a railroad company, and said company was afterward consolidated with another, and the new company issued and sold bonds, it was held that *bona fide* holders of said bonds had a better equity against the property of the railroad company than the beneficial owner of the trust funds, who, being aware of their misappropriation, suffered the trustee to retain possession of the stock, and acquiesced in and promoted the sale of the bonds. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691.

2. *Crutchfield v. Haynes*, 14 Ala. 49;

22 Ala. 83; *Colbert v. Daniel*, 32 Ala. 322; *Martin v. Clark*, 116 Ill. 654; *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175; *Spencer v. Hawkins*, 4 Ired. Eq. (N. Car.) 288; *Waring v. Purcell*, 1 Hill Eq. (S. Car.) 202; *Booth v. Booth*, 1 Beav. 126; *Fyler v. Fyler*, 3 Beav. 550; *Griffiths v. Porter*, 25 Beav. 236; *White v. White*, 5 Ves. 555; *Brice v. Stokes*, 11 Ves. 319; *Langford v. Gascoyne*, 11 Ves. 336; *Walker v. Symonds*, 3 Swanst. 64; *Ryder v. Bickerton*, 3 Swanst. 80, n; *Mayer v. Gould*, 1 Atk. 615; *Smith v. French*, 2 Atk. 243; *Nail v. Punter*, 5 Sim. 555; *Fellows v. Mitchell*, 1 P. Wms. 81; *In re Chertsey Market*, 6 Price 280; *Byrchall v. Bradford*, 6 Madd. 235.

Where the beneficiaries are empowered by an act to consent to, or withhold their consent from, a mortgage of their estate, they will be held by their consent to have concluded their own rights. *Magraw v. Pennock*, 2 Grant Cas. (Pa.) 89.

The rule that one purchasing property of a trustee with notice of the trust shall be charged with the same trust as the trustee from whom he purchased, has no application where the trustee conveys to the beneficiaries themselves, with the consent of the creator of the trust and the owner of any equitable interest remaining after the trust. *Storrs v. Flint*, 46 N. Y. Super. Ct. 498.

It is the general rule that one purchasing land of a trustee with constructive or actual notice of a resulting trust therein, becomes a trustee; but where the purchase is made with the assent, and at the request of the beneficiaries, this rule does not apply. *Page v. Page*, 8 N. H. 187.

Where money in the hands of a trustee has been applied, with the consent of the beneficiaries, to the legitimate purposes for which it was designed, the holder cannot recover it from the trustees, although the use to which it was applied was an unlawful one. *Verona v. Peckham*, 66 Barb. (N. Y.) 103.

3. See *Marberry v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467.



An offer of the *cestui que trust* to accept a settlement of the controversy, does not affect his right to assert the trust.<sup>1</sup>

The *cestui que trust*'s ratification of the trustee's unauthorized act, or his acquiescence therein, will operate as an estoppel only where he was aware of all the material facts of the transaction which in any way affect the ratification,<sup>2</sup> and only where he was *sui juris*.<sup>3</sup>

The general principles of the law of waiver and estoppel apply to the administration of trusts and control both beneficiary and trustee.<sup>4</sup>

But a trustee who has purchased at his own sale and relies upon the acquiescence of the *cestui que trust* to confirm his title under

Though a beneficiary may have confirmed her trustee's unlawful acts, he must show, in order to estop her from holding him liable, that she acted on full information, without false suggestion or reservation on his part, and that she was so aware of the law as to impeach the transaction in a court of equity. *Luers v. Brunjes*, 5 Redf. (N. Y.) 32.

A beneficiary agreeing in a judicial proceeding that a trustee, under a lost deed, had power to sell, cannot, after a sale, deny that the power existed. *Jones v. Hudson*, 23 S. Car. 494.

In *Pope v. Farnsworth*, 146 Mass. 339, the court, by Holmes, J., said: "There is no illegality in a *cestui que trust* authorizing an act which otherwise would be a breach of trust toward himself, or in his releasing, or agreeing to hold harmless, his trustee for such an act after it is done."

1. *Mathis v. Stufflebeam*, 94 Ill. 481.

2. See *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Accounting—Settlement and Release*; *Gilman, etc., R. Co. v. Kelly*, 77 Ill. 426; *Cope v. Clarke*, 18 W. R. 279; *Buckeridge v. Glasse, Cr. & Ph.* 135.

3. 2 *Perry on Trusts* (4th ed.), §849.

4. See ESTOPPEL, vol. 7, p. 1; WAIVER; *Davis v. Bowmar*, 55 Miss. 671; *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291; *Butterfield v. Cowing*, 112 N. Y. 486.

The acceptance of a deed from a trustee to his *cestui que trust*, reciting that all the personal assets of the trust estate had been previously transferred to the latter, and conveying to her the real estate, will estop the beneficiary from an action against the trustee for account. *Miller v. Simonton*, 5 S. Car. 20.

A party who insists that land was

bought for him in the name of another, who loaned the money at usurious rates, must acquaint innocent purchasers with the knowledge of such facts, and if he has been ejected from the premises without setting up such facts in his defense, as a notice to others, and has abandoned the premises, declaring an intention to forego all claim thereto, he cannot have an equitable right to pursue subsequent purchasers and recover the land. *Ferguson v. Talmadge*, 20 Ill. 581; *Talmadge v. Kirk*, 20 Ill. 220.

Where there had been a change of trustees for the payment of debts, with the assent of the debtor, it was held that a bill by the debtor against the original trustee, for an account of the trust property, could not be sustained. *Mitchell v. Lenox*, 1 Edw. Ch. (N. Y.) 428.

Where property, conveyed to a trustee for the security of the surety of the grantor, is sold by the trustee, and the proceeds applied to the purposes of the trust, with the consent of the grantor and the beneficiary, it will be presumed to have been rightly applied. *Couch v. Couch*, 9 B. Mon. (Ky.) 160.

If in the answer to a bill to enforce a trust, there are admissions from which the court can execute the trust, so that complainants are not under the necessity of resorting to parol proof of the trust, such admissions will exclude the defendants from the benefit of the statute, unless insisted on in the answer. *Dean v. Dean*, 9 N. J. Eq. 425.

A trustee appointed to sell property under a decree in chancery, and to dispose of the proceeds in accordance with any future decree, and who gives bond accordingly, cannot, in a suit against him upon the bond, for not obeying such decree of disposition, question the cor-

the purchase, is charged with the burden of proving such notice to the *cestui que trust* as amounts to distinct information and acquiescence after the communication of such information.<sup>1</sup>

If, while assuming to act as trustee, he misapplies the trust moneys, he will not be heard to claim that he was not legally a trustee.<sup>2</sup>

**XIX. PROCEDURE—1. In General.**—The subject of procedure, as affecting the execution of trusts, has been touched upon and, to some extent, covered in the earlier volumes of this work under titles treating of equity, equity pleading, and kindred subjects.<sup>3</sup> There is no distinctive practice peculiar to the administration of trusts,<sup>4</sup> and the general rules governing chancery practice and pleading, apply to the procedure in matters of this nature. This department of equitable jurisprudence is intimately related to many of the other branches of that great system of the law, such as fraud, marshalling assets, the establishment of equitable liens, specific performance, injunction, accounts, and receivership.

**2. Jurisdiction.**—The enforcement of trusts and of many of the rights incident thereto is, of necessity, altogether within the jurisdiction of courts of equity; indeed, it is difficult to conceive of a case directly involving the administration of a trust of which a court of common law could properly take cognizance. The execution and enforcement of trusts and trust obligations, the adjustment of disputed rights under them, the investigation and settlement of accounts between parties in confidential relations, the establishing of the existence of a fiduciary relationship, are questions which fall naturally within the primary and exclusive jurisdiction of the chancery courts.<sup>5</sup>

rectness of either decree. *Richardson v. State*, 2 Gill (Md.) 439.

A testamentary trustee is estopped to refuse to account to his beneficiary, on the ground that the will made him an executor also, when he has taken possession of the real estate as well as the personalty, and failed to render an account as executor. *Wooden v. Kerr*, 95 Mich. 188.

A trustee who has appeared in a legal proceeding and gone into the investigation on the merits, will not be heard thereafter to object that an action and not a petition is the proper remedy for the beneficiary to compel the payment of the amount of the improper investment. *Matter of Foster's Will*, 15 Hun (N. Y.) 387.

1. *Miles v. Wheeler*, 43 Ill. 123.

2. 2 Perry on Trusts (4th ed.), § 846; *Rackham v. Suddall*, 16 Sim. 297; *Pearce v. Pearce*, 22 Beav. 248; *Hope v. Liddell*, 21 Beav. 183; *Hennessey v. Bray*, 33 Beav. 96; *Derbishire v. Home*,

3 De G. M. & G. 80; *Life Assoc., etc., v. Siddall*, 3 De G. F. & J. 58.

3. See EQUITY, vol. 6, p. 715; EQUITY PLEADINGS, vol. 6, p. 724.

4. See *Matter of Foster's Will*, 15 Hun (N. Y.) 387.

5. *U. S. v. Gillespie*, 9 Fed. Rep. 74; *Haverstick v. Trudel*, 51 Cal. 431; *Aguisola v. Arnaz*, 51 Cal. 438; *Norton v. Hixon*, 25 Ill. 371; 79 Am. Dec. 338; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Dorsey v. Garey*, 30 Md. 489; *McCartney v. Bostwick*, 32 N. Y. 53. See also *Cooper v. McClun*, 16 Ill. 435; *Hopkins v. Granger*, 52 Ill. 502; *Whitman v. Fisher*, 74 Ill. 147; *Davis v. Hamlin*, 108 Ill. 39; 48 Am. Dec. 541; *Weaver v. Fisher*, 110 Ill. 146; *Reese v. Wallace*, 113 Ill. 589; *Sturgeon v. Burrall*, 1 Ill. App. 537; *Stokes v. Frazier*, 72 Ill. 428.

B bought with the money of A a parcel of land, and took a deed to it in his own name. He then made a dec-

laration of trust, setting forth that he held the land for A's benefit, although he afterward conveyed it without A's knowledge to A's wife. It was held that A could not maintain an action of law against B for a breach of the trust, but must seek relief in equity. *Norton v. Ray*, 139 Mass. 230.

The plaintiff deeded his farm to the defendant to secure a debt, the defendant to hold the farm until the debt was paid. In an action to recover the value of the property and its products, the plaintiff charged in his bill that the trustee had wrongfully sold the property, and the produce grown upon it. It was held that inasmuch as the complaint charged the defendant as trustee, the plaintiff could not be heard to say that the trust was never open, nor that active trust relationship never existed. His remedy was in equity and not at law. *Jasper v. Hazen*, 1 N. Dak. 75.

Trusts are within the jurisdiction of the courts of equity, and the remedies connected with trusts are so closely identified with equitable procedure and practice, that no departure from the practice pursued in those courts can be permitted, unless authorized by statute, or by some special rule of court. *Ledyard's Appeal*, 51 Mich. 623.

Whether a trustee has an equitable right to convey, is a question purely of equitable jurisdiction, and one which a court of law cannot entertain. *Canoy v. Troutman*, 7 Ired. (N. Car.) 155.

Property, the title of which has been made fraudulently to another by the real purchaser, in secret trust for himself, cannot, at law, be subjected to the purchaser's debts, but must be pursued in a court of equity. *Morris v. Rippey*, 4 Jones (N. Car.) 533. See also *Wallace v. Smith*, 2 Handy (Ohio) 78.

A court of law will not notice a resulting trust. *Thompson v. Peake*, 7 Rich. (S. Car.) 353.

A *cestui que trust* cannot maintain an action at law against a trustee, while the trust is still open; his only remedy is by a bill in equity. *Davis v. Coburn*, 128 Mass. 377.

A court of equity would maintain the *cestui que trust* in the possession and use of the property against the trustee's claim, but the court of law, regarding only the legal title, could not enforce this right. *Presley v. Stribling*, 24 Miss. 527.

Trusts do not come within the jurisdiction of a court of law, and the judgment against a trust, in a suit against

the administrator by the next of kin, does not act as a bar to a suit in the court of equity. *Blue v. Patterson*, 1 Dev. & B. Eq. (N. Car.) 457.

Where an administrator or executor refuses to call on the trustee of an estate, the beneficial interest in which is alleged to be in his testator or intestate, equity alone supplies a remedy for the default. *Green v. Collins*, 6 Ired. (N. Car.) 139.

Where a trust results to the debtor in the surplus of chattels assigned for the payment of debts, it can be reached only in equity. *McDermutt v. Strong*, 4 Johns. Ch. (N. Y.) 687.

Where an executor, administrator, or trustee purchases the estate which he himself sells, the purchase cannot be avoided at law, except for actual fraud; the remedy is found in equity. *Yeackel v. Litchfield*, 13 Allen (Mass.) 417; 90 Am. Dec. 207.

There is no adequate remedy against a board of trustees for violating a trust by *quo warranto* brought by a private individual. That tries the right only, and gives no sufficient relief for such breach. The remedy lies only in a court of chancery. *Dart v. Houston*, 22 Ga. 506.

In *Mississippi*, if the testamentary trusts are such as to require equitable interference, the fact that they are created by will is no bar to the jurisdiction of equity. The fact that the probate court cannot give full relief in case of such trust, gives jurisdiction to the court of equity. *Wade v. American Colonization Soc.*, 7 Smed. & M. (Miss.) 663; 45 Am. Dec. 324.

A trustee, as such, is, in general, to be sued only in equity. But, choosing to bind himself by a personal covenant, he is liable at law for a breach of such covenant, just as any other person would be, even though he adds "as trustee" to his signature. *Duvall v. Craig*, 2 Wheat. (U. S.) 45.

The beneficiary who seeks to hold the trustee for negligence, must sue in equity, not at law. *Hukill v. Page*, 6 Biss. (U. S.) 183.

A court of equity will take jurisdiction, where a bank has sued its cashier for misappropriation of money in violation of his duty. The relation of the *cestui que trust* and trustee existing between them is sufficient to give jurisdiction. *Merchants' Bank v. Jeffrey*, 21 W. Va. 504. But compare *Appeal of McMullen*, 130 Pa. St. 370, to the contrary.

It is peculiarly the province of the chancery court to give relief where a trustee, for the benefit of creditors, commits an error, or acts in bad faith in the administration of trusts. *Goncelier v. Foret*, 4 Minn. 13.

The courts of chancery of *Ohio* are vested with jurisdiction of testamentary trusts for the benefit of the poor. *Landis v. Wooden*, 1 Ohio St. 160.

A court of equity has the same jurisdiction over security trusts, that it ordinarily possesses and exercises over other trust estates. *Van Houten v. McKelway*, 17 N. J. Eq. 126.

Equity has jurisdiction in cases of breach of trusts of an official character. *Norton v. Hixon*, 25 Ill. 371; 79 Am. Dec. 338.

Equity has an inherent jurisdiction over trusts for charitable purposes, such as building churches. *Hopkins v. U p s h u r*, 20 Tex. 89; 70 Am. Dec. 375.

Questions involving the administration of trusts, are matters of original and special equity jurisdiction; thus, in *Congdon v. Cahoon*, 48 Vt. 49, where the deeds of trust created, made the defendants trustees of expressed trusts in favor of several persons, and imposed special duties upon them in relation to the trust property, and provided that, in a certain event, it should go on in equal shares to all the beneficiaries, it was held that one of the beneficiaries could not, upon the happening of the event, maintain an action in *assumpsit*, against the trustees for her share, but that she must seek relief in chancery, for there the rights of law could be ascertained and settled.

The supreme court has jurisdiction over implied as well as over expressed trusts, in cases where the courts of law afford no adequate remedy. *Wright v. Dame*, 22 Pick. (Mass.) 55.

A suit against a bank for improper disposition of a special deposit, which had been made by the plaintiff's agent, is to charge the defendant with a breach of trust, and therefore is of equitable cognizance. *Manhattan Bank v. Walker*, 130 U. S. 257.

A devised estate charged with payments of the debts of the testator, is a trust fund, and may be reached in equity. *Rochester v. Buford*, 5 J. J. Marsh. (Ky.) 32.

Where a trust is clearly defined, and there exists a trustee capable of holding the property and executing the trust, equity has jurisdiction by its inherent

authority. *McIntire Poor School v. Zanesville, etc., Canal Co.*, 9 Ohio 203.

Where the legal title to property is vested in a naked trustee, the matter, as between the trustee and the *cestui que trust*, is peculiarly within the province of the court of chancery. *Brown v. Wright*, 4 Yerg. (Tenn.) 57.

The enforcement of a specific execution of a trust, declared by parol in relation to real property, if plain and unambiguous in its terms, and established by satisfactory evidence, comes within the jurisdiction of the court of equity. *Haywood v. Ensley*, 8 Humph. (Tenn.) 460.

Equity always has jurisdiction to enforce a trust, and for this purpose may appeal to the conscience of the trustee, and the ability to establish a trust by other evidence, does not impair the jurisdiction of the court to enforce it. *Coates v. Woodworth*, 15 Ill. 654.

The jurisdiction of a court of chancery over a trust, to enforce it, and prevent further abuse of it by removal of the delinquent trustee, is not to be doubted. *Lasley v. Lasley*, 1 Duv. (Ky.) 117.

It is peculiarly within the jurisdiction of a court of chancery to enforce trusts, upon the application of persons interested, and in general when it becomes necessary to appoint a trustee to prevent the failure of a trust, and to execute the same. *Callis v. Ridout*, 7 Gill & J. (Md.) 1.

The jurisdiction of chancery over trusts can be taken away, only by showing a complete execution of the trust. *Jordan v. Jordan*, 2 L. Repos. (N. Car.) 292.

The *Georgia* Code, § 1970, provides that upon the rendition of a judgment upon a mortgage note, the grantee may record a deed of the land to the defendant, and then the land may be sold to satisfy such judgment, which shall have priority over all other judgments against the defendants.

It was held in *Thomas v. American Freehold Land, etc., Co.*, 47 Fed. Rep. 550, that such a proceeding must be brought in equity, and not in a federal court of law. *Following New England Mortgage Security Co. v. Gay*, 33 Fed. Rep. 636, and *Alexander v. Scotland Mortgage Co.*, 47 Fed. Rep. 131.

Upon the death of a testamentary trustee, his successor in the trust cannot hold the decedent's administrator liable in an action at law, but must call him to account for the trust fund in a court

The disposition of trust funds is within the jurisdiction of equity,<sup>1</sup> as well as the prevention of a diversion of the trust fund.<sup>2</sup>

The remedy for a breach of trust in the application of moneys is by a bill in equity, and not by an action at law for the recovery of the money.<sup>3</sup>

The rule which limits the jurisdiction of courts of equity to cases where there is no adequate remedy at law, does not, speaking generally, apply to the case of a trust, as there equity has a natural and primary jurisdiction, superadded to any legal rights that the suitor may have, and concurrent with them.<sup>4</sup> This

of equity. *Curtis v. Smith*, 6 Blatchf. (U. S.) 537.

During his lifetime, the testator gave his note to the complainant, with the understanding that the testator's wife would pay it out of her inheritance from him. It was held that the enforcement of this trust was by an equitable proceeding, rather than by an action at law. *Buckingham v. Clark*, 61 Conn. 204.

Where debts are, by will, made a charge on real estate, equity will assume jurisdiction, on the ground of trust, without prior action by the probate court, trust being an original ground of equity jurisdiction. *Harris v. Douglas*, 64 Ill. 466.

Corporate assets being a trust fund, the forum for its enforcement is a court of equity, and this is especially true where they constitute a joint trust after paying all its creditors. *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79.

Where a trustee has received funds belonging to a testamentary trust, the jurisdiction to order an accounting is in a court of chancery, and not in a probate court. *McBride v. McIntyre*, 91 Mich. 406.

When, after the dedication of land as a public park, the owner, in violation of the trust, attempts to reclaim it, mortgaging it and otherwise asserting ownership, the remedy of the municipality, and persons who have purchased lots in faith of the dedication, is in equity. *Maywood Co. v. Maywood*, 17 Ill. App. 253; 118 Ill. 61.

1. *Pacific R. Co. v. Atlantic, etc., R. Co.*, 20 Fed. Rep. 277; *John Crossley Sons v. New Orleans*, 20 Fed. Rep. 352; *Stokes v. Frazier*, 72 Ill. 428; *Ryder v. Sisson*, 7 R. I. 341.

A court of equity has jurisdiction in matters of account; first, where there is a fiduciary relation between the parties; second, where the account is so complicated that it cannot be con-

veniently taken in an action of law. *Pacific R. Co. v. Atlantic, etc., R. Co.*, 20 Fed. Rep. 277, citing *Fowle v. Lawrason*, 5 Pet. (U. S.) 495; *Mitchell v. Great Works Milling, etc., Co.*, 2 Story (U. S.) 648; *Badger v. McNamara*, 123 Mass. 117; *O'Conner v. Spaight*, 1 Sch. & Lef. 305.

2. *Aurora v. Chicago, etc., R. Co.*, 19 Ill. App. 360; 119 Ill. 246.

3. *Bureau County v. Thompson*, 39 Ill. 566.

4. *McC Campbell v. Brown*, 48 Fed. Rep. 795; *Coates v. Woodworth*, 13 Ill. 654; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Howell v. Moores*, 127 Ill. 67; *Hubbard v. U. S. Mortgage Co.*, 14 Ill. App. 40; *First Congregational Soc. v. Trustees, etc.*, 23 Pick. (Mass.) 148; *Henderson v. Hoke*, 1 Dev. & B. Eq. (N. Car.) 138; *Hall v. Harris*, 3 Ired. Eq. (N. Car.) 289.

Thus, under the *Kentucky* Act requiring trustees to give bond, and authorizing suit thereon for any breach of duty, the party aggrieved is not limited to his remedy upon the bond, but may sue in equity for an accounting. *Laurel County Ct. v. Laurel County Seminary* (Ky. 1892), 20 S. W. Rep. 258.

It is no bar to a bill in equity to enforce a trust, that an action at law, for money had and received, might be sustained. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460; 30 Am. Dec. 103; *New York Ins. Co. v. Roulet*, 24 Wend. (N. Y.) 505.

The enforcement of a pure trust comes within the original equity jurisdiction, and does not depend upon a condition that the beneficiary has exhausted his remedy by judgment, and execution returned unsatisfied against his debtor. *Sweeny v. Sheridan*, 37 N. Y. Super. Ct. 587.

A testamentary trustee may maintain a bill in equity for the possession of lands devised to him for the use of

rule may be subject to modification where the statute confers equity jurisdiction only where the remedy at law is not plain, adequate, and complete.<sup>1</sup>

Equity will assume no authority where it appears that the trust is being properly administered.<sup>2</sup>

Occasionally a right may spring out of a trust relationship, of which, at the most, the trust itself is but an incident and not an essential feature, as where the controversy is over a simple legal demand and the parties to it happen to occupy a fiduciary position toward one another. The mere fact that the property involved is trust property, or that one of the disputants is a trustee or a beneficiary in some trust which is not actually in question in the controversy, will not oust the common-law courts of their proper power of adjudication.<sup>3</sup>

It is not necessarily a ground of equitable jurisdiction that a confidence has been reposed. Thus, the giving of credit on this

those entitled to the beneficial interest in them, although he might have brought ejectment at law. *Harrison v. Rowan*, 4 Wash. (U. S.) 202.

1. *Maury v. Mason*, 8 Port. (Ala.) 217; *Kimball v. Moody*, 27 Ala. 130.

The *Massachusetts* rule limits the equitable jurisdiction to cases where the parties cannot have a plain, adequate, and complete remedy at common law. *Wright v. Dame*, 22 Pick. (Mass.) 55; *Frue v. Loring*, 120 Mass. 507.

In *Taylor v. Turner*, 87 Ill. 296, it was held that there was no equitable jurisdiction in a case of bailment to a factor in trust to sell, upon his refusal to pay over the proceeds to the person entitled, as upon the ground of trust, the legal remedy being ample.

When a trustee, in two characters, has the means of committing fraud as trustee and purchaser both, a court of equity will interfere, and not compel the party to wait until the mischief is done. But where there is an adequate remedy at law, courts of equity will not interpose. *Powles v. Dilley*, 9 Gill (Md.) 222.

2. *Myers v. School Trustees*, 21 Ill. App. 223.

3. If the trustee chooses to bind himself by a personal covenant, he is liable at law for a breach thereof, even though he described himself in the covenant as trustee. *Duvall v. Craig*, 2 Wheat. (U. S.) 45. See generally, *Hall v. Bryan*, 50 Md. 194; *Frue v. Loring*, 120 Mass. 507.

The mere circumstance that a trust is created on certain property, does not

give a court of chancery jurisdiction to settle disputes arising with regard to the title. *Colburn v. Broughton*, 9 Ala. 351.

A trustee is not allowed to come into chancery to collect purely legal demands, when a remedy at law is adequate, specific, and perfect. *Kimball v. Moody*, 27 Ala. 130.

For injury done to trust property by a stranger, the trustee's remedy is at law, and not in equity. *Meridith v. Hickman*, 1 A. K. Marsh. (Ky.) 242.

Where property conveyed in trust is seized and sold on execution, at the instance of a party not claiming under the trust, a bill in equity will not lie by the trustees or beneficiary against the purchasers, to recover the property; their remedy is at law. *Sheppards v. Turpin*, 3 Gratt. (Va.) 373; *Marriott v. Givens*, 8 Ala. 694; *Bissell v. Lindsay*, 9 Ala. 162.

If a trustee who has power to sell, but not to mortgage, mortgages the trust estate, the remedy of any one who claims, either in his own right or as trustee, under the beneficiary, is at law, and not in equity. *Peabody v. Harvard College*, 10 Gray (Mass.) 283.

**Accounts.**—In *Frue v. Loring*, 120 Mass. 507, the court, by Colt, J., said, in denial of the equitable jurisdiction: "Nor can this bill be maintained under the jurisdiction given to this court in suits upon accounts, when the nature of the account is such that it can not be conveniently and properly adjusted and settled in an action at law. It is not shown by sufficient distinct allegations that there is any particular

theory will not become the basis of equitable jurisdiction;<sup>1</sup> nor will equity assume jurisdiction where one merely holds money which of right belongs to another, and there is no duty except to pay it over.<sup>2</sup> The nature and extent of the trust cannot be inquired into collaterally in an action at law,<sup>3</sup> nor can the acts of a trustee *de facto* be questioned collaterally.<sup>4</sup>

It is a familiar rule of equity that jurisdiction once acquired is retained by the court until entire justice may be done to all parties. So the stricter rules of law are not recognized where they would tend to limit the jurisdiction inequitably. And rights apparently unconnected and foreign are oftentimes adjusted by the chancellor, if his assumption of jurisdiction in this fashion will prevent a multiplicity of suits and in the end facilitate justice.<sup>5</sup>

difficulty in ascertaining the true state of the account between the parties.

It is said that courts of equity will decline to take jurisdiction under this head where the accounts are all on one side; or where there is a single matter on the side of the plaintiff and mere set-offs on the other side, and no discovery is sought." *Citing Locke v. Bennett*, 7 Cush. (Mass.) 449.

A party who, in ignorance of the trust, furnishes goods to a trustee to carry on a trust business, which is improved thereby, may, under *Georgia Code*, 3377, recover his debt out of the trust estate in an action at law. *Moore v. Lampkin*, 63 Ga. 748.

The mere fact that one loaning money takes a note payable to a *feme covert*, in trust for himself, will not invest a court of equity with the jurisdiction of a suit by his executor against the debtor and the husband and wife, there being no allegation in the bill that husband or wife interpose any impediments to a recovery at law by suit in their name. *Rowland v. Logan*, 11 Ala. 663.

An action for money had and received, lies by a beneficiary against his trustee, where the money should be paid over on demand. *Derome v. Vose*, 140 Mass. 575.

The interposition of a court of equity is not necessary, where a trust fund has been misapplied. The beneficiary may follow it at law as far as he can trace it. *U. S. v. State Nat. Bank*, 96 U. S. 30.

Where the president of a bank has misappropriated the funds of the bank, he is not a trustee in the sense that a court of equity will have jurisdiction over a suit against him for the misappropriation of the funds. *Warner v. McMullin*, 131 Pa. St. 370.

But in *Merchants' Bank v. Jeffries*, 21 W. Va. 504, it was held that in a suit by a bank against its cashier for a wrongful use of its funds, equity had jurisdiction growing out of the relation between the cashier and the plaintiff bank.

An action at law will lie for the recovery of money held under a parol trust, when the trust has been performed so far that nothing remains to be done by the trustee but to distribute the money. *Chase v. Perley*, 148 Mass. 289.

The jurisdiction of equity, as to trusts, ought to be confined to cases of controlling legal rights, vested and remaining in trustees, created as such in some proper mode, and should not be extended to all cases of abused confidence. *Ashley v. Denton*, 1 Litt. (Ky.) 86.

A bill for relief cannot be brought in equity against an agent, under the head of a trust, where the agency is wholly closed, and no duty remains to be done by the agent. *Baker v. Biddle*, Baldw. (U. S.) 394.

Where the trust is completely executed, and the balance remaining in the trustee's hands is a sum certain, an action will lie at law against him for money had and received. *McLaughlin v. Swann*, 18 How. (U. S.) 217.

1. *Steele v. Clark*, 77 Ill. 471.

2. *Hindman v. Aledo*, 6 Ill. App. 436.

So held in *Douglass v. Martin*, 103 Ill. 25, where the trust sought to be enforced arose out of the deposit of money to be paid over to an attorney, upon condition that he procure the discharge of a third person from arrest; otherwise to be returned to the depositor. The remedy is at law.

3. *Hall v. Bryan*, 50 Md. 194.

4. *Hodgdon v. Shannon*, 44 N. H. 572.

5. *Norris v. Hassler*, 22 Fed. Rep. 401.

As a rule, courts of equity have no extra-territorial jurisdiction, that is to say, they will not assume jurisdiction where all the parties, as well as the trust property, are beyond the limits of the state.<sup>1</sup> But after the court has first acquired jurisdiction of a

And see *Duncan v. Grafflin*, 26 N. J. Eq. 228.

A court of chancery may adjust in a single suit the rights of all the parties who complain of violation of trusts growing out of the same transaction, when an inquiry into one involves an investigation of the others. *Cleghorn v. Love*, 24 Ga. 590.

Trusts between the same parties were created by three different instruments, by the first and second of which the trustee was to receive the rents and profits of the real estate and the personal property, and by the last the trustee was to supply to the *cestui que trust* necessary board and maintenance. It was held that these instruments contained only one transaction, and could not well be effectually closed up by separate suits, one in reference to the real and another to the personal estate; and as a single action for this purpose would lie if both the parties were alive, there was no good reason why it should not be brought in the names of the personal representatives and heirs-at-law of the beneficiary against the trustee's representatives; that is, his widow and heirs-at-law. Nor is it a valid objection to this mode of proceeding that it asks a conveyance of the real estate acquired by the trustee to the parties entitled thereto; this being only a result which follows an accounting for the profits and rents of the real estate, and not an independent cause of action. *Richtmyer v. Richtmyer*, 50 Barb. (N. Y.) 55.

A trustee to whom a debtor's property has been conveyed in trust for the payment of all debts, not specifying them, cannot as a rule bring suit against a particular judgment creditor, who holds a lien on part of the land, to ascertain whether this particular judgment has been paid in whole or in part. In order to avoid multiplicity of suits, however, he may in a proper case proceed as by a creditor's bill to ascertain all liens, etc. *Ambler v. Leach*, 15 W. Va. 677.

1. *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487.

In *McCullough v. McCullough*, 44 N. J. Eq. 313, the trustees resided in *Minnesota*, but were appointed in *New*

*Jersey* and required to account in *New Jersey*. The *cestuis que trustent* resided respectively in *New Jersey* and in states distant from *Minnesota*. Proceedings were instituted by the trustees asking instructions as to investments. The court, by McGill, Chancellor, said: "The courts of a state, within which a trustee must account, should hesitate to sanction an investment upon the security of lands that are not within their own jurisdiction, not merely because in such case they will be left without proper facilities to obtain accurate and satisfactory information concerning the investment, but also because they will lose direct control of the fund itself. Where the trustee is without the jurisdiction, it becomes more important that the fund should be within it, for otherwise the courts may find themselves stripped, not only of power to properly investigate the condition of the trust, but also of power to enforce their decrees. . . . In the case under consideration, the trustees reside and have the trust funds in a state distant from the state of the courts to which they must account, and distant from the residences of their *cestuis que trustent*. The continuance of such a condition of affairs must be condemned. If it remains, the happening of circumstances may readily be imagined that may not only put the beneficiaries of the trust to great annoyance, disadvantage, and expense, but also render our courts powerless to do them material service." The courts will not direct nor approve an investment of trust funds out of the jurisdiction, unless such investment is plainly authorized by the instrument creating the trust, *Gray v. Lynch*, 8 Gill (Md.) 403; *Amory v. Green*, 13 Allen (Mass.) 413; *Brown v. French*, 125 Mass. 410; 28 Am. Rep. 254; *Hogan v. DePeyster*, 20 Barb. (N. Y.) 100; *Rush's Estate*, 12 Pa. St. 375; *Coltrane v. Worrell*, 30 Gratt. (Va.) 434; *Lamar v. Nicou*, 112 U. S. 452; *Stuart v. Stuart*, 3 Beav. 430; *Miles' Will*, 27 Beav. 579; *Bethell v. Abraham*, L. R., 17 Eq. 24; or unless such investment is allowed by statute. *Ex p. Paule*, 1 Phil. 570; *Brackenbury's Trust*, 31 L. T. N. S. 79; *Kirkpatrick's Trust*, 15 Jur. 91; *Ex p. French*, 7 Sim.



part of the trust estate, it is entitled to administer the whole of it, even though a portion lies within the domain of another court.<sup>1</sup>

If a suit has been prematurely brought, the court will not entertain jurisdiction, but will allow the bill to be dismissed without prejudice.<sup>2</sup>

**3. Parties<sup>3</sup>—a. WHO MAY SUE.**—Only those who have some substantial interest in the administration of the trust are entitled to bring suit to enforce it or to establish rights arising under it. To this end a stranger has no standing in a court of equity.<sup>4</sup>

510; *Norris v. Wright*, 14 Beav. 291. But compare *Wilcox v. Morrison*, 9 Lea (Tenn.) 699. In this case the settlor, the trustee, and the *cestui que trust* all resided in *Virginia*, in which state the real estate conveyed was also situated. A judgment in a *Tennessee* court was embraced in the trust, and when the rest of the trust fund had been disposed of, the settlor filed his bill in the *Tennessee* court of chancery, seeking to have the trust executed to the trustee's account. It was held that the *Tennessee* court had jurisdiction.

A bill in chancery may be entertained in *Kentucky* against one who is an administrator in another state, and has received "rents accruing since the death of the intestate." Where the heirs are infants and reside in *Kentucky*, he will be considered as trustee. *Atchison v. Lindsey*, 6 B. Mon. (Ky.) 86.

1. *Owens v. Ohio Cent. R. Co.*, 20 Fed. Rep. 10. In this case the court, by Jackson, J., said: "But one question remains unnoticed, and that is, can this court extend its jurisdiction over the defendant company's property beyond its geographical or territorial jurisdiction? This is a trust estate, and must be administered as an entirety for the protection of all concerned. It is well settled that the court that first takes jurisdiction of a part of a trust estate has the legal right to administer upon the whole. It follows that this court, having prior jurisdiction over that portion of the trust estate found in this circuit, by reason of the jurisdiction thus acquired has the right to administer upon that portion of the trust estate lying between the Ohio River and Corning, Ohio."

2. So held where, owing to a pending suit and other circumstances, the time was not ripe for the relations of the trustee to his beneficiaries to be passed upon, or for a settlement to be compelled. *Albright v. Oyster*, 22 Fed. Rep. 628.

In *Nichols v. Rogers*, 139 Mass. 146, where persons interested in a mine agreed in writing that one of them was to have the "sole, absolute, and untrammelled control" of their respective interests, with authority to distribute them from time to time, as he should deem best, provided he reserved some interest to the parties; and to spend the money contributed by those interested according to his best judgment, in order to serve their interests, a bill brought in equity within six months after the agreement, to compel the holder of the various shares to convey to the plaintiff the share he was entitled to, being held premature, was dismissed.

3. See a discussion of this branch of the subject in *EQUITY PLEADINGS*, vol. 6, pp. 750-751; *PARTIES TO ACTIONS*, vol. 17, p. 552.

4. *Perry on Trusts*, § 873; *White v. Haynes*, 33 Ind. 540; *Tucker v. Palmer*, 3 Brev. (S. Car.) 47.

A stranger to a deed of trust cannot be heard to complain of informalities and irregularities in the execution of the powers conferred by it. *Marston v. Rowe*, 43 Ala. 271.

In a suit in the nature of a bill in equity to enforce a trust, it appeared that the plaintiff had no direct interest whatever in the enforcement of the trust, but that there was merely a possibility that in case of its enforcement, the plaintiff might become a beneficiary of the trust. It was held that this was not a sufficient interest on the part of the plaintiff to support the suit. *Female Assoc. v. Beekman*, 21 Barb. (N. Y.) 565.

By the terms of a will it was provided that a trustee should hold certain property for the benefit of the children of complainants and of the wife of the trustee, until the death of the last survivor of complainants and the wife, at which time it should be divided equally among the said children or their rep-

The trustee, where he is willing to take the necessary step, is the only proper plaintiff in suits instituted for the protection or preservation of the trust property.<sup>1</sup> Such suits, if brought at the

representatives. Complainants filed their bill against the trustee, alleging waste, mismanagement, and his insolvency, and praying an injunction and the appointment of a receiver. It was held that complainants had no interest in the property covered by the testator's will, and hence could not sue; also that, should the children for whose benefit the trust was created be made parties, the court should interfere to protect the trust property for their benefit. *Hayles v. Farmer*, 58 Ga. 324.

1. As to the power of the trustee to sue, see *supra*, this title, *Powers, Duties, and Liabilities of the Trustee—Scope and Limitations*. See also PARTIES TO ACTIONS, vol. 17, p. 552 *et seq.*

The trustee of an express trust may sue in his own name. *Merchants' Bank v. McClelland*, 9 Colo. 608; *Clark v. Fosdick*, 118 N. Y. 7; 16 Am. St. Rep. 733; *Lake v. Albert*, 37 Minn. 453; *Wolcott v. Standley*, 62 Ind. 198. See *Hawes on Parties to Actions*, § 32, and cases cited; *Wetmore v. Hegeman*, 88 N. Y. 69; *Winters v. Rush*, 34 Cal. 136; *Harney v. Dutcher*, 15 Mo. 89; 55 Am. Dec. 131; *Pearce v. Twichell*, 41 Miss. 344; *Weaver v. Wabash, etc., Canal*, 28 Ind. 112.

#### Who Is "Trustee of an Express Trust."

—A person with whom or in whose name a contract is made for the benefit of another, is a "trustee of an express trust." So held where ostensible partners sued without joining dormant partners in the action. *Platt v. Iron Exch. Bank*, 83 Wis. 358.

Citizens appointed at a town meeting to collect money subscribed for the use of the town, and who apply it to public purposes, are "trustees of an express trust," within the meaning of the *Indiana* statute, and may sue in their own names for such money. *Dix v. Akers*, 30 Ind. 431.

But one who contracts merely as the agent of another, and has no personal interest in the contract, is not the "trustee of an express trust" within the meaning of this statute, and cannot as such sue in his own name. *Rawlings v. Fuller*, 31 Ind. 255.

In *Ryan v. Bibb*, 46 Ala. 323, a husband who had received from his wife's guardian, funds belonging to the wife, and appropriated them to the purchase

of real estate to be held by him in his own name, made a *bona fide* conveyance of this property to a trustee for his wife's use. It was held that the trustee's interest in the property was sufficient to enable him to maintain trover for its conversion.

Trustees appointed under a law of another state to take charge of the assets, collect the debts, etc., of a dissolved corporation, are allowed to bring suit against its debtors in *Louisiana*. *Planters' Bank v. Bass*, 2 La. Ann. 430.

A trustee appointed by the orphans' court, in place of a deceased trustee, may maintain an action for money had and received by a third person for the benefit of the trust estate, though the money was received before his appointment. *Budd v. Hiler*, 27 N. J. L. 43.

The charter of the *Planters' Bank* at Natchez created the commissioners of the sinking fund trustees of the fund, and empowered them to loan the same on interest, and to maintain suits for the recovery of the same; but it was held that in such actions, they must allege that they are sinking-fund commissioners, and that they are incumbents of the office, and entitled by law to act as such commissioners. *Sinking Fund Commissioners v. Walker*, 6 How. (Miss.) 143.

While a trustee, who has wrongfully mortgaged trust property, is liable to the *cestui que trust* for the loss sustained thereby, even though in the honest belief that he was acting for the best, yet he has such a pecuniary interest as will authorize him to bring a suit to restrain a statutory foreclosure of the mortgage. *Brown v. Cherry*, 56 Barb. (N. Y.) 635; 38 How. Pr. (N. Y.) 352; 38 Am. Dec. 433.

In a suit by the trustee of an express trust, it is not necessary that the name of the beneficiary should appear in the caption. *Phillips v. Ward*, 51 Mo. 295.

A trustee may maintain an action of *assumpsit* for money had and received for rent of the beneficiary collected and in the hands of his agent. *Beardslee v. Horton*, 3 Mich. 560.

Trustees holding deeds for *cestuis que trustent* are vested with such an interest as will enable them to enforce the agreement on which the deed was

instance of the beneficiary, are, nevertheless, brought in the name of the trustee, and in most cases with his consent, or in conjunction with him.<sup>1</sup>

A bill brought by the *cestui que trust* in his own name is not

founded. *Moale v. Buchanan*, 11 Gill & J. (Md.) 314.

A trustee, in a trust deed made in another state, may follow the trust property to *Texas* and enforce the trust by suit without making the beneficiaries parties. *Givens v. Davenport*, 8 Tex. 451.

At law, a trustee is, for all purposes, vested with a fee simple, and may bring suit for an injury to the estate without reference to the interest of the *cestui que trust*. *Mordecai v. Parker*, 3 Dev. (N. Car.) 425.

Trustees may maintain detinue for trust estates. *Baker v. Washington*, 5 Stew. & P. (Ala.) 142.

Whether a survivor of several trustees can or cannot execute alone all the duties and powers of the trust, he may yet maintain a suit in his name. *Richeson v. Ryan*, 15 Ill. 13.

Where promissory notes are made payable to A and B, trustees by appointment of the court, or to their successors in trust, a successor in the trust is not able to maintain an action on the notes in his own name, but must sue in the name of A and B. *Ingersoll v. Cooper*, 5 Blackf. (Ind.) 426.

Where a husband had incumbered his real estate by an ante-nuptial decree, his widow, who was administratrix of his estate, was held to possess such an interest in the land so incumbered as to entitle her to institute proceedings in a court of equity to restrain the administrator of the deceased trustee from intermeddling with it or with the trusts connected with it. *Ready v. Hamm*, 46 Miss. 422.

In *Paget v. Pease*, 23 Abb. N. Cas. (N. Y.) 290, it was held (Macomber, J., *dissenting*) that a trustee who held the legal title to the reversionary interest, was the proper plaintiff in an action for its protection, and certainly a necessary party to the proceeding in the absence of a special showing to the contrary.

Where a debtor conveys personal property to a trustee to secure to the creditor the payment of a debt, and a person gets possession of the property and applies it to his own use, the beneficiary can maintain no action at law in his own name against the parties so

converting it; the trustee must bring the action. *Poage v. Bell*, 8 Leigh (Va.) 604.

Trustees for the payment of legacies and debts may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, and the decision of the court, when fairly obtained, will bind the rights of the creditors and legatees against the trustees. *Miles v. Davis*, 19 Mo. 408.

A trustee entitled to the rents and profits of the trust property may sue therefor in his own name. *Ponder v. McGruder*, 42 Ga. 242.

A note to A and B, as trustees of a corporation, must be sued in their names as such, and not in the name of the corporation. *Binney v. Plumley*, 5 Vt. 500; 26 Am. Dec. 313.

One trustee may by an action call upon his co-trustee to account. *Vose v. Galpen*, 18 Abb. Pr. (N. Y.) 96; *Bartlett v. Hatch*, 17 Abb. Pr. (N. Y.) 461.

1. A trustee may either bring suit in his own name or in conjunction with his *cestui que trust*. *Harris v. McBane*, 66 N. Car. 334.

A trustee and a *cestui que trust* may unite in a bill for the recovery of the trust estate. *Jennings v. Davis*, 5 Dana (Ky.) 127.

It is unnecessary, in order to enable the *cestui que trust* to maintain a suit in the name of the trustee, that the trustee should expressly authorize the suit. *Chambersberg Ins. Co. v. Smith*, 11 Pa. St. 120.

Where an action is to be brought for funds deposited in a bank by a trustee against the personal representatives of the depositor, it may be carried on with the *cestui que trust's* consent and by the trustee appointed to succeed the depositor, though the beneficiary could have sued in her own name. *Macy v. Williams*, 55 Hun (N. Y.) 489.

A claim against an executor for the recovery of property left in trust by his testator can only be presented by the trustee and not by the *cestuis que trust-ent* or their guardian. *Richardson v. Frederitze*, 35 Mo. 266.

Where a township trustee loans money of the town and takes a note therefor,

bad on demurrer because so brought, where it appears in the bill that the trustee has acquired an adverse interest and has been made a defendant.<sup>1</sup> Where there is more than one trustee, all should join.<sup>2</sup> But the failure of one to join in the suit will not deprive the others of their right of action.<sup>3</sup> Where one of the trustees has committed a breach of trust, his co-trustees may sue to restore the property, without the *cestuis que trustent* being made parties to the suit.<sup>4</sup>

If the trustee be merely nominally in charge of the trust property, the general rule forbids his litigating matters in his own name relating to the trust without joining with him all who are beneficially interested. But this rule has its exceptions and modifications.<sup>5</sup>

Where the party named as trustee in the trust deed seeks to

payable to himself, the town cannot bring an action on the note. *Robins v. Dishon*, 19 Ind. 204.

The trustee, as the holder of a legal title to the reversionary interest, is the proper party to bring an action to protect it, and, in the absence of special circumstances, it cannot be said that he is not a necessary party. *Macomber, J., dissenting*; *Paget v. Pease*, 23 Abb. N. Cas. (N. Y.) 290; 17 Civ. Pro. Rep. (N. Y.) 324.

Upon suit being instituted, under the Burnt Records Statute of *Illinois*, to establish title to real estate, the trustee may sue with the consent of the beneficiary without making him a party. *Harding v. Fuller*, 141 Ill. 308.

A *cestui que trust* may sue at law in the name of the trustee, whenever necessary for the protection of the trust property, and the trustee can neither release the right of action, nor dismiss the suit, although he may ask indemnity against costs. *Somerville v. Johnson*, 36 N. J. Eq. 211.

If the trustee refuses to bring suit in a proper case, the beneficiary may sue. *Owens v. Ohio Cent. R. Co.*, 20 Fed. Rep. 10.

1. *Webb v. Vermont, etc., R. Co.*, 9 Fed. Rep. 793.

Generally, as to the trustee's power to sue, see *Ryan v. Bibb*, 46 Ala. 323; *O'Neill v. Henderson*, 15 Ark. 235; 60 Am. Dec. 568; *Worthy v. Johnson*, 10 Ga. 358; 54 Am. Dec. 393; *Leach v. Thomas*, 27 Ill. 457; *Governor v. Woodworth*, 63 Ill. 254; *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531; *Bardstown, etc., R. Co. v. Metcalf*, 4 Metc. (Ky.) 199; 81 Am. Dec. 541; *Lahy v. Holland*, 8 Gill (Md.) 445; 50 Am. Dec. 705; *Harney v. Dutcher*,

15 Mo. 89; 55 Am. Dec. 131; *Corning v. Greene*, 23 Barb. (N. Y.) 33; *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204; *Oatman v. Barney*, 46 Vt. 594.

2. *Perry on Trusts*, § 885; *Holland v. Baker*, 3 Hare 68; *Thatcher v. Candee*, 4 Abb. App. Dec. (N. Y.) 387.

3. Where certain assets were assigned to trustees, and among them a note made by three persons, one of them being one of the trustees, it was held that the payment of the note could be enforced in equity at the suit of the other trustees. *Faulkner v. Thompson*, 14 Ark. 478.

The survivor of several co-trustees may maintain a suit alone, where the right of action survives, whether he can alone execute all the duties of the trust or not. *Richeson v. Ryan*, 15 Ill. 13.

4. *Perry on Trusts*, § 884; *Wood v. Brown*, 34 N. Y. 337; *McGregor v. McGregor*, 35 N. Y. 218.

5. *Stillwell v. McNeely*, 2 N. J. Eq. 305; *Willink v. Morris Canal, etc., Co.*, 4 N. J. Eq. 377; *Malin v. Malin*, 2 Johns. Ch. (N. Y.) 238.

Where a bill filed by trustees seeks the sale of land vested in them in trust, and they have not a present absolute power of disposition over their estate, according to the terms of the trust, their *cestuis* are necessary parties. *Smith v. Gaines*, 39 N. J. Eq. 545.

A *cestui que trust*, after reaching her majority, can maintain an action in her own name, for waste to her premises, without the legal title being conveyed to her, even though there is a provision in the trust deed that they shall be conveyed to her. *Wyant v. Dieffendafer*, 2 Grant Cas. (Pa.) 334.

In *Willink v. Morris Canal, etc., Co.*,

recover the subject-matter thereof, he may do so in his individual capacity without describing himself in the bill as trustee.<sup>1</sup>

And under the *Missouri* statute permitting the trustee of an express trust to bring suit in his own name, one who is made the payee of a note, as trustee for another, may sue upon the note in his own name after the *cestui que trust* has died, if no administrator has been appointed.<sup>2</sup>

Where the beneficiaries are so numerous that it would not be practicable to make them all parties to the proceeding, the trustee may sue in his own name without joining with him all the *cestuis que trustent*.<sup>3</sup>

Suits for the possession of real estate are properly brought by the party entitled to the possession, whether he be trustee or *cestui que trust*. Thus, the trustee holding the legal title to the land is the proper plaintiff to maintain trespass thereon.<sup>4</sup> But the

4 N. J. Eq. 377, the court said: "The undeniable general rule in equity is, that a nominal trustee cannot bring a suit in his own name alone, but must associate with it the names of the persons having the beneficial interest. The cases cited on the argument fully establish this proposition, and it will be seen by the case of *Stillwell v. McNeely*, 2 N. J. Eq. 305, that the rule is recognized in this court; but it is there stated that the court will hold, as they certainly must, a discretionary power to dispense with that necessity, in cases of great inconvenience, or where unnecessary expense would be incurred. In *Van Vechten v. Terry*, 2 Johns. Ch. (N. Y.) 197, on a bill for foreclosure, a nominal trustee was held to be a sufficient party defendant, because the real owners were two hundred and fifty. This was to avoid expense." And in this case the court, on the ground of convenience and expediency, held that the nominal trustee could sue alone on behalf of all parties in interest.

In *Smith v. Gaines*, 39 N. J. Eq. 545, the court, by Runyon, Chancellor, said: "The general rule as to parties in cases of trust is, that in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trustent* are necessary parties. Many exceptions have been made to this rule, some for convenience, some for the reason that, by the terms of the trust, or from the nature of the suit, the trustees themselves represented the *cestuis que trustent*. On this latter ground, it has been laid down that where the only object of the suit is to transfer the trust property into the hands of the trustees, the *cestuis que trustent* need not be par-

ties, but if the existence or enjoyment of it is affected by the prayer of the suit, then they should be. Even to the rule, in this restricted form, there are numerous exceptions. . . . Courts of equity exercise a large discretion in the matter, guided sometimes by slight circumstances, and taking care, on the one hand, that justice shall not be defeated through the impracticability of bringing in all persons interested in the issue, and, on the other hand, that the rights of individuals shall not be determined when they are neither heard nor represented. . . . It was held in *Lloyd v. Smith*, 13 Sim. 457, that where a bill seeks the sale of the real estate vested in trustees by devise, and they have not a present, absolute power of disposition over it, according to the terms of the trust, they do not fully represent the *cestuis que trustent*, and the latter are necessary parties. This doctrine governs the present case. The trustees have not a present power to sell either the life estate or the remainder, nor to consent to the sale thereof, and their prayer for such a sale is an attempt to override, or at least modify, the terms of their trust. In such an effort, of course, they do not represent the *cestuis que trustent*, and the latter are entitled to be heard on the question whether it shall succeed. They are, therefore, necessary parties."

1. *Bromley v. Mitchell*, 155 Mass. 509.

2. *Beck v. Haas*, 111 Mo. 264.

3. *Bardstown, etc., R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199; 81 Am. Dec. 541. See also *Van Vechten v. Terry*, 2 Johns. Ch. (N. Y.) 197; *Willink v. Morris Canal, etc., Co.*, 4 N. J. Eq. 397.

4. *Hawes on Parties to Actions*, §

*cestui que trust*, if entitled to the possession, may in his own name sue a stranger therefor,<sup>1</sup> or he may sue the trustee in ejectment.<sup>2</sup>

Suits to compel the proper execution of the trust may be instituted by the beneficiary,<sup>3</sup> as the one most interested, or, in rare cases, by the settlor.<sup>4</sup> It has been held that the settlor has no

32; *Burns v. Sanderson*, 13 Fla. 384; *Cox v. Walker*, 26 Me. 512; *Siemers v. Schrader*, 88 Mo. 23. But see *Morrow v. Odom*, 14 S. Car. 623.

A party who holds the legal title to property, coupled with a trust for his co-complainants, may confess the trust, and unite with the parties holding the equity in a bill for the recovery of the property. *Marble v. Whaley*, 33 Miss. 157.

A *cestui que trust* cannot bring an action of ejectment against his trustee, unless a surrender of the legal estate is fairly to be presumed; but the trustee can maintain the action against the beneficiary, whose only remedy in such case is by an injunction. *Brown v. Combs*, 29 N. J. L. 36.

*Illinois Revised Statutes*, ch. 30, § 3, provides that where the trustee holds under a deed "to the use, confidence, and trust" of another, the title shall be in the *cestui que trust*. In *United Brethren Church v. First M. E. Church*, 138 Ill. 608, the conveyance was to A, B and C, "trustees of the U. B. Church, . . . their successors in office and assigns," to have and to hold "to their successors and assigns forever." This was held to vest the title in the trustees individually and not in the church; and a suit in ejectment against a stranger should be brought in their names.

1. *Hawes on Parties to Actions*, § 32; *Sedgwick & Wait on Trial of Title to Land*, § 223; *Howard v. Snelling*, 28 Ga. 474; *Glover v. Stamps*, 73 Ga. 209; 54 Am. Rep. 870.

2. Where the *cestuis que trustent* are entitled as such to the possession of land, and are ousted of it, they may maintain ejectment to recover it. *School Directors v. Dunkleberger*, 6 Pa. St. 29.

A *cestui que trust*, after the purpose of the deed has been satisfied, may maintain ejectment on a demise in his own name, though the legal estate is still vested in the trustee. But it will be presumed that the trustee has surrendered his estate, if there has been a satisfaction of the purposes of the trust, or the beneficial occupation in the estate by its possessors leads to a suppo-

sition that a conveyance for the legal estate has been made to the parties beneficially interested in whom the trust is a plain one, and the court of equity will compel the trustees to make a conveyance. *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464.

3. See *supra*, this title, *Rights and Remedies of the Beneficiary*. See also *PARTIES TO ACTIONS*, vol. 17, p. 651; *Cubberly v. Cubberly*, 33 N. J. Eq. 82, 591.

Where a trustee violates his duty, any of the parties interested may call him to account in a court of equity. *Tucker v. Palmer*, 3 Brev. (S. Car.) 47.

Where property is conveyed, without consideration, in trust, the *cestui que trust* may maintain a bill to enforce the trust against the trustee who has accepted it. *Fogg v. Middleton*, *Riley Eq. (S. Car.)* 193; *Baker v. Evans*, 1 Winst. Eq. (N. Car.) 109; *Chapman v. Wilbur*, 4 Oregon 362.

4. One who claims to have deeded land in trust to be conveyed as a gift to a person named, and that his grantee deeded it to another, is a proper plaintiff to insist that his grantee execute the trust. *Abbott v. Gregory*, 39 Mich. 68.

If a grant is made for a limited and defined purpose, the grantor has such an interest as enables him to insist, in a court of equity, upon the execution of the trust as originally declared and accepted. *Warren v. Lyons City*, 22 Iowa 351.

*Strong v. Doty*, 32 Wis. 381, was a suit by one of the grantors in a trust deed to enforce an execution of the trust or forfeit the property. The facts were as follows: Complainant and others conveyed land to trustees and their successors in office forever, in trust, to erect thereon a church for the use of the members of the Methodist Church, according to the rules and discipline of the general conference, and, further, that they should at all times, forever afterwards, permit the ministers of that denomination to preach therein. The trustees built a church building and continued its use for purposes of worship for thirty years

right to maintain a suit merely to obtain a construction of the trust deed,<sup>1</sup> that privilege being confined to the trustee and the *cestui que trust*. Where there are both immediate and remote beneficiaries, the latter may seek relief in equity, so long as they have an interest in the administration of the trust which the court's decree may affect.<sup>2</sup> But where their interest is so remote that it cannot be reached by the decree of the court, they cannot, it seems, be permitted to sue. Thus, a *cestui que trust*, with an interest in remainder or reversion, has no right to apply to a court of equity for an order affecting only the present income of the trust estate; for to this fund the life tenant alone would be entitled.<sup>3</sup>

In the event of the death of the beneficiary, the trust may be enforced at the suit of his heirs at law, if it concerns real property, or of his personal representative, if the trust relates to personalty.<sup>4</sup>

An action for an accounting or a settlement is properly brought by any beneficiary in interest, and such beneficiary may sue on his own behalf or on behalf of all the *cestuis que trustent*.<sup>5</sup>

It is not necessary that all the *cestuis que trustent* join in the suit where their number is so great that it would be impracticable for

and then abandoned it, selling the lot and building to parties who converted it into a blacksmith shop. It was held that the title did not revert, and that although equity, at suit of the parties interested, might compel a due execution of the trust, the complainant, who was not shown to be a member of the M. E. Church, or to have any more interest than the general public in the execution of the trust, could not maintain an action for that purpose, on the ground that he was one of the original grantors.

1. *Levy v. Hart*, 54 Barb. (N. Y.) 248.

2. *Clarke v. Deveau*, 1 S. Car. 172.

3. One who has no present title to the beneficial estate cannot sue to compel a trustee to convey his legal title, provided the legal title when so conveyed will inure to another, who is the present beneficial owner. *Widdicombe v. Childers*, 84 Mo. 382.

4. *Ware v. Galveston City Co.*, 111 U. S. 170; *Seymour v. Freer*, 8 Wall. (U. S.) 202.

5. A *cestui que trust*, after the decease of the party who declared the trust, may bring a suit in his own name against the trustee, if the latter refuses to pay over. *Tritt v. Crotzer*, 13 Pa. St. 451.

Where profits and interests come into the hands of a trustee, and are not accounted for at the *cestui que trust's* death, who has a life interest in the trust fund, the *cestui que trust's* ad-

ministrator is entitled to an account. *Brown v. Ricks*, 30 Ga. 777.

A *cestui que trust* arrived of age may bring suit for his share of the fund, without joining minors entitled to similar shares. *Hitchcock v. Linsly*, 17 Hun (N. Y.) 556.

A bill filed by a part of the *cestuis que trustent*, to recover the trust estate from one tortiously holding it, and to get a trustee appointed to execute the trust, should not be dismissed for want of equity. *Howard v. Gilbert*, 39 Ala. 726.

In a suit for the removal of a trustee, under *Minnesota Comp. Stat.* 384, § 26, all the persons interested in the trust are not compelled to join in the action. *Goncelier v. Foret*, 4 Minn. 13.

In a suit by one of three beneficiaries against the trustee, calling for an accounting and the payment of his third interest, the entire fund may not be distributed. *Zimmerman v. Frailey*, 70 Md. 561.

One who has no actual present title to a beneficial estate, cannot sue to compel a conveyance from the trustee of the legal estate; while in a case where each beneficiary is entitled to the aliquot part of an ascertained and definite trust fund, each may sue for his part without making the other beneficiaries parties. *Hubbard v. Burrell*, 41 Wis. 365.

The rule is otherwise where the amount of the trust fund itself must be

all to appear. A few may sue for all,<sup>1</sup> or a portion of the parties in interest may be sued as representatives of all.<sup>2</sup> Any substantial beneficial interest will entitle the possessor to sue in his own name to compel the administration of the trust.<sup>3</sup>

b. WHO ARE NECESSARY PARTIES AND WHO ARE NOT.—To all suits and actions involving the administration of trusts, trustee and beneficiary are necessary parties.<sup>4</sup> If there are two or more trustees, all must be joined, if all are to be bound by the

determined by an accounting in the action. *Eldredge v. Putnam*, 46 Wis. 205.

1. *Perry on Trusts*, § 885; *Smart v. Bradstock*, 7 Beav. 500; *Bromley v. Smith*, 1 Sim. 8; *Preston v. Grand*, etc., *Dock Co.*, 11 Sim. 327; *Lloyd v. Loaring*, 6 Ves. 773; *Cockburn v. Thompson*, 16 Ves. 321; *Taylor v. Salmon*, 4 M. & C. 134; *Hickens v. Congreve*, 4 Russ. 562; *Walworth v. Holt*, 4 Myl. & C. 619; *Manning v. Thesiger*, 1 S. & S. 106; *Weld v. Bonham*, 2 S. & S. 91; *Atty. Gen'l v. Heelis*, 2 Sim. & S. 67; *Bateman v. Margerison*, 6 Hare 496. But compare *Harrison v. Stewartson*, 2 Hare 533, where there were twenty-one beneficiaries and all were required to appear. And *Rathbone v. Stocking*, 2 Barb. (N. Y.) 135, where it was held that where several persons are interested in a trust fund, in unequal proportions, no action at law will lie by either party for his share until a distribution has been made, and the proportion of each, and his right thereto, ascertained and settled.

2. *Perry on Trusts*, § 885; *Adair v. New River Co.*, 11 Ves. 429; *London v. Richmond*, 2 Vern. 421; *Meux v. Maltby*, 2 Swanst. 277; *Milbank v. Collier*, 1 Coll. 237; *Harvey v. Harvey*, 4 Beav. 215; *Bunnett v. Foster*, 7 Beav. 540.

The beneficiary has a right of action in chancery to compel the specific performance of a contract made by a third person with the trustee for the purchase of land conveyed by the deed of trust, and he may make the trustee and the purchaser of the land and the settlor in the deed of trust parties defendant, although, as a rule, the proper procedure would require the trustee and the beneficiary to unite in bringing suit. *Fleming v. Holt*, 12 W. Va. 143.

3. Where A gave land for the use of all religious denominations professing the Christian faith, upon which a house for public worship was built by individuals of the different denominations, it was held that any *cestui que trust*

having an interest in the use, might maintain proceedings in equity to compel a performance of the trust according to the intent of the donor. *Baptist Church v. Presbyterian Church*, 18 B. Mon. (Ky.) 635.

When suit is brought to compel an accounting by the trustees, the real owner of shares obtained by fraud from the trustees by a nominal owner, is a proper plaintiff, although such real owner has not complied with the trust agreement, compliance by the nominal owner accruing to the benefit of the real owner. *Hazard v. Dillon*, 34 Fed. Rep. 485.

Under the *Delaware* procedure, the eldest male heir of a deceased trustee is the proper plaintiff in a suit in ejectment to recover the land claimed under the trust. *McMullen v. Lank*, 4 Houst. (Del.) 648.

A special and express trust, created by the appropriation of a lot for burial purposes by a cemetery association, and the appropriation of the surplus means of the association solely to charitable uses, are objects which will be upheld, and a performance of the trust enforced in equity on the application of any member of the association, where there has been an abuse of the trust. *Hullman v. Honcomp*, 5 Ohio St. 237.

4. See *EQUITY PLEADING*, vol. 6, pp. 750, 751; *PARTIES TO ACTIONS*, vol. 17, p. 651. For exceptions to the rule, see *Moore v. Hood*, 9 Rich. Eq. (S. Car.) 311; 70 Am. Dec. 210.

**The Trustee a Necessary Party.**—In a bill brought by a beneficiary for the recovery of an amount alleged to be due him, the trustee is a necessary party in order that the decree may bind his legal interest. *Carter v. Jones*, 5 Ired. Eq. (N. Car.) 196; 49 Am. Dec. 425.

A trustee is a necessary party to a suit in regard to a trust estate, and naming him in the bill without serving papers on him does not make him a party. *Cassidy v. McDaniel*, 18 Mon. (Ky.) 519.



decree of the court.<sup>1</sup> And all *cestuis que trustent* must be before the court either as suitors or defendants,<sup>2</sup> unless the party

Where a suit is brought to enforce a trust, the trustee, though a minor, is a necessary party, and it cannot be maintained against the guardian of such minor alone. *Wakefield v. Marr*, 65 Me. 341.

The court cannot take jurisdiction of the legal title to trust property without making the trustee a party. *Phipps v. Tarpley*, 26 Miss. 597.

To subject trust property, at law, to the payment of a debt for which it may be liable, the mode indicated by the *Georgia* Code, § 3301 *et seq.*, must be followed, and the trustee, or if none, then the beneficiary, must be made a party defendant. *Brown v. Tucker*, 47 Ga. 485.

To a suit brought by a stranger to defeat the trust, a trustee with general powers and important duties in relation to the trust, is a necessary party. *McArthur v. Scott*, 113 U. S. 340.

If the trust is an active one, and the title is in the trustee for the use of a married woman or a minor, the trustee is a necessary party to a suit to divest the beneficiary's interests. *O'Hara v. McConnell*, 93 U. S. 150.

A conveyed personal property to B, in trust to sell and pay the claim of C. In a suit by C to foreclose the deed of trust, praying judgment for the amount due and for the sale of the property, it was held that the trustee should be made a party. *Tucker v. Silver*, 9 Iowa 261.

**Trustee and Beneficiary.**—Both the trustee and the beneficiaries must be parties to a proceeding to enforce a mechanic's lien against the trust property. *Columbia Bldg., etc., Co. v. Taylor*, 25 Ill. App. 429.

In suits affecting the trust property, whether brought by the trustee or against him, the beneficiaries, as well as the trustee, must generally be made parties. *Carey v. Brown*, 92 U. S. 171.

In a suit by a trustee for any matter concerning the performance of the trust, the *cestui que trust* must be made a party. *Burney v. Spear*, 17 Ga. 223; *Hall v. Harris*, 11 Tex. 300.

In suits in equity respecting trust property, the *cestui que trust* is a necessary party. *Day v. Wetherby*, 29 Wis. 363.

Where a trust deed gave Jones possession and use of a tract of land for life,

it was held that the trustee could not, in Jones' life, recover from a railroad company a strip thereof granted to it by Jones for a road-bed, until Jones' right of possession had been adjudged forfeited. This could only be done in a case to which he should be made a party. *Tutt v. Port Royal, etc., R. Co.*, 20 S. Car. 110.

1. **All the Trustees.**—*Perry on Trusts*, § 876; *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347; *Hutchinson v. Ayres*, 117 Ill. 558; *Lexington v. McConnell*, 3 A. K. Marsh. (Ky.) 224; *Munch v. Cockerell*, 8 Sim. 219; *Tarleton v. Hornby*, 1 Y. & C. 336; *Humberstone v. Chase*, 2 Y. & C. 213; *Perry v. Knott*, 4 Beav. 179; *Priestman v. Tyn-dall*, 24 Beav. 244; *Rehden v. Wesley*, 29 Beav. 215; *Fletcher v. Green*, 33 Beav. 513; *Willie v. Ellice*, 6 Hare 505; *In re Chertsey Market*, 6 Price 278.

The court will not decline jurisdiction of a suit to foreclose a mortgage executed to secure canal bonds, because one of five trustees cannot be made a party, if the other four are before the court. *Stewart v. Chesapeake, etc., Canal Co.*, 4 Hughes (U. S.) 41.

A renouncing trustee is not a necessary party to a suit against a co-trustee for mismanagement, by the latter, of the trust estate. *Earle v. Earle*, 48 N. Y. Super. Ct. 18.

2. **Beneficiaries to be Made Parties.**—Every person interested in a trust estate should be made a party in a suit for its administration. *Elam v. Garrard*, 25 Ga. 557.

The *cestui que trust* must be made a party, and if there are more than one, all are necessary, if it is practicable to join them in the suit. *Boyden v. Part-ridge*, 2 Gray (Mass.) 190; *Lauriat v. Stratton*, 11 Fed. Rep. 107; *First Nat. Bank v. Crafts*, 145 Mass. 444; *Lyman, Petitioner*, 11 R. I. 157; *Holland v. Baker*, 3 Hare 68. See *Ridgeway v. Potter*, 114 Ill. 457.

*Cestuis que trustent* should, in general, be made parties to a bill of equity which affects their interests. *Piatt v. Oliver*, 2 McLean (U. S.) 267.

In a suit against the trustees to have a purchase of the trust estate by them declared to be for the benefit of the beneficiaries, the latter must all be joined in the suit. *Campbell v. John-son*, 1 Sandf. Ch. (N. Y.) 148.

All the parties interested should be joined in a suit to subject the trust fund to the satisfaction of a judgment at law. *Helm v. Hardin*, 2 B. Mon. (Ky.) 231.

A creditor seeking to carry into effect an assignment in trust for the creditors' benefit, and to obtain his share of the trust fund, must make all the creditors parties, or he must sue for himself and the other creditors, who may come in and satisfy their demands. *Bryant v. Russell*, 23 Pick. (Mass.) 508; *Haughton v. Davis*, 23 Me. 28.

A trustee is not allowed to proceed to vindicate the title intrusted to him from an adverse claim by a bill of equity, without making a *cestui que trust* a party. *Blake v. Allman*, 5 Jones Eq. (N. Car.) 407; *Reed v. Reed*, 16 N. J. Eq. 248.

A beneficiary, who was entitled to a fractional share of the income of an estate in the hands of a trustee, sued the trustee for an accounting, in order that the complainant's share of the income might be ascertained. It was held that the *cestuis que trustent* entitled to the remainder of the net income should have been joined in the suit, so that, by binding them by the accounting, future litigation and accountings might be prevented, and the trustee might safely execute the decree in favor of the complainant. *Speakman v. Tatem*, 45 N. J. Eq. 388.

Where an action is brought against a trustee for a distributive share of an estate which he is bound to divide among different persons, and the proportionate share of each has not yet been ascertained, all such persons must be joined in the action. *General Mut. Ins. Co. v. Benson*, 5 Duer (N. Y.) 168.

A bill in equity averred that the plaintiff was executor of the estate of B, who was executor and trustee of the estate of C, a citizen of Georgia, a portion of which consisted of certain stock of a Pennsylvania coal company, and prayed that this stock be transferred to A, and the dividends be paid to A. The answer admitted these averments to be true, but prayed that the *cestuis que trustent* be made parties to the bill, and that copies of the wills and letters testamentary be produced. It was held that a decree directing such transfer and payment, without first granting the company's prayer, was error. *Lehigh Coal, etc., Co.'s Appeal*, 88 Pa. St. 499.

The doctrine that, where a breach of trust is charged, and where no other

general rule or order of the court interferes, and the facts demand a contribution or a recovery over, all persons who should be before the court to enable it to make a full and final judgment, are necessary parties, has not been abrogated by the *New York Code*. *Sherman v. Parish*, 53 N. Y. 483.

Where a trustee is called upon to account for the trust moneys, all the *cestuis que trustent* should be made parties to the suit, that there may be a single accounting, and that all parties interested in it may be bound by it. *Speakman v. Tatem*, 45 N. J. Eq. 388; *Hamm v. Stevens*, 1 Vern. 110; *Vanderpool v. Davenport*, 3 N. J. Eq. 122.

A modification of the rule has been noted elsewhere in this article, and is as follows: Where one of several *cestuis que trustent* entitled to a certain aliquot share of a certain sum seeks to recover from the trustee his share of that sum, he need not make the owners of the remaining shares parties to the suit. *Speakman v. Tatem*, 45 N. J. Eq. 388; *Hubbard v. Burrell*, 41 Wis. 365; *Hares v. Stringer*, 15 Beav. 206; *Marryatt v. Maryatt*, 23 L. J. Ch. N. S. 876; *Hughson v. Cookson*, 31 Y. & C. 578; *Hunt v. Peacock*, 11 Jur. 555; *Smith v. Snow*, 3 Madd. 10; *Hutchinson v. Townsend*, 2 Keen 675; *Perry v. Knott*, 5 Beav. 293; *Platt v. Oliver*, 2 McLean (U. S.) 307; *Van Wart v. Price*, 14 Abb. Pr. (N. Y. Supreme Ct.) 4, note; *Hauenstein v. Kull*, 59 How. Pr. (N. Y. Supreme Ct.) 24; *General Mut. Ins. Co. v. Benson*, 5 Duer (N. Y.) 168; *Wing v. Bull*, 38 Hun (N. Y.) 291; *Power v. Hathaway*, 43 Barb. (N. Y.) 214.

Where a breach of trust is alleged, all the *cestuis que trustent* must be joined, even though their respective interests are fixed. *Lanaghan v. Smith*, 2 Phill. 301; *Williams v. Powell*, 2 Phill. 329; *Munch v. Cockerell*, 8 Sim. 231; *Kellaway v. Johnson*, 5 Beav. 319; *Ling v. Colman*, 10 Beav. 370; *Hall v. Austin*, 2 Coll. 570.

Where a bill is filed for an account, and to execute a trust created by a deed absolute on its face, but really executed upon trust to pay the grantor's debts, and then for his family's use and benefit, his widow and heirs must be joined in the suit, as should also all persons whose interests are involved in the issue, or who would be affected by the decree. *Pence v. Pence*, 13 N. J. Eq. 257.

A person seeking to enforce a claim

seeking relief sues authoritatively on behalf of all the beneficiaries.<sup>1</sup>

The heirs and personal representatives of the trustee,<sup>2</sup> the heirs and personal representatives of a deceased beneficiary,<sup>3</sup> the heirs

for necessities against the trust property of a mother and her children, if he seeks a sale of any part of the trust property, must join both the mother and children, if both are *cestuis que trustent*. *Prewett v. Lamb*, 36 Miss. 495.

Where the amount of a trust fund for the creditors is not fixed, and an account must be taken to fix it, all the *cestuis que trustent* must be joined either as plaintiffs or defendants, and the Act of Congress of Feb. 28th, 1839, does not enable the court to proceed without them, to make a decree distributing parts of the fund to those entitled to them in severalty. *Green v. Sisson*, 2 Curt. (U. S.) 171.

A trustee held stock belonging to several persons to whom advances had been made on it by the plaintiff; two of the stockholders refused to pay the advances. A bill filed against them and the trustee, was held insufficient for not making other stockholders parties. *Jamison v. Stewart*, 14 Phila. (Pa.) 134.

In an action for relief against a mortgage held by the trustee, the *cestuis que trustent* should be made parties. *Clemmons v. Elder*, 9 Iowa 272.

In a bill to enjoin a trustee from asserting his title or conveying it away, or to compel him to convey it to one to whom the beneficiary has transferred his interest, the beneficiary is a necessary party. *Richards v. Richards*, 9 Gray (Mass.) 313.

A bill in equity to restrain a misapplication of a fund held by a corporation in trust, cannot be brought against the trustees appointed by the corporation to hold and manage the fund, unless the corporation is made a party to the bill. *Tibbatts v. Bidwell*, 1 Gray (Mass.) 399.

Where three out of four trustees of church property, executed notes for the church's debt, and one of them paid the notes, and the latter's executor filed a bill against two other trustees to have a lien declared upon the church property in his favor on account of the money paid, it was held that the fourth trustee should be made a party, and also the members of the church beneficiaries of the trust. *Headrick v. Ruble*, 10 Lea (Tenn.) 15.

A court of equity will decree the

specific performance by a trustee of a contract, when such contract conforms to the law of his trust and his duty as to the improvement of the trust property, and where the party with whom the contract is made has performed his part. Where the specific performance of such a contract is sought, affecting to a great extent the interests of the *cestuis que trustent*, they should be parties to the suit. *Trustees, etc. v. Gleason*, 15 Fla. 384.

In a proceeding to enforce a mechanic's lien upon trust property, both trustee and beneficiary should be made parties. See *MECHANICS' LIENS*, vol. 15, p. 167.

1. Where the parties to a trust deed are so numerous that it is an utter impossibility to bring them all before the court, the cause may proceed, if a sufficient number are parties on each side to sustain the controversy. *U. S. Bank v. Huth*, 4 B. Mon. (Ky.) 423.

2. *Greenleaf v. Queen*, 1 Pet. (U. S.) 138; *Skiles v. Switzer*, 11 Ill. 533; *In re Abbott's Petition*, 55 Me. 580; *Plumley v. Plumley*, 8 N. J. Eq. 511; *Williamson v. Wickersham*, 3 Coldw. (Tenn.) 52.

Land was conveyed to A in trust to permit B to enjoy it for life, and at B's death to convey the land to her children then living, and to the children of those deceased. On B's death the trust was held to be not executed, so that, in an action for partition, A being dead, A's heir was a necessary party. *Huckabee v. Newton*, 23 S. Car. 291.

In a suit to declare a resulting trust in land purchased with the plaintiff's money, the deed being taken in the name of the purchaser, an heir of the deceased purchaser was held to be a necessary party. *Freeman v. Russell*, 40 Ark. 56.

But in *Hawley v. Ross*, 7 Paige (N. Y.) 103, it was held that upon the death of the trustee of a bond for the benefit of the obligor's children, since the revision of the statutes, the personal representatives of the trustee had no interest in the appointment of a new trustee.

3. *Kelly v. Karsner*, 72 Ala. 106; *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468.

Where a misappropriated trust fund is composed in part of personal prop-

and representatives of the testator, where the trust is testamentary in its nature,<sup>1</sup> the debtors of a judgment debtor in a proceeding in chancery to confiscate or garnishee their debts,<sup>2</sup> are, under certain circumstances, necessary parties. And, generally speaking, all persons whose rights or interests under the peculiar circumstances of the case are liable to be affected by such a decree as the chancellor has power to award, should be joined as parties.<sup>3</sup>

And where the trustee is charged with having converted the estate to his own use by wrongfully conspiring with a third person,

erty, the heirs and the administrator of a deceased *cestui que trust* should be made parties in an action to recover the same; and where the trust property is partly real and partly personal, the heirs and the legal representatives of all the beneficiaries may join in one action to recover the whole. *Butler v. Lawson*, 72 Mo. 227.

1. *Allen v. Simons*, 1 Curt. (U. S.) 122.

Where a bill is filed in behalf of a devisee, against the trustees of the testator's estate, praying in general terms for an account of the estate and effects of the testator and of every part thereof, without confining the prayer to the estate which has come to the hands of the trustee as such, the personal representatives of the testator should be joined in the suit. *Sherman v. Burnham*, 6 Barb. (N. Y.) 403.

2. *Barrett v. Reid*, *Wright* (Ohio) 700.

3. Property was conveyed to a trustee, the proceeds to be applied first, to free the maker and the indorser from their liability upon a promissory note, the balance to be accounted for to the grantor. Upon a suit in equity against the trustee by the grantor, it was held that the maker and indorser of the note were necessary parties. *Fish v. Berkey*, 10 Minn. 199.

A, who had been guardian of B, brought his bill against C, his successor in that office, for an alleged balance. Upon C's filing a cross-bill alleging a balance to be due to B, it was held that B should have been a party to the suit. *Campbell v. Williams*, 3 T. B. Mon. (Ky.) 122.

If A places C's money in the hands of B to purchase land for C's benefit, on a refusal by B to convey the land thus purchased to C, a bill of equity to enforce such trust must be brought in the name of C, and A cannot devise the land thus purchased, so as to enable D,

the devisee, to compel a conveyance to himself; and if D claims a conveyance from B under a transfer of C's equitable right, C must be a party to the bill. *Culbertson v. Matson*, 11 Mo. 493.

Where a deed of trust is allowed to stand in the way of younger judgment liens, after the debts secured by it have become due, a court of equity, at a suit of the judgment creditor, if the rents and profits of the property will not satisfy the liens in five years, will direct a sale of the property, and not merely of the equity of redemption. *Laidley v. Hinchman*, 3 W. Va. 423.

All the trust creditors should be parties to such a suit. *Laidley v. Hinchman*, 3 W. Va. 423.

If an assignee in insolvency, by leave of court, sells the estate of his assignor, and acting through third persons becomes the purchaser, and thereafter manages the estate for his own benefit and for the benefit of other persons, the court will require that the persons interested with the assignee in the purchase, be made parties to a suit brought to compel him to account for the profits made by him after the sale. *First Nat. Bank v. Crafts*, 145 Mass. 444.

A bill filed for an account of the residue of the testator's estate, directed by his will to remain in the hands of his executors for a period of twenty years after his decease, in trust, for his children and grandchildren, and at the end of that time to be divided between them, is demurrable for want of parties, unless all persons interested in the trust property are made parties to the bill, or those omitted are unknown or out of the jurisdiction, or have been fully accounted with, and such excuse for not joining them is stated in the bill. *D'Wolf v. D'Wolf*, 4 R. I. 450. And see generally *Richardson v. Richardson*, 83 Mich. 653.

Upon a bill for the appointment of a new trustee, all persons beneficially

it is proper to sue both the trustee and the confederate, for they are jointly liable and may be sued jointly in the county where either resides.<sup>1</sup>

The following have been held, under the circumstances of the case, not to be necessary parties: A former trustee who has been divested of all title and interest in the trust estate,<sup>2</sup> the heirs of a trustee,<sup>3</sup> his personal representatives or the sureties upon his bond,<sup>4</sup> the trustee himself, in a suit where a debtor, to secure a debt, had assigned a judgment in trust for one of two co-sureties for him, and the other surety sues to apply the judgment to the debt,<sup>5</sup> the *cestui que trust* in certain contingencies,<sup>6</sup>

interested should be made parties. *Regan v. West*, 115 Ill. 603.

To a bill filed to establish a trust in the case of lands held by a decedent in fee, the widow and her husband by a second marriage, are necessary parties. *Bailey v. West*, 41 Ill. 290.

1. *Shivers v. Palmer*, 14 Ga. 342.

One who participates with a trustee in the misappropriation of trust funds, renders himself liable to the *cestui que trust*, *Georgia Code*, § 3151, expressly so providing, and he may be sued jointly with the trustee, or separately. *Bigham v. Coleman*, 71 Ga. 176.

2. *Hubbell v. Hubbell*, 22 Ohio St. 208.

3. Where lands held in trust were devised by the trustee to his executor, to be sold and converted into personal property, it was held, in a suit against the executor and the purchaser to establish the trust, that the heirs of the trustee need not be parties. *Paul v. Fulton*, 25 Mo. 156.

The heirs of a deceased trustee are not necessary parties to a bill in equity to enforce a trust, where the land in which it is claimed, has been duly sold by the administrator of his estate under license from the probate court. *Bates v. Hurd*, 65 Me. 180.

4. The administrator of a deceased trustee, is not a necessary party to a bill to declare and enforce the trust against the heirs. *Hallesy v. Jackson*, 66 Ill. 139.

Where a bill of equity is brought to compel the delivery to a trustee of a trust estate, pledged by his deceased predecessor as a security for money lent him for his private use, it is unnecessary to join, as defendants, the beneficiaries or the widow, or legal or personal representatives of the former trustee, or the sureties on his bond. *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217.

5. *Kerns v. Chambers*, 3 Ired. Eq. (N. Car.) 576.

6. See *White v. Haynes*, 33 Ind. 540; *Miles v. Davis*, 19 Mo. 408; *Coe v. Beckwith*, 31 Barb. (N. Y.) 339.

Where an executor files a bill to execute the trusts declared by the will, the *cestuis que trustent* need not be made parties. *Beal v. Crafton*, 5 Ga. 301.

In a suit by a trustee to reduce the trust funds into his possession, the *cestuis que trustent* are not necessary parties. *Adams v. Bradley*, 12 Mich. 346; *Morey v. Forsyth*, Walk. (Mich.) 465; *Cook v. Wheeler*, Harr. (Mich.) 443.

A bill in equity by a creditor against a trustee, to subject the resulting trust arising after the *cestuis que trustent* named in the trust deed are satisfied, need not make such *cestuis que trustent* parties. *Corner v. Stevenson*, 3 Jones Eq. (N. Car.) 95.

A party claiming an interest in a conveyance under a parol declaration of trust, evidenced by parol only, is not a necessary party to a suit to avoid the conveyance, as such a trust could not be enforced. *Whelan v. Whelan*, 3 Cow. (N. Y.) 537.

In a suit by a creditor against his debtor and an assignee of the property of such debtor in trust, to avoid the assignment as fraudulent, it is not necessary to make the *cestuis que trustent* under the assignment parties. *Wakeman v. Grover*, 4 Paige (N. Y.) 23; *Willett v. Stringer*, 17 Abb. Pr. (N. Y.) 152. To the contrary, see *Stout v. Higbee*, 4 J. J. Marsh. (Ky.) 632.

A guardian contracted to pay the mother of his wards a certain sum for their support, and in a suit by the widow to set off the sum against a judgment held by the guardian against her, it was held that the wards were not necessary parties. *Lindsey v. Stevens*, 5 Dana (Ky.) 104.

Where a bill was filed by a trustee of

particularly remote beneficiaries possessing no present vested interest,<sup>1</sup> and even the trustee.<sup>2</sup>

Others who are unnecessary parties are instanced in the notes.<sup>3</sup>

a *feme covert*, impeaching a mortgage made by the *cestui que trust*, and claiming the right to redeem, and praying for a settlement of accounts between the *cestui que trust* and the mortgagee, such settlement was made, and a full opportunity was given the *cestui que trust* to controvert the pretensions of the appellee, and a full defense was made, it was held that it was not necessary, in such a suit, to make the *cestui que trust* a formal party. *Woodson v. Perkins*, 5 Gratt. (Va.) 345.

Where a fund was raised by a town acting as a parish, to be held by trustees for the minister's support, and the parish in whom the right to the fund vested, voted that the income thereof should be paid to their minister as part of his salary, and brought a bill against the trustees on their refusal to pay it over, it was held that the minister was rightly joined as a plaintiff, and that the town was not a necessary party to the suit. *First Congregational Soc. v. Trustees, etc.*, 23 Pick. (Mass.) 148.

Where A and B assigned property to C in trust to pay the debts of the former firm of A & D, and certain debts of A & B, and to pay the surplus to the order of A & B, and A & B gave an order on C payable out of the surplus to E, and C accepted it, and E filed a bill against C alone for an account of the fund and to have the surplus applied to satisfy the order, it was held that neither A & B, nor A & D, nor any other of the *cestuis que trustent* need be joined as parties, as the trustee represented all the interests of all the parties. *Buck v. Pennybacker*, 4 Leigh (Va.) 5.

Where a trustee sues merely to get possession of the trust property from a third party, the beneficiary is not a necessary party to the suit. *Hickox v. Elliott*, 22 Fed. Rep. 13; 10 Sawy. (U. S.) 415.

If the trustee represents his *cestuis que trustent* in all things relating to the trust property, they need not be made parties to a proceeding against him to enforce or defeat the trust. *Kerrison v. Stewart*, 93 U. S. 155.

In a suit brought against a trustee to set aside a trust deed, a *cestui que trust* need not be made a party defendant, although he may, in the discretion of

the court, be permitted to voluntarily appear and defend. *Winslow v. Minnesota, etc.*, R. Co., 4 Minn. 313; 77 Am. Dec. 519.

The *cestuis que trustent* are not necessary parties to a suit for a debt incurred by the trustee in the management of the trust, and for which he is personally liable. *Connally v. Lyons*, 82 Tex. 664; 27 Am. St. Rep. 935. Nor to a suit brought to set aside a trust deed for fraud. *Vetterlein v. Barnes*, 124 U. S. 169.

1. *Stevens v. Melcher*, 6 N. Y. Supp. 811; 53 Hun (N. Y.) 636.

Where application is made for the sale of trust property, the life tenants being all living and made parties, and the remainder-men being uncertain, the latter are not necessary parties. *Schley v. Brown*, 70 Ga. 64.

2. In a suit to sequester the shares of trustees who have been wasting the trust estate, a part trustee, who is not entitled to any portion of the income of the trust, need not be joined as a party to the proceeding, where no decree is made against the general property of any trustee or beneficiary, but a decree is made merely to regulate the temporary disposition of the trust fund. *Raynes v. Raynes*, 54 N. H. 201.

3. Where a bill is brought to convert into a trustee a purchaser, who has taken a conveyance to himself, absolute on its face, alleging as a part of the parol trust, that a portion of the property was to be reconveyed to the daughters of the plaintiff upon their marriage, no consideration moving between the defendant and the daughters, neither they nor their husbands need be made parties plaintiff, and neither of them is incompetent to testify for the plaintiff by reason of interest. *Lamb v. Pigford*, 1 Jones Eq. (N. Car.) 195.

A *cestui que trust* may call the trustee to account, without making those persons parties with whom the trustee, in breach of his duty, has seen fit to divide the fund. He may, however, make such persons parties. *Felton v. Long*, 8 Ired. Eq. (N. Car.) 224.

In an action by the trustee of a fund for the benefit of creditors deposited in the hands of a third person, for instructions as to the administration of the

Whatever binds the trustee in any proceeding which he begins and carries on in good faith, to enforce a trust, to which the beneficiaries are not actual parties, binds them.<sup>1</sup>

c. WHO ARE PROPER PARTIES DEFENDANT.—Anyone may properly be made a party whose interest in the matter before the court is such that the decree of the court may, either immediately or remotely, affect it.<sup>2</sup>

4. Pleading.—To this branch of the subject the general princi-

trust, neither the sheriff who holds a warrant of attachment against the depositor, nor the depository of the fund, need be made parties, where the plaintiff in the attachment suit has been made a party. *Coe v. Beckwith*, 31 Barb. (N. Y.) 339.

A claim for services rendered to a trust estate cannot be enforced against a person because of his subsequent receipt of a portion of such estate, under the provisions of the will creating it; and such person need not be made a party to an action against the trustees to recover for such services. *Stanton v. King*, 8 Hun (N. Y.) 4.

A bill may be brought by the *cestui que trust* against the representative of one trustee who had the exclusive possession of the property, without making the representatives of the other trustee parties to the suit, where no account is prayed against the latter. *Fleming v. Gilmer*, 35 Ala. 62.

Generally, both the trustee and *cestui que trust* should be parties; but where the trusteeship is a naked trust, and there is no trustee, it seems that the whole interest is before the court, and that a decree may be rendered, particularly if the proceeding be *in rem*. *Sprague v. Tyson*, 44 Ala. 338.

Where an action has been brought to compel the heirs of a deceased testator to convey land to a testamentary trustee, in order that its provisions may be performed, the legatees whose interests it is not sought to affect, are not necessary parties. Nor are persons not *in esse* necessary parties, if those *in esse* whose interests are the same, are made parties. *Regan v. West*, 115 Ill. 603.

An heir at law is not a necessary party to a suit brought against his ancestor's legal representative, for the recovery of loss sustained by a violation of trust of the ancestor as executor, although he is a proper party. *McCartin v. Traphagen*, 43 N. J. Eq. 323; *Darsheimer v. Rorback*, 23 N. J. Eq. 46.

In an equitable suit by an assignee

in bankruptcy, to obtain possession of property transferred by the bankrupt to the defendant in trust for the wife and children of the bankrupt, it is not necessary to make the wife and children parties. *Vetterlein v. Barnes*, 124 U. S. 169.

A, who was one of the next of kin contesting a will, asked of B, a contestant, authority to undertake the collection of B's share, A to pay the cost of the suit, and retain one-half of the amount recovered, promising to divide his own half with his brothers and sisters, whom he represented to be poor and needy. The arrangement was made, and a sum of money recovered, but A refused to divide with his brothers and sisters. It was held that they might maintain a suit in equity upon A's promise in their behalf, and that B was not a necessary party to the bill. *Cubberly v. Cubberly*, 33 N. J. Eq. 82, 591.

In an action to enforce a trust, an intermediate grantee is not a necessary party. *Ryan v. O'Connor*, 41 Ohio St. 368.

1. *Richter v. Jerome*, 123 U. S. 233.

2. See PARTIES TO ACTION, vol. 17, p. 651. See generally *Ward v. Funsten*, 86 Va. 359; *Weaver v. Van Akin*, 77 Mich. 588.

In a bill by a *feme covert* to get the control of property held by the executor of a trustee under an ante-nuptial settlement, the children in remainder should be made defendants. *Fleming v. Gilmore*, 35 Ala. 62.

Where a trust was created for the purposes of trade, and debts were incurred in the prosecution of the trust, for which, by the terms of the deed, the trust property was liable, it was held that the trustee was a proper party to an action for the enforcement of the payment of the debts out of the fund, and that he might be joined after the judgment was reversed, for want of proper parties. *Stevenson v. Matthews*, 9 Pa. St. 316.

A trustee to sell property, who has

ples governing equity pleading apply.<sup>1</sup> It is necessary that all parties in interest be before the court,<sup>2</sup> and that the bill set out with certainty the facts requisite to identify the property sought to be affected by the trust.<sup>3</sup> And a bill that fails to bring in the necessary parties or identify the trust property is demurrable.

In drawing a bill against the trustee, the pleader must bear in mind that there is a presumption that the trustee has performed his full duty, and he must set out specifically all facts necessary to rebut this presumption.<sup>4</sup>

Besides this presumption in favor of good faith and faithful discharge of duty on the part of the trustee,<sup>5</sup> the legality of the creation of the trust<sup>6</sup> will also be presumed, until the contrary is shown.

Where the perversion of a trust is charged, everything will be presumed to have been consistent with the trust, which the bill does not show to have been inconsistent with it.<sup>7</sup>

Where the complainant is seeking to establish the existence of a trust, he must aver all the facts which are needed to clearly show its existence, for no necessary fact will be taken for granted,

advertised it for sale, being a mere agent of the *cestui que trust*, and having no interest in the controversy, is a proper party to a bill filed to enjoin the sale on the ground of a fraudulent combination between the *cestui que trust* and another person, to defraud the complainant of his rights. *Everett v. Winn*, 1 Smed. & M. (Miss.) 67.

Under the prayer for general relief in a bill of equity alleging the decease of the grantor of a deed of trust, the non-payment of the debt, and the flight of the trustee from the country, it is proper to make the administrator a party, compel a settlement of his accounts, and appoint a new trustee. *Woods v. Fisher*, 3 W. Va. 536.

Where a suit is brought to enforce a trust deed executed by a defaulting official for the benefit of the territory and of the county, the territory, the county, and the trustees are all proper parties plaintiff. *Territory v. Golding*, 3 Utah 39.

As to when the trustee and not the beneficiary is a proper party to a proceeding to condemn land, see *State v. Easton*, etc., R. Co., 36 N. J. L. 181.

1. See EQUITY PLEADING, vol. 6, p. 750.

2. See *supra*, this title, *Parties*.

3. Flint on Trusts and Trustees, § 333; *Howard v. Fay*, 138 Mass. 104.

A petition that seeks to recover land by reason of a trust, must charge it with certainty. *Brace v. Reid*, 3 Greene (Iowa) 422.

4. Flint on Trusts and Trustees, § 332; *Matcubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412; *Dial v. Dial*, 21 Tex. 529; *Atty. Gen'l v. Norwich*, 2 Myl. & C. 406.

Under a bill in equity, a trustee is not to be held accountable for any neglect or violation of duty, not charged in the bill. *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *Page v. Olcott*, 28 Vt. 465.

5. See *Massachusetts Mut. L. Ins. Co. v. Boggs*, 121 Ill. 119. Compare *Munn v. Burges*, 70 Ill. 604.

Upon a suit to enforce a trust, fraud will not be presumed, but must be charged in the pleadings if counted on. *Link v. Link*, 90 N. Car. 235.

But in the investigation of a charge of fraud between parties in fiduciary relations, it has been held that less evidence will be required to establish fraud, than where the question of fraud arises between persons not occupying that position. *Keaton v. McGwier*, 24 Ga. 217.

6. The courts will presume that a trust in lands was legally created, unless the contrary appears, and a bill to enforce it need not aver that it was created by a deed or otherwise, unless the trust is denied in the answer, in which case it must be proved by competent evidence. *Whiting v. Gould*, 2 Wis. 552.

7. *Happy v. Morton*, 33 Ill. 398; *Foss v. Harbottle*, 2 Hare 502.



outside of those established by the well-known judicial presumptions just mentioned.<sup>1</sup>

Cases illustrating what averments are sufficient or necessary to constitute a good complaint, are cited below.<sup>2</sup>

1. See *Courvoisier v. Bouvier*, 3 Neb. 55; *Hansen v. Berthelsen*, 19 Neb. 433.

A bill for the establishment of a trust in property supposed to have been purchased with trust funds, must allege that fact. *Danforth v. Herbert*, 33 Ala. 497.

For the maintenance of a bill in equity, it is not sufficient to allege merely that a conveyance of land by absolute deed was in fact in trust, but it should be shown that the conveyance was in trust expressly or by implication, and if by implication, such facts should be stated as would clearly show it to be such. *Rowell v. Freese*, 23 Me. 182.

A bill to compel the delivery to a trustee of trust funds pledged by his deceased predecessor, as security for money lent to him for his private use, must allege that the lender knew that the property which was pledged, was trust property, and that the money was lent for such private use. *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217.

A bill seeking to enforce the execution of a trust in the name of a mere volunteer and for his benefit, must allege a declaration of the trust in his favor. *Compton v. Vasser*, 19 Ala. 259.

Where the facts appearing in a suit to execute a trust, tend to show a covinous purpose in the creation of the trust, such purpose will not be noticed without a direct averment thereof in the pleadings. *Hudgins v. White*, 2 Ired. Eq. (N. Car.) 575.

It is not necessary for one who seeks to enforce a resulting or presumptive trust to show, by appropriate averments, that it belongs under some one of the classes mentioned in the *Kentucky Revised Statutes*, ch. 80, § 22. *Graves v. Graves*, 3 Metc. (Ky.) 167.

A complaint which merely alleged that lands were conveyed to a husband in 1831, four years after his marriage, and that the consideration was paid by the wife, out of her own estate, is an insufficient averment of a resulting trust. *Joyce v. Haines*, 33 N. J. Eq. 99.

In a suit for the recovery of an alleged half interest in land formerly held in trust for the plaintiff, the complaint was demurrable, in that it did

not show that the defendants, who derived title from the alleged trustee, were not *bona fide* purchasers with notice of the plaintiff's claim. *De Mares v. Gilpin*, 15 Colo. 76.

Where a bill seeks to convert a purchaser of personal property, who takes the absolute conveyance to himself, into a trustee for another, on the ground that the purchase was made with the latter's money, or where it seeks to correct a deed of land, absolute on its face, by having it declared to be only a mortgage, it must be alleged and proved that the redemption clause, or declaration of trust, was omitted, by reason of mistake, ignorance, fraud, or undue advantage, and the alleged intention of the parties that such conveyances should not be absolute, must be established, not merely by parol proof of the declarations of the purchasers to that effect, but by proof of circumstances and facts, *dehors* the deeds, inconsistent with the idea of an absolute purchase. *Clement v. Clement*, 1 Jones Eq. (N. Car.) 184; *Briggs v. Morris*, 1 Jones Eq. (N. Car.) 193; *Taylor v. Taylor*, 1 Jones Eq. (N. Car.) 246.

Where the petition does not set forth a case of trust, nor seek relief on that account, it does not present a case of equity jurisdiction on the ground of trust. *Claussen v. Lafrenz*, 4 Greene (Iowa) 224.

2. *Felix v. Patrick*, 145 U. S. 317; *Veal v. Veal*, 89 Ky. 314; *Walton v. Stewart*, 61 Hun (N. Y.) 625; 129 N. Y. 667; *Muller v. Buyck*, 12 Mont. 354.

The bill of a trustee of an express trust which shows on its face that the plaintiff is not the real party in interest, should show for whose benefit he sues. *Holladay v. Davis*, 5 Oregon 40.

In *sc. fa.* against a trustee, it is unnecessary to allege that the defendant was adjudged trustee. *Bickford v. Boston, etc., R. Co.*, 21 Pick. (Mass.) 109.

The averments in a bill that X laid out money belonging to himself and Y and Z in the purchase of land for their common use; of an agreement that X and Y should be owners in fee, and tenants in common, each of a moiety; that Z should have her wood from the land;

and that a deed was taken to X, are sufficient to raise a trust. *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371.

A party who comes into chancery, and claims a right as a substituted trustee under the testator's will, should allege in his bill the necessary facts, to show that a vacancy had occurred, which authorized his appointment; and also to show that he had been legally appointed as such trustee. *Cruger v. Halliday*, 11 Paige (N. Y.) 314.

The requisites of a complaint sufficient to enforce a trust, where the beneficiary was dead and part of the heirs resided beyond the jurisdiction, were stated in *Chamberlain v. Lancey*, 60 Me. 230.

A charge in the complaint of the plaintiff bank that about \$10,000 of the bank funds and assets were diverted, and converted by its president and cashier into the property of the defendant corporation, of which such bank officers were also the principal officers, with the further averment that the property of the defendant rested substantially upon the funds and assets of the bank, is sufficient, on general demurrer, to impress a trust on such corporate property in favor of the bank, when such funds and assets had been acquired by the defendant, with notice. *Farmers', etc., Bank v. Kimball Milling Co.*, 1 S. Dak. 388.

A general allegation that the defendant acted fraudulently and in bad faith, is sufficient. *Nichols v. Rogers*, 139 Mass. 146.

**Bill Held Sufficient.**—In an action to enforce a trust in a mining claim under a verbal agreement between the parties, the complaint sufficiently alleges the performance of conditions on the plaintiff's part, where it states "that plaintiff has performed all and singular his agreements and covenants with defendant." *Maritz v. Lavelle*, 77 Cal. 10; 11 Am. St. Rep. 229.

A complaint alleged that a conveyance of real estate was made to the defendant "without consideration, and upon the parol condition and understanding between the grantor and herself that she should hold an undivided half of it in trust for G, and after the grantor's death should sell it and give half the proceeds to G." A demurrer, on the ground that the agreement of the grantee was alleged to be by parol, should be overruled, as the grantee, having received the benefit, could be

compelled to perform the agreement. *Todd v. Munson*, 53 Conn. 579.

A petition of a *cestui que trust*, which alleges that the trustee is in possession of the trust estate, and refuses to pay over the profits thereof or the principal, but is applying the same to his own benefit, discloses a good cause of action, for which equity will grant relief, even under a general prayer, although the specific relief prayed for may not be granted. *Dial v. Dial*, 21 Tex. 529.

A plaintiff's bill averred that the defendants jointly agreed that each should hold in trust for the plaintiff, shares of stock, until the dividends should amount to the price of the shares; and that one defendant sold such shares to his co-defendant. This states a cause of action, although not enough to call for a specific account. *Magauran v. Tiffany*, 62 How. Pr. (N. Y. Supreme Ct.) 251.

In a suit to enforce a trust on which a conveyance, absolute on its face, was made, the bill need not recite that the terms of the trust were omitted from the deed by fraud or mistake, the suit not being to reform the deed. *Link v. Link*, 90 N. Car. 235.

The failure to aver that the trustee did not really think it was best for his children that he should ignore his trust obligation in their behalf, is not a sufficient ground of demurrer. *McDonald v. McDonald*, 92 Ala. 537.

The complaint alleged that property was devised in trust for the complainant and another, to be conveyed at a certain time to the beneficiaries; that the complainant was induced, through the trustee's fraud, to convey her interest to her co-beneficiary, without consideration; that the trustee had made no conveyance of said property to either of the beneficiaries; that the co-beneficiary was refusing to reconvey to the complainant, or to join in an action against the trustee; and prayed that the deed to the co-beneficiary be declared void, and the property be conveyed to the beneficiaries according to the provisions of the will. Demurrer for want of equity was overruled. *Weaver v. Van Akin*, 77 Mich. 588.

A bill alleged the plaintiff to be the equitable owner of land, that the trustees were dead, and their heirs either unknown to her or non-residents. The plaintiff asked for an injunction restraining the city from opening a street through the land, and prayed for the appointment of a trustee to protect the

The facts required to establish the jurisdiction must appear in the bill.<sup>1</sup> If the plaintiff sues as "trustee," he must allege facts showing that he is trustee.<sup>2</sup>

While the courts will suffer considerable freedom in the preparation and amendment of pleadings, it has been held that the bill of complaint cannot be so far amended, after the evidence is all in, as to entirely alter the theory of the suit.<sup>3</sup>

**5. Evidence.**—Evidence which will establish the existence of a trust must be clear, full, and convincing.<sup>4</sup> If the trust has its origin in a writing, it cannot be proven by parol, unless a sufficient excuse be forthcoming for failure to produce the writing, and the parol proof adduced be unequivocal and conclusive.<sup>5</sup>

legal title. It was held that the bill was sufficient. *Forsyth v. Wheeling*, 19 W. Va. 318.

**Bill Held Insufficient.**—A general averment of fraud or bad faith is not sufficient. *Nichols v. Rogers*, 139 Mass. 146.

A trust to sell land for a price satisfactory to the parties, under the supervision of the plaintiff, cannot be enforced, where the bill does not aver that an opportunity had ever occurred to sell for a satisfactory price, or that the plaintiff had ever exercised his supervision and control with a view to effect the sale. *Shultz v. McLean* (Cal. 1890), 25 Pac. Rep. 427, 430.

In an action brought by a child for the recovery of property which has been sold by its father, before he can be allowed to prove that his father has defrauded him of his *legitimate* by simulated sales of his property, simulation must be averred in the petition, and a simple averment that the defendant knowingly and wrongfully detains from the plaintiff, without any legal right, lands which the plaintiff had inherited from his father, will be insufficient. *McQueen v. Sandel*, 15 La. Ann. 140.

A bill in equity which was filed by the heirs-at-law of a decedent, seeking to hold the defendant a trustee for their benefit of the legal title to a certain piece of land to which (they alleged) their ancestor had a pre-emption right at the time of his decease, and to which the defendant, by fraudulently colluding with one of the heirs afterward secured a patent, was held defective on demurrer, because it did not allege, first, that the time limited by the act of Congress for their ancestor to make his entry had not expired at the time of the defendant's entry on the land; second, that the complainants were able and willing to enter the land, if the defend-

ant had not entered, or that they were prevented from doing so by his entry; third, a tender of the money expended by the defendant in making the entry, or a readiness and willingness upon the part of the complainants to repay it. *Martin v. Tennison*, 26 Ala. 738.

1. The jurisdiction of a court of chancery cannot be invoked by a *cestui que trust*, in asserting a legal title, without alleging that the trustee had refused the use of his name in an action at law. *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464.

2. *Wilson v. Polk County*, 112 Mo. 126.

3. *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40.

4. See generally, under this heading, *supra*, this title, *Creation of Trusts*; *McVey v. Parker*, 64 Ala. 493; *Parker v. Pierce*, 16 Iowa 227; *Bradley v. Bradley*, 21 Iowa 480; *Cuming v. Robins*, 39 N. J. Eq. 46.

One who seeks to charge another as trustee for his benefit, must be held to a clear proof of the trust. *Clarke v. Quackenbos*, 27 Ill. 260; *Quackenbos v. Clarke*, 27 Ill. 290. Compare *Wachter v. Blowney*, 104 Ill. 610; *Schneider v. Becker*, 125 Ill. 109.

Where A filed a bill against B's heirs, for a deed of a part of a lot of land purchased in B's name, with money alleged to be furnished by A, and the bill was not sworn to, and was denied on oath in the answer, and there being no memorandum of an agreement, and the only evidence in support of the bill being declarations of B, which were rebutted by proof of possession by the deceased for two years without claim, and of frequent acts of ownership upon the whole lot, it was held that the bill was properly dismissed. *Testament v. Perkins*, 3 Greene (Iowa) 209.

5. *McVey v. Parker*, 64 Ala. 493.

And unless the trust arises on the face of the deed itself, proof thereof must be clear and conclusive.<sup>1</sup>

While a trust in lands created by parol must, in an attempt to enforce the trust, be manifested by a writing duly signed, it is competent, after the trust has terminated by a conveyance of the property by the trustee, to prove the trust by parol evidence.<sup>2</sup>

A trust will not be implied by law nor presumed, except in cases where it is supported by strong circumstances showing that a trust was intended by the parties.<sup>3</sup>

Cases illustrating the sufficiency of evidence to establish the existence of a trust relationship, are given below.<sup>4</sup>

1. *McVey v. Parker*, 64 Ala. 493; *Olive v. Dougherty*, 3 Greene (Iowa) 371.

Where the answer denies a trust, such trust must be proved by legal and competent testimony, although the Statute of Frauds is not set up as a defense to the trust, by the answer. *Whyte v. Arthur*, 17 N. J. Eq. 521.

In a suit against a bank receiver for dividends upon a debt for a deposit in the name of "S, Trustee," the mere statement of the depositor that the money deposited belonged to his daughter, taken in connection with a showing that she was the owner of property of which "S" had the charge, and from which the deposit might have been derived, is not sufficiently clear and conclusive to enable the daughter to recover, in the absence of a showing that the fund so deposited was derived from her property. *Sowles v. Witters*, 35 Fed. Rep. 463.

2. *Silvers v. Potter*, 48 N. J. Eq. 539.

3. *Brace v. Reid*, 3 Greene (Iowa) 422.

4. Where the complaint seeks to establish an express trust in the proceeds of a promissory note, proof of the intention to create a trust which was never executed, is not sufficient to sustain the complaint. *Lanternman v. Abernathy*, 47 Ill. 437.

If the answer is evasive and unsatisfactory, and it appears that the defendant has conveyed a large portion of the property according to the terms of the alleged trust, and taken receipts, and done other acts inconsistent with an absolute conveyance, and that the plaintiff was weak in intellect and liable to be controlled by the defendant, and was in fact deceived by him as to the nature of the conveyance, the trust will be declared by a court of equity, and the defendant will be held to an

account. *Lamb v. Pigford*, 1 Jones Eq. (N. Car.) 195.

Upon a suit brought to enforce a reconveyance of land deeded nearly forty years before, and of which the plaintiff and his grantor had been in continuous possession all of this time, except for the first three years, the testimony of one witness was that he saw certain papers executed at and about the time of the conveyance, and that he understood them to be a deed and a bond to reconvey, and another witness testified to having seen the bond. The bond could not be found, and there was evidence which tended to show that the consideration of the deed was only one-ninth of the value of the land. It was held that a trust was sufficiently established to justify a granting of the relief sought. *Orviss v. Dunn*, 34 Fed. Rep. 683.

A plaintiff seeking to establish a trust in his own favor in land held by the defendant, is not obliged to show a paramount title against all the world; it is sufficient to establish that the defendant stands in the relation of a trustee to him. *Leakey v. Gunter*, 25 Tex. 400.

Parol evidence is insufficient to prove a trust made seventeen years before a suit brought to enforce it, and eleven years after the death of the alleged trustee, when other rights have attached. *Emerick v. Emerick*, 3 Grant's Cas. (Pa.) 295.

Where a will, valid on its face, conveys real estate to trustees in trust, and the objects of the trust are clearly defined, and are not at the time the will takes effect illegal, a perfect legal title is vested in the trustees, and where ejectment is brought by them against a stranger and intruder, without color or claim of title adverse to that of the plaintiffs, the latter cannot be required

The burden of proof falls on the party who seeks to establish a trust in conflict with the legal title.<sup>1</sup>

A trust in personal property may be proven by parol.<sup>2</sup>

Parol evidence is admissible to establish a resulting trust, even though the trustee deny under oath; for the Statute of Frauds exempts such trusts from its provisions. But the proof must be clear and strong.<sup>3</sup>

Parol testimony to establish a resulting trust should be ac-

in the first instance to make any further proof of title than to prove the execution of the will. They are not bound to show who are *cestuis que trustent*. *Cumberland v. Graves*, 9 Barb. (N. Y.) 595.

Where the claim is made that a decedent held land upon a resulting trust, the testimony of a single witness as to declarations made to him by the deceased, will hardly suffice to establish such a trust, unless the testimony embraces other matters, and no attempt is made to rebut it when witnesses are accessible who know the facts. *Grace v. Hanks*, 57 Tex. 14.

1. *Harris v. Stone*, 15 Iowa 273; *Shepard v. Pratt*, 32 Iowa 296.

Where a bill is filed for the enforcement of an express trust, alleged to have been created by the defendant's agreement to receive and collect claims, for the security of a demand due the firm of I. G. & Co., proof of an agreement made by the debtor of I. G. & Co. with the defendant, that the latter should receive and collect certain claims, and should pay the proceeds either to the debtor himself, or to three firms, of which I. G. & Co. was one, does not sustain the averments of the bill. *Paulding v. Lee*, 20 Ala. 753.

2. *Allen v. Withrow*, 110 U. S. 119; *Martin v. Greer*, 1 Ga. Dec. 109; *Davis v. Coburn*, 128 Mass. 377; *Chase v. Perley*, 148 Mass. 289; *Hooper v. Holmes*, 11 N. J. Eq. 122; *Pitney v. Bolton*, 45 N. J. Eq. 639; *Lord v. Lowry*, 1 Bailey Ch. (S. Car.) 510.

3. *Browne on Statute of Frauds*, § 83; *Reed on Statute of Frauds*, § 971; 2 Whart. on Ev., § 1035; 1 Greenl. on Ev., § 266; *Lofton v. Sterrett*, 23 Fla. 565; *Coates v. Woodworth*, 13 Ill. 654; *Nichols v. Thornton*, 16 Ill. 113; *Krauth v. Thiele*, 45 N. J. Eq. 407; *Chenoweth v. Lewis*, 9 Oregon 150; *White v. Sheldon*, 4 Nev. 280.

A resulting trust may be proved by parol, even in opposition to the denial

of the answer of the trustee; but the proof must be clear, and be received with great caution. *Blair v. Bass*, 4 Blackf. (Ind.) 539; *Jennison v. Graves*, 2 Blackf. (Ind.) 441; *Page v. Page*, 8 N. H. 187; *Snelling v. Utterback*, 1 Bibb (Ky.) 609; 4 Am. Dec. 661; *Letcher v. Letcher*, 4 J. J. Marsh. (Ky.) 590; *Pugh v. Bell*, 1 J. J. Marsh. (Ky.) 399; *Dis-mukes v. Terry*, Walk. (Miss.) 197; *Larkins v. Rhodes*, 5 Port. (Ala.) 195; *Peebles v. Reading*, 8 S. & R. (Pa.) 484; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Jenkins v. Eldridge*, 3 Story (U. S.) 181; *Corprew v. Arthur*, 15 Ala. 525; *Poulet v. Johnson*, 25 Ga. 403; *Enos v. Hunter*, 9 Ill. 211; *Nichols v. Thornton*, 16 Ill. 113; *Collins v. Smith*, 18 Ill. 160; *Clarke v. Quackenbos*, 27 Ill. 260; *Brown v. Pitney*, 39 Ill. 468; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198; *Fausler v. Jones*, 7 Ind. 277; *Noel v. Noel*, 1 Iowa 423; *Brace v. Reid*, 3 Iowa 422; *Bryant v. Hendricks*, 5 Iowa 256; *MacGregor v. Gardner*, 14 Iowa 326; *Cooper v. Skeel*, 14 Iowa 578; *Childs v. Griswold*, 19 Iowa 362; *Kin-cell v. Feldman*, 22 Iowa 363; *Monroe v. Graves*, 23 Iowa 597; *Hickey v. Young*, 1 J. J. Marsh. (Ky.) 1; *Carey v. Callan*, 6 B. Mon. (Ky.) 44; *Buck v. Pike*, 11 Me. 9; *Baker v. Vining*, 30 Me. 121; 50 Am. Dec. 617; *Faringer v. Ramsay*, 2 Md. 365; *Greer v. Baughman*, 13 Md. 257; *Brawner v. Staup*, 21 Md. 328; *White v. Sheldon*, 4 Nev. 280; *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 434; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Harrison v. Mc-Mennomy*, 2 Edw. (N. Y.) 251; *Swinburne v. Swinburne*, 28 N. Y. 568; *Reid v. Fitch*, 11 Barb. (N. Y.) 399; *Foy v. Foy*, 2 Hayw. (N. Car.) 131; *Stall v. Cincinnati*, 16 Ohio St. 169; *Byers v. Wackman*, 16 Ohio St. 440; *Wetherell v. Hamilton*, 15 Pa. St. 195; *Lloyd v. Carter*, 17 Pa. St. 216; *McBarron v. Glass*, 30 Pa. St. 133; *Holder v. Nunnally*, 2 Coldw. (Tenn.) 288; *Grooms v. Rust*, 27 Tex. 231; *Wallace v. Bowens*, 28 Vt. 638; *Lehman v. Lewis*,

cepted with extreme caution, and should be clear and such as goes distinctly to prove the facts necessary to create such resulting interest.<sup>1</sup> The party seeking to establish it has the burden of proof, and must produce evidence which is clear, satisfactory, and conclusive.<sup>2</sup>

Parol evidence to establish a trust is not regarded with favor, and must be clear, satisfactory, and conclusive.<sup>3</sup> An express trust cannot be proven by parol.<sup>4</sup>

Parol evidence will be admitted to show that a purchase made in the name of one was a joint purchase at the cost of more than the one and for the benefit of all,<sup>5</sup> or that the consideration for a

62 Ala. 129; *Bayles v. Baxter*, 22 Cal. 575; *Church v. Sterling*, 16 Conn. 400; *Alexander v. Alexander*, 46 Ga. 283; *Franklin v. Colley*, 10 Kan. 260; *Marsh v. Davis*, 33 Kan. 326; *Dryden v. Hanway*, 31 Md. 254; 100 Am. Dec. 61; *Blodgett v. Hildreth*, 103 Mass. 486; *Felch v. Hooper*, 119 Mass. 52; *Cloud v. Ivie*, 28 Mo. 578; *Johnson v. Quarles*, 46 Mo. 423; *Hopkinson v. Dumas*, 42 N. H. 296; *Hanff v. Howard*, 3 Jones Eq. (N. Car.) 440; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71; *Nixon's Appeal*, 63 Pa. St. 282; *Phelps v. Seely*, 22 Gratt. (Va.) 589; *Whiting v. Gould*, 2 Wis. 552; *Thomas v. Chicago*, 55 Ill. 403; *Mahoney v. Mahoney*, 65 Ill. 406; *St. Patrick's Catholic Church v. Daly*, 116 Ill. 76.

Parol evidence may be admitted in a court of chancery, for the purpose of showing what the transaction is in all its details, out of which a trust results by operation of law. *Rogan v. Walker*, 1 Wis. 527.

A resulting trust may be proved against a person claiming by descent, by the ancestor's parol admissions. *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17.

A resulting trust arising by implication of law out of external facts and circumstances, and not out of any agreement of the parties, may be established or defeated by extrinsic evidence. *Donlin v. Bradley*, 119 Ill. 412.

For the establishment of a resulting trust in favor of the husband or his heirs, in real estate purchased by the wife, the evidence that the money used in the purchase was his, must be decisive and clear, though it may be by parol, and where the husband permits such a purchase, and the title to be taken by the wife, a presumption is raised as between them, and as between her and the heirs of the husband, that it was intended as an advancement and

provision for her. *Sunderland v. Sunderland*, 19 Iowa 325.

Where the deed recites a money consideration, though it is but of a small amount, parol evidence to establish a resulting trust is not admissible. *Russ v. Mebius*, 16 Cal. 350.

1. *Noel v. Noel*, 1 Iowa 423.

Where a trust is set up under a parol agreement, years after its alleged creation, and long after the parties thereto have died, very strict proof is necessary, and the relief granted is only upon the most satisfactory evidence. *Nelson v. Worrall*, 20 Iowa 469.

2. *Green v. Dietrich*, 114 Ill. 636; *Corder v. Corder*, 124 Ill. 229.

And not by loose and random conversations. *Robinson v. Robinson*, 22 Iowa 427; *Maple v. Nelson*, 31 Iowa 322; *Green v. Dietrich*, 114 Ill. 636.

3. *Allen v. Withrow*, 110 U. S. 119; *Lantry v. Lantry*, 51 Ill. 458; 2 Am. Rep. 310; *MacGregor v. Gardner*, 14 Iowa 326; *Childs v. Griswold*, 19 Iowa 362; *Sunderland v. Sunderland*, 19 Iowa 325; *Nelson v. Worrall*, 20 Iowa 469; *Monroe v. Graves*, 23 Iowa 597; *Shepard v. Pratt*, 32 Iowa 296; *Peters v. Jones*, 35 Iowa 512; *Trout v. Trout*, 44 Iowa 471; *Burns v. Byrne*, 45 Iowa 285.

4. *Stonehill v. Swartz*, 129 Ind. 310.

Where by a deed absolute, land has been conveyed to the ancestor, for which the heirs have parted with nothing, parol evidence is not admissible to show that the conveyance was made to him under the express agreement that he should have merely a life estate, and transmit the land to certain of his heirs upon his death. *Stonehill v. Swartz*, 129 Ind. 310. See also *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, 113 Ind. 83.

5. *Powell v. Monson, etc., Mfg. Co.*, 3 Mason (U. S.) 347. See *Letcher v. Letcher*, 4 J. J. Marsh. (Ky.) 590.

purchase was in fact paid by some person other than the person named in the deed or conveyance as grantee.<sup>1</sup>

Parol evidence is admissible to show that the deed purporting to have been made for a certain named consideration, was in fact made without consideration, and that the grantee held the lands in trust for the grantor.<sup>2</sup>

Where a charge of conversion is made against one occupying a fiduciary position, it has been held proper to introduce the tax assessment lists to show an increase in the personality of the trustee during the period of the alleged conversion.<sup>3</sup>

It has been held competent to show the financial condition of the purchaser, where the question in suit is whether the purchase was made with trust funds, or by the purchaser with his own money.<sup>4</sup> Evidence will be heard to show that a deed absolute on its face was given in trust for the grantor.<sup>5</sup>

The Statute of Frauds requires written evidence of the existence of the trust sought to be enforced, if it relate to lands, but does not forbid the parol creation of a trust.<sup>6</sup>

1. Parol evidence is admissible to prove that a sheriff's deed, absolute on its face, was taken by the grantee, under an agreement to hold the property in trust for a third party. *Smith v. Eckford* (Tex. 1891), 18 S. W. Rep. 210.

Where the consideration in a deed is expressed to be paid by the grantee, verbal evidence is nevertheless admissible to show the payment thereof by a third person, for the purpose of establishing a resulting trust in his favor. *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *De Peyster v. Gould*, 3 N. J. Eq. 474; 29 Am. Dec. 723; *Page v. Page*, 8 N. H. 187; *Dismukes v. Terry*, Walk. (Miss.) 197; *Dickenson v. Dickenson*, 2 Murph. (N. Car.) 279. To the contrary, *Philbrook v. Delano*, 29 Me. 410; *Groesbeck v. Seeley*, 13 Mich. 329.

Where S, to save patent expenses, conveyed by an absolute deed, without payment of any money consideration, one-half of unpatented land to H, his brother-in-law, who owned the other half, it was held in an action of trespass by a grantee of H's executor, that parol evidence was admissible to show that the conveyance was made to obtain a patent for the whole in one, and to establish a trust for S. *Lingenfelter v. Ritchey*, 58 Pa. St. 485; 98 Am. Dec. 308.

2. *Ryan v. O'Connor*, 41 Ohio St. 368.

3. *Haxton v. McClaren*, 132 Ind. 235.

4. *Gale v. Harby*, 20 Fla. 171. Compare, however, *Rankin v. Harper*, 23

Mo. 579, where it was held that, in a case in which a resulting trust in land was asserted, on the ground that the conveyance was taken in fraud of the creditors of the supposed *cestui que trust*, evidence of his pecuniary circumstances, three years after he directed the conveyance, would not be received.

5. Evidence *aliunde* is admissible to show that a deed, absolute on its face, was given in trust for the grantee to sell the premises conveyed, and apply the proceeds in payment of a debt due from the grantor. *Hopkins v. Watts*, 27 Ga. 490. But compare *Sturtevant v. Sturtevant*, 20 N. Y. 39, and *Clagett v. Hall*, 9 Gill & J. (Md.) 80, where it is held that in the absence of allegations of fraud or mistake, an absolute conveyance cannot be made out to be in trust, by parol evidence. Thus, one whose grantee has sold the land, is precluded from showing a resulting trust, and recovering the price of the land.

6. See *supra*, this title, *Creation of Trusts*; 1 Greenl. on Ev., § 266; 2 Whart. on Ev., §§ 903, 1034; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Norton v. Mallory*, 63 N. Y. 434; *Kinsey v. Bennett*, 37 S. Car. 319.

Parol evidence of a secret trust, and of a contract to convey land, is inadmissible under the Statute of Frauds; but, independent of the statute, the evidence will not avail against the denial of the alleged trustee and vendor.

A trust may be proved by circumstantial evidence,<sup>1</sup> by admissions in the pleadings made either explicitly or by implication by the party sought to be charged,<sup>2</sup> or by his admissions elsewhere made.<sup>3</sup>

The trustee can make no admissions to the prejudice of the estate or of the beneficiary.<sup>4</sup>

Subsequent declarations of the trustee are competent evidence to establish a trust.<sup>5</sup>

Declarations made by the grantor are admissible, if made at the time the trust was created and while the grantor still retained an interest in the property.<sup>6</sup> Declarations of a purpose to create

Chiles v. Woodson, 2 Bibb (Ky.) 71; Barbin v. Gaspard, 15 La. Ann. 539.

1. Lamb v. Girtman, 26 Ga. 625; Davis v. Coburn, 128 Mass. 377.

Where the plaintiff alleges an express trust, he is bound to prove it, as averred. It may be proved by circumstances, and the court will look to the then existing circumstances, to see the intention of the parties. Gunter v. Janes, 9 Cal. 643.

A single witness' evidence, unsupported by corroborating circumstances, stating the defendant's admission of facts denied in the answer, is insufficient to establish an express trust. Miller v. Thatcher, 9 Tex. 482; 40 Am. Dec. 172. See Hall v. Layton, 16 Tex. 262.

2. A letter from the trustee to the *cestui que trust* admitting the existence of the trust, is evidence in an action between the *cestui que trust* and a party (a volunteer) to whom the trustee afterward conveyed, and supported by evidence of similar declarations of the trustee, is sufficient to establish the trust. Massey v. Massey, 20 Tex. 134.

A deceased trustee's admissions, particularly if corroborated, are sufficient to establish a trust based upon a negative fact, as the non-payment of the purchase-money by the trustee to his vendors, the alleged beneficiaries. Van Dever v. Freeman, 20 Tex. 333; 70 Am. Dec. 391.

A grantee's admission in an absolute deed that it was intended as a trust deed, made in his answer to a bill against him for the enforcement of the trust, was sufficient evidence to establish the trust under the Statute of Frauds, although he denied that he ever accepted it or interfered with the trust estate. Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157.

A parol trust in land may be proved

by admissions contained in the trustee's answer under oath. McVay v. McVay, 43 N. J. Eq. 47.

3. The declarations of one under oath, that he gave money as a gift, and had no interest in the land purchased with it, may be given as proof to bar his claims to a resulting trust in such land. Graves v. Graves, 3 Metc. (Ky.) 167.

In a suit to enforce a trust created by parol, it is proper for the complainant to interpose any evidence of acts or words of the defendant, which tends to show a recognition by him of the trust. Chase v. Perley, 148 Mass. 289.

4. Thomas v. Bowman, 30 Ill. 84; Bragg v. Geddes, 93 Ill. 39.

5. Smith v. McElyea, 68 Tex. 70. But not sufficient. Williams v. Lowe, 4 Neb. 392.

The purchaser of land in his own name, but as agent or trustee of another, to whom he afterward conveys, is a witness to prove the trust. Brown v. Downing, 4 S. & R. (Pa.) 494.

The declarations of one, while holding the legal title to an estate, are admissible to show that he is merely trustee against those claiming under him, though such person is alive and within reach of the process of the court. Giblehouse v. Stong, 3 Rawle (Pa.) 437.

6. Allen v. Withrow, 110 U. S. 119; Price v. Kane, 112 Mo. 412.

On the question for whose benefit a trust was created, the declarations of the grantor made before the conveyance, are competent evidence, as are the subsequent declarations and acts of the trustee, and of those who hold under deeds from him. The grantor's declarations, made after the execution of the deed, are not, however, competent on the question of his intent in making it. Smith v. McElyea, 68 Tex. 70.



a trust, not carried out, are of no value ; nor are direct promises to that effect which do not amount to a contract.<sup>1</sup>

Trusts provable by parol may be disproved by parol.<sup>2</sup>

Under the familiar rule of evidence, however, parol evidence will not be admitted to vary the terms of a trust created in writing.<sup>3</sup>

The legality of the trust and the faithful performance of the trust by the trustee being presumed,<sup>4</sup> the burden of proof is on the party who seeks to show the contrary. Payments made by the trustee to the beneficiary will be presumed to be payments on account of income from the trust estate, in the absence of a showing to the contrary.<sup>5</sup>

These presumptions make only a *prima facie* case for the trustee, however, for his statement of accounts will not be accepted as conclusive in his favor.<sup>6</sup>

1. Allen v. Withrow, 110 U. S. 119.

2. 2 Whart. on Ev., § 1035.

The presumption of a trust, raised by parol evidence, may be repelled by parol. Smith v. Howell, 11 N. J. Eq. 349; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Page v. Page, 8 N. H. 187; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; Edwards v. Edwards, 39 Pa. St. 369.

3. Gainus v. Cannon, 42 Ark. 503; Simms v. Smith, 11 Ga. 195; Lake v. Freer, 11 Ill. App. 576; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; Taylor v. Baldwin, 10 Barb. (N. Y.) 585; Richards v. Crocker, 20 N. Y. Supp. 954; 66 Hun (N. Y.) 629; Dickenson v. Dickenson, 2 Murph. (N. Car.) 279; Lloyd v. Inglis, 1 Desaus. Eq. (S. Car.) 333; Harris v. Barnett, 3 Gratt. (Va.) 323; Lewis v. Lewis, 2 Ch. R. 77; Finch's Case, 4 Inst. 86; Childers v. Childers, 3 K. & J. 310; 1 De G. & J. 482; Fordyce v. Willis, 3 Bro. C. C. 587; Leman v. Whitley, 4 Russ. 423.

But parol evidence may be heard where the trust was discretionary, to prove how that discretion was exercised. Simms v. Smith, 11 Ga. 195.

But the trustee, who is the lessor of the plaintiff, has been held to be a competent witness to show that the real trust is different from the one apparent in the conveyance. Drum v. Simpson, 6 Binn. (Pa.) 478; 6 Am. Dec. 490.

The recitals in the declaration of the trust will estop the trustee to show that in fact it was executed at a time other than that of which it bears date. Russell v. Peyton, 4 Ill. App. 473.

A trustee is not competent to prove

that the deed of trust was never intended to have any operation for the purposes therein expressed. Wilson v. Wilson, 1 Desaus. Eq. (S. Car.) 219.

In Price v. Kane, 112 Mo. 412, it was held that where a husband had conveyed land in trust for his wife, reserving no power of revocation, parol evidence of the wife's declaration that the property was her husband's, and that she would reconvey it to him whenever he asked it, is not sufficient to establish a trust in such property in his favor.

4. See *supra*, this title, *Pleading*.

A trustee cannot be surcharged upon evidence of witnesses that the property ought to have yielded more than it did, where no evidence exists as to particulars, and there is evidence that the rents demanded were at reasonable prices, and that everything received had been accounted for, and the property considerably improved under his management. Moore's Appeal, 10 Pa. St. 435.

5. Woodard v. Wright, 82 Cal. 202.

6. Baker v. Williamson, 4 Pa. St. 456.

In a suit involving a title to land in Texas, it was held that a decree rendered by a court of chancery of another state was admissible to show the nature and terms of the trust under which money was transferred to a trustee in Texas to be invested. Wallace v. Campbell, 53 Tex. 229.

In a controversy between a trustee and a *cestui que trust*, it was held proper to admit in evidence a transcript of the settlement of the trustee's accounts made before a court of the county, in which the deed of trust

Cases illustrating the competency of evidence under peculiar circumstances, are cited below.<sup>1</sup>

6. *Costs*.—It is not possible to lay down any rules of general

was recorded. *McAfee v. Balden*, 6 Bush (Ky.) 537.

1. In *Luco v. DeToro*, 91 Cal. 405, A, who was the owner of the equitable interest in unpatented lands, employed an attorney to procure a patent for the same for the person through whom A claimed title, and promised the attorney a certain portion of the land in the event of his success. The attorney transferred his interest in the trust which A held for him, and in a suit by the assignee against A's personal representative to recover the attorney's interest, it was contended by the defendant that both the attorney and his assignee had abandoned the contract. It was held that evidence was admissible which tended to show that, until the procurement of the patent, the assignee continued to expend on it sums of money for that purpose.

A trustee may not prove by parol the amount of costs expended by him in receiving trust property. *Gates v. Hunter*, 13 Mo. 511.

Where the plaintiff had given in evidence what was alleged to be an express trust, executed by the holder of the legal title, the defendant's evidence explanatory of the transaction out of which the alleged trust arose, as to the intention of the parties and the terms and effects of the trust, was held to be admissible; as was also evidence that the purchaser under whom the plaintiff claimed had no title in the land (of which notice was given before the sale), that he had made no payment, nor offer of payment, of his share of the purchase-money, and that he had by parol waived all his right on account of the purchase. *Deitzler v. Mishler*, 37 Pa. St. 82.

If, while a suit in equity is pending relating to property assigned in trust, sales are made after the committee's report and before its acceptance, varying the state of the accounts between the parties, on a final hearing before the court evidence of such sale is admissible. *Kendall v. New England Carpet Co.*, 13 Conn. 383.

Where certain land was deeded to a certain person under a parol contract that he should reconvey one-half of the land, and he mortgaged the land, and afterward, upon the institution of

a suit to foreclose, executed a declaration in writing of the trust, it was held that such declaration was valid, and in proof of the trust was admissible in evidence in the foreclosure suit in behalf of the *cestui que trust*. *Sime v. Howard*, 4 Nev. 473.

The plaintiff brought suit to recover land which he had purchased at a judicial sale. The defendant asserted an equity attaching to the estate by virtue of a definite agreement that plaintiff would buy the land for defendant and reconvey to him, upon being repaid the sum bid with accrued interest. It was held competent, after the admissions of evidence of such an agreement, to show that there was a general impression among the bystanders at the sale that such was the understanding, and that there was no competition in consequence among the bidders, and that evidence was also admissible to corroborate defendant's statement as to what the actual agreement was. *Cheek v. Watson*, 85 N. Car. 195.

By his bill of complaint, a *cestui que trust* sought to hold the maker of a promissory note belonging to a trust estate, liable for deductions from the amount due thereon allowed by the trustee, on the ground of collusion between the trustee and the maker. It was held that the maker of the note might introduce evidence to show the good faith of the trustee, as well as evidence that he had no notice of the trustee's fraudulent intention. *Maynard v. Cleveland*, 76 Ga. 62.

In an action to have a party declared a trustee, and to compel him, as such, to convey land claimed to have been acquired by him from a third party as trustee of the party making complaint, the latter party may not introduce testimony as to whether he knew that the other was about to make the purchase. *Branson v. Caruthers*, 49 Cal. 375.

In an action for the recovery of money alleged to have been received by the defendant in trust, if complainant introduces no direct evidence of any contract or conditions under which the money was received, but relies upon circumstances, the defendant may testify to the purpose for which he supposed the money was given him, and

application, which may be said to govern courts of equity in their jurisdiction over trusts in reference to the awarding of costs; this is a matter within the discretion of the court, and generally the exercise of this discretion cannot be reviewed upon appeal.<sup>1</sup>

A general rule, however, may be stated to be, that a trustee who is acting within the line of his duty and in good faith appears before the court as the party to a suit, whether instituted by himself or against him, will be held exempt from the payment of costs out of his personal income, and any costs incurred by him under such circumstances will be repaid out of the trust fund under the order of the court having jurisdiction in the premises, or by the *cestui que trust*.<sup>2</sup>

Subject to the reasonable discretion of the court in awarding

the understanding with which he received it. *Davis v. Coburn*, 128 Mass. 377.

In an action for the recovery of property conveyed in trust to secure debts, evidence that the debts had been "paid or nearly so," was properly rejected. *Poole v. Adkisson*, 1 Dana (Ky.) 110.

In *Barry v. Lambert*, 98 N. Y. 300; 50 Am. Rep. 677, it appeared that a bond and mortgage had been executed to defendant and M as executors for \$8,000, \$6,000 of this sum belonged to the estate, and the balance was loaned by the plaintiff to M. In an action brought by plaintiff to enforce a trust in the bond and mortgage for this loan, it was held competent to admit M's declaration made soon after the loan, when she was in feeble health and anticipating an early death, to the effect that she had received the loan, and that plaintiff was to have an interest in the mortgage as security therefor, and that it was her intention to execute a written acknowledgment to that effect; and this was considered a good and sufficient declaration of trust.

1. *Taylor v. Root*, 48 N. Y. 687; *Gray v. Dougherty*, 25 Cal. 266; *State v. Tolan*, 33 N. J. L. 195. See also *Costs*, vol. 4, pp. 317, 322. The plaintiff may be charged with costs. *Armstrong v. Zane's Heirs*, 12 Ohio St. 287; *Coleman v. Ross*, 46 Pa. St. 180.

Costs, in equity actions, are not a matter of course, but always in the discretion of the court, and hence to entitle either party to them it is necessary that the court should expressly allow them. *Kreitz v. Frost*, 55 Barb. (N. Y.) 474.

2. *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373; *Graver's Appeal*, 50 Pa. St. 189; *Callender v. Keystone Mut. Life*

*Ins. Co.*, 23 Pa. St. 471; *Bendall v. Bendall*, 24 Ala. 295; 60 Am. Dec. 469; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *Bliss v. American Bible Soc.*, 2 Allen (Mass.) 334; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 451; 9 Am. Dec. 313; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 473; *Hosack v. Rogers*, 9 Paige (N. Y.) 463; *Hall v. Hallet*, 1 Cox 141; *Norris v. Norris*, 1 Cox 183; *Sammes v. Rickman*, 2 Ves. Jr. 38; *Rashley v. Masters*, 1 Ves. Jr. 201; *Roche v. Hart*, 11 Ves. 58; *Taylor v. Glanville*, 3 Madd. 176.

The rule is stated more broadly by Lewin, and by Flint in his *American notes to Lewin on Trusts*, as follows: "The general rule is that a trustee shall have his costs of suit awarded to him at the hearing, either out of the trust estate or to be paid by his *cestui que trust*." 2 Lewin on Trusts and Trustees (Am. ed. of 1888), pp. 985, 987.

In a proceeding to obtain the instruction of the court as to the mode of executing the trust, see *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Jones v. Stockett*, 2 Bland (Md.) 409.

A testamentary provision, made for carrying trusts into effect, embraces the costs of a suit in relation to such trusts. *Stagg v. Beekman*, 2 Edw. (N. Y.) 89.

As a rule, a testamentary trustee who abandons the trust for his own convenience, is chargeable with the expense of all proceedings necessary to obtain his discharge from the trust. If, however, independently of his resignation and withdrawal, an account should be filed at about the same time, he may be allowed the costs strictly pertinent to the accounting. *Brautigam v. Escher*, 2 Dem. (N. Y.) 269.

If the suit is brought upon a contract entered into by the testator or in-

costs according to the circumstances of the particular case at bar, the unsuccessful party is, as a general rule, held for the costs;<sup>1</sup> but this rule is not enforced as strictly against a trustee as against others, for he will be protected as long as he acts with reasonable diligence and care.<sup>2</sup>

The trustee who acts in bad faith, or who is in the wrong through carelessness, will be charged with whatever costs his misconduct or negligence has occasioned.<sup>3</sup>

Where a trustee appears before the court for the purpose of obtaining an order for the reimbursement of his expenses, and

testate, or for a wrong done in his lifetime, the executors or administrators are not liable for costs. *Justices v. Haygood*, 20 Ga. 847; *Jamison v. Lindsay*, 1 Bailey (S. Car.) 79; *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 415.

1. *Westley v. Williamson*, 2 Moll. 458; *Burgess v. Wheate*, 1 Ed. 251; *Dunlop v. Hubbard*, 19 Ves. 205; *Hill v. Mague*, 2 Moll. 46; *Brodie v. St. Paul*, 1 Ves. Jr. 326.

2. A trustee holding, as such, an award for his *cestui*, of damages for land taken to widen streets, cannot be made to account for costs, though not successful in maintaining his *cestui que trust's* right to the whole of the award against her tenant of the premises taken, who claimed a part of it. *Coutant v. Catlin*, 2 Sandf. Ch. (N. Y.) 485.

The Georgia practice as to appeals by trustees without paying costs, etc., where the judgment is against the estate, is discussed in *Sawyer v. Cheney*, 59 Ga. 368.

3. *Warbass v. Armstrong*, 10 N. J. Eq. 263; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *McCarter's Estate*, 94 N. Y. 558; *Chamberlin v. Estey*, 55 Vt. 378; *Newton v. Bennet*, 1 Bro. C. C. 137; *Franklin v. Frith*, 3 Bro. C. C. 433; *Seers v. Hind*, 1 Ves. 294; *Piety v. Stace*, 4 Ves. 620.

In determining whether a case of fraud is made out against a trustee, such as, under Gen. Statutes of *New Hampshire*, ch. 230, § 43, will render him liable for costs, although not chargeable as trustee, the court may act either upon the finding of the jury, or upon its own view of the evidence. *Kent v. Hutchins*, 50 N. H. 92.

Trustees will not generally be allowed the costs consequent upon their separate defenses, unless some of them have a beneficial interest, or there is some special reason for their severance. *Gaunt v. Taylor*, 2 Beav. 346; 4 Jur.

166; *Dudgeon v. Corley*, 4 Dr. & War. 158; *Tarback v. Woodcock*, 3 Beav. 289; *Hodson v. Cash*, 1 Jur. N. S. 864; *Course v. Humphrey*, 26 Beav. 402; 5 Jur. N. S. 615; *Prince v. Hine*, 27 Beav. 345; *Atty. Gen'l v. Wyville*, 28 Beav. 464.

An executor or administrator failing in an unjust claim, is personally liable to the defendants for costs. *Show v. Conway*, 7 Pa. St. 136. And see *Muntorf v. Muntorf*, 2 Rawle (Pa.) 180; *Harrison v. Warner*, 1 Blackf. (Ind.) 385.

If the suit is groundless or vexatious, *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 415, or rendered necessary by the trustee's mere caprice or obstinacy, he may be charged with the costs personally. *Brinton's Estate*, 10 Pa. St. 408; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Smith v. Bolden*, 33 Beav. 266; *Jones v. Lewis*, 1 Cox 199.

If a trustee has mingled the trust fund with his own money, and not accounted for the full sum due from him, he will not be allowed his costs in a bill filed by him to obtain a discharge from further execution of the trust. *Bogle v. Bogle*, 3 Allen (Mass.) 158.

If the amount found due a trustee is much less than the sum claimed, he may be decreed to pay the costs. *Atty. Gen'l v. Brewers Co.*, 1 P. Wms. 376.

If a trustee willfully misstates his accounts, he will be charged with costs. *Sheppard v. Smith*, 2 Bro. P. C. 372; *Flannagan v. Nolan*, 1 Moll. 86. And so, if he has kept them in a careless or confused manner, *Norbury v. Calbeck*, 2 Moll. 461; or keeps the beneficiary from a correct knowledge of them by chicanery in his answer, *Avery v. Osborne*, Barn. 349; *Reech v. Kennegal*, 1 Ves. 123; or refuses to account at all, he will be charged with costs. *Boynton v. Richardson*, 31 Beav. 340; *Wroe v. Seed*, 4 Gif. 425; *Kemp v. Burn*, 4 Gif. 348.

A trustee holding property in trust

compensation for services rendered, he may properly ask that the costs be taxed against the estate and not against himself,<sup>1</sup> but not where the proceeding involves matters of purely personal interest to the trustee.<sup>2</sup> Where a trustee is entitled to costs out of the fund, they will be taxed as between solicitor and client.<sup>3</sup>

**7. The Decree.**—Inasmuch as a court of equity enforces its orders against the person rather than the thing in controversy, its decree is operative so long as the parties to be controlled by it are within reach of the arm of the court. Equity acts upon the conscience; hence, a trustee within the jurisdiction of the court can be compelled to perform acts in relation to property which lies beyond the territory over which the court has authority.<sup>4</sup> But a trustee appointed by a foreign court, or acting under authority therefrom, is amenable to that court alone, and cannot be controlled by a local court, merely because he resides within the territorial jurisdiction thereof.<sup>5</sup>

As has been said elsewhere in this article, the court, having

for a married woman, who refuses to convey the legal title to a purchaser from the husband and wife, and answers a bill seeking a conveyance, resisting the relief sought, so far identifies himself with the cause of his co-defendants as to make himself liable to a decree for costs. *Knowles v. Knowles*, 86 Ill. 1.

Under *Wisconsin Revised Statutes* (1858), § 49, ch. 133, an administrator is not personally liable for costs in an action brought by him in his representative capacity for a conversion of a part of the estate, whether such conversion occurred before or after the death of his intestate, unless he has been guilty of mismanagement or bad faith in maintaining the action. *Knox v. Bigelow*, 15 Wis. 415.

1. *Trustees v. Greenough*, 105 U. S. 527.

In a proceeding by a trustee for a settlement and compensation for services, where the only issue found against him concerns the amount claimed for services, all costs should be adjudged in his favor, except such as pertain to that issue only. *Lape v. Jones* (Ky. 1891), 15 S. W. Rep. 658.

2. *Ingram v. Kirkpatrick*, 8 Ired. Eq. (N. Car.) 62.

While it is a general rule that the costs of the accounting fall upon the trust estate, this rule does not apply where the trustee, to suit his own ends and his own convenience, refuses to continue with the trust. *Matter of Edwards*, 10 Daly (N. Y.) 68.

3. *McKim v. Handy*, 4 Md. Ch. 228;

*Mohun v. Mohun*, 1 Swanst. 201; *Saunders v. Saunders*, 3 Jur. N. S. 727; *Moore v. Frowd*, 3 Myl. & C. 49.

**4. Trustee's Removal from the State.**—Where the instrument creating a trust provides "that if a trustee named shall refuse or become unable to execute the trust according to the true intent and meaning thereof," certain persons named shall "have power under his or their hands and seals to appoint some other person to do the same," the trustee, by his removal from the state, does not become unable to execute the trust, nor is such removal to be construed as a refusal by him to perform the trust. *Bonner v. Lessley*, 61 Miss. 392.

The supreme court of *Pennsylvania* has jurisdiction to force a trustee, a resident of that state, to convey the legal title to lands lying in other states, and held by him in trust. *Vaughn v. Barclay*, 6 Whart. (Pa.) 392.

Where a bill is filed to execute a testamentary trust, and a partition of land lying in various counties and chancery districts, is necessary, in execution of that trust, a court of chancery acquires, by a personal service of all the parties in interest, jurisdiction to divide such lands, without regard to their location; and an equity court, sitting in any district in which a part of said lands lie, may make partition of them, according to the provisions of the *Tennessee Act of 1827 and 1829*. *Todd v. Cannon*, 8 Humph. (Tenn.) 512.

5. *Curtis v. Smith*, 6 Blatchf. (U. S.) 550; *Campbell v. Sheldon*, 13 Pick.

once assumed jurisdiction of the parties and the subject-matter, will retain control for the purpose of accomplishing justice between the parties.<sup>1</sup> This is true in many cases where the several acts of the court might alone be beyond its power to perform. But no general rule can be laid down which will set limitations to the power of the chancellor in matters relating to trusts. Individual cases, with their varying circumstances and facts, fall within the sound discretion of the court sitting in equity, and it is not possible to formulate any rules which shall control the exercise of this judicial discretion. Generally speaking, the court has power to enforce, against all parties to a valid trust, the performance of all duties imposed upon them by the provisions of

(Mass.) 8; *Campbell v. Wallace*, 10 Gray (Mass.) 162; *Chase v. Chase*, 2 Allen (Mass.) 104; *Smith v. Mutual Ins. Co.*, 14 Allen (Mass.) 342; *Curtis v. Smith*, 60 Barb. (N. Y.) 9.

Where the decree of a court of one state creates a trust, the court of another state has no jurisdiction to enforce such a trust on behalf of the beneficiary or his creditors, even though the trustee personally resides in the latter state, but has given no bond and filed no inventory in the state where he was appointed. *Jenkins v. Lester*, 131 Mass. 355. See also *Leland v. Smith*, 131 Mass. 358, note.

1. *McLaughlin v. Van Keuren*, 21 N. J. Eq. 379; *Speakman v. Tatem*, 45 N. J. Eq. 388.

If a note given to an administrator for the purchase-money of decedent's personal estate is transferred by the administrator, in payment of his own debt, a subsequent administrator (the first having resigned his office) may file a bill to enjoin the collection of the note by the assignee; and the chancery court, having entertained jurisdiction to assist in the execution of the trust imposed on the administrator, and to prevent a multiplicity of suits, may grant relief, and order the note to be given up to the acting administrator. *Scott v. Searles*, 7 Smed. & M. (Miss.) 498; 45 Am. Dec. 317.

In *Phillips v. Phillips*, 50 Mo. 603, a father had conveyed most of his land by absolute deed of gift to his son. Parol evidence was introduced showing that the father relied upon this son not to "defraud his brother and sister." The grantee, the deeds being lost, brought suit for a decree establishing his title, one of the *cestuis que trustent* being a minor. The court held that the minor must be protected, and that its decree

would be withheld until satisfactory provision was made for the protection of the minor's interests.

Where a trust attached to a particular legal estate in the defendant is established by the plaintiff, and the defendant sets up a distinct legal title, the court will decide between the two legal titles. *Henderson v. Hoke*, 1 Dev. & B. Eq. (N. Car.) 119.

The court will, in its discretion, grant such a decree as to it seems right under the circumstances. Thus, where a trust fund is in danger of being converted to the injury of any claimant having a present or future fixed title thereto, a court of chancery may direct such fund to be administered in such a manner as, in its discretion, shall best secure the objects and purposes of the trust. *Tappan v. Ricamio*, 16 N. J. Eq. 89.

Equity may direct the conversion of a trust fund from personal property into real estate, when for the interest of the *cestui que trust*, and not in conflict with the will. *Ex p. Jordan*, 4 Del. Ch. 615.

Where infant *cestuis que trustent* under a trust deed conveyed to their mother 1,500 acres of land, which was sold for taxes, and purchased from the estate by one who agreed that their parents might repurchase 1,400 acres thereof for \$1,500, filed a bill in equity showing themselves unable either to redeem or repurchase except by sale of a portion, it was held that the chancery court might elect between a sale of the portion necessary or an extension of the contract of repurchase, as might be most advantageous to the plaintiff. *Johns v. Smith*, 56 Miss. 727.

Where a testator left to his executors a fund, the income of which was to be applied for the use of the legatee, his wife and family, during his life, and he

the trust, to determine the construction of the instrument creating the trust, and fix its bounds and limitations, and instruct the trustee in his execution of it.

The court is generally bound by the terms of the instrument of trust, so long as they are legal and enforceable; but conditions may arise under which the court may with propriety go counter to the direct requirements of the trust instrument.<sup>1</sup>

Thus, it will correct any mistake that may have been made in the execution of the instrument creating the trust, reform the instrument itself and enforce the provisions which it may deem beneficial or equitable, modifying those which in its judgment would, if strictly enforced, tend to work hardship or injustice.<sup>2</sup>

became so intemperate as to be unfit to receive it, the orphans' court, upon petition presented, ordered that a portion of the income should be paid to the wife for the benefit of the family. It was held that such a decree was not error. *Noble's Appeal*, 39 Pa. St. 425.

In *Meddis v. Bull* (Ky. 1892), 18 S. W. Rep. 6, a testator created certain trusts, whereby his widow was to receive an annuity, the payment of the same being secured by a lien upon all estate and property not specifically devised. The residuary estate embraced much unproductive land. The will conferred upon the original trustee and executor the power to sell this unproductive real estate, but denied this power to his successors. The original trustee resigned. The estate chargeable with the widow's annuity did not produce a sufficient income to pay it. It was held that the court had the power to order the sale of the unproductive lands, invest the proceeds in other property from which a profit might be derived to help pay the widow's annuity, and thus save the body of the estate to the remainder-men.

A married woman, who, by the terms of a trust, is entitled to an annuity for her sole and separate use, the corpus of the trust fund being secured for her children, may look to the actual produce of the fund for her annuity. If the trustee, with her co-operation and approval, has carried on the trust farm and produced supplies for her support and for the conduct of the farm, it is within the power of a court of equity to sanction what he has done, appoint a receiver and take possession of the farm, and decree that a part of the future net income year by year be applied to the satisfaction of accumulated indebtedness owing to creditors for supplies so furnished. *Robert v. Tift*, 60 Ga. 566.

1. The court may order the sale of unproductive property if the *cestuis que trustent* are destitute, even though no power of sale be conferred by the terms of the trust. *Voris v. Sloan*, 68 Ill. 588. Compare *Curtiss v. Brown*, 29 Ill. 201.

In the exercise by the court of the power to dispose of the trust estate otherwise than in the manner provided in the deed of trust, the court should proceed with great caution. It is the court's duty to put itself in the position of the creator of the trust, and act as he would have done had he anticipated the existing contingency. *Curtiss v. Brown*, 29 Ill. 201.

Courts of equity have power, in cases of necessity, to order a disposition of trust estates, which is not in accordance with the provisions of the trust deed. *Curtiss v. Brown*, 29 Ill. 201.

A court of equity has power, when a proper case is made, to order trustees to anticipate the time of payment under a will, so far as it may appear necessary for the maintenance of the devisees, the testator's children. *Rhoads v. Rhoads*, 43 Ill. 239.

2. *Finlayson v. Finlayson*, 17 Oregon 347; 11 Am. St. Rep. 836.

**Reformation.**—It is within the power of the court, under a prayer for general relief in an action, to set aside a trust deed, to reform the same, and create a permanent trust according to the real interest of the parties. *Riddle v. Cutter*, 49 Iowa 547.

Where the legal title to real estate has been invested in a trustee to hold and convey the same to other parties for certain purposes, and the intention of the parties cannot be carried out, because, by an oversight, the legal title had been conveyed to an infant, a

Whatever is necessary for the preservation of the subject-matter, or the protection of the rights of the *cestui que trust*, will be done, whether contemplated in the instrument of trust or not.<sup>1</sup>

**XX. TERMINATION OF THE TRUST.**—A trust may be brought to an end, first, by operation of law; second, by its own limitations; third, by the act of the parties.

1. **By Operation of Law.**—As has been seen, the trust will continue no longer than the legitimate purposes contemplated in its creation require. Artificial estates are not favored by the courts. It is only when the trust requires the performance of some active duty by the trustee, or the preservation of some contingent or residuary interest or estate that the trust once created will be kept alive.<sup>2</sup>

Under certain limitations, a trust may be terminated by lapse of time,<sup>3</sup> or by the decree of a court of competent jurisdiction. But a decree declaring a trust terminated is only permissible when the parties in interest have all consented thereto, or the purposes of the trust have been substantially accomplished.<sup>4</sup>

2. **By Its Own Limitations.**—Seldom, if ever, is a trust perpetual. The failure of beneficiaries, the complete fulfillment of every

court of equity will set aside such a conveyance. *Hawthorn v. Root*, 6 Bush (Ky.) 501.

1. Where a trust fund in the custody of the court is about to be wasted or misapplied, the court should prevent it. *Thomas v. Morgan County*, 59 Ill. 479. See also *Moore v. School Trustees*, 19 Ill. 83.

If a trustee turns the trust property over to the custody of one who neglects to care for it properly, a court of equity will interfere to protect the property from waste. *Heyman v. Kelly*, 1 Nev. 180.

2. See *supra*, this title, *Nature of the Trustee's Estate*.

3. See *supra*, this title, *Statute of Limitations—Laches—Lapse of Time*.

4. *Thompson v. Ballard*, 70 Md. 10; *Bowditch v. Andrew*, 8 Allen (Mass.) 339; *Inches v. Hill*, 106 Mass. 577; *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320; *Norris v. Thomson*, 19 N. J. Eq. 314; *Short v. Willson*, 13 Johns. (N. Y.) 33; *In re Thompson's Estate*, 10 Pa. Co. Ct. Rep. 472; *In re Seipe's Estate*, 11 Pa. Co. Ct. Rep. 27.

Where the whole object and purpose of a trust have been accomplished, the interests created under it have all vested, the parties request it and the trustee consents, a court of equity may decree the determination of the trust. *Bowditch v. Andrew*, 8 Allen (Mass.) 339. See also *Smith v. Harrington*, 4

*Allen (Mass.)* 566; *Inches v. Hill*, 106 Mass. 575; *Stone, Petitioner*, 138 Mass. 476; *Gannon v. Ruffin*, 151 Mass. 204.

The court will not decree a trust to be at an end, where its purposes have not been accomplished and the interests have not yet all vested. *Brandenburg v. Thorndike*, 139 Mass. 102.

It was held in *Taylor v. Taylor*, 9 R. I. 119, that the trustee holding under a naked trust could be compelled to convey to the beneficiary. And such a decree was entered in *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399. In the latter case the court, by Strong, J., said: "In *Rush v. Lewis*, 21 Pa. St. 72, and *Kuhn v. Newman*, 26 Pa. St. 227, this court refused to decree a conveyance from the nominal trustee, in cases where the legal estate was held to be executed in the *cestui que trust* by force of law, on the ground that there was no necessity for it. Yet the nominal trust beclouds the title, and embarrasses the rights of alienation, which belong to the true owner. We think it better, therefore, to decree a conveyance, and such is the practice of courts of chancery, where the purposes of a trust once existing have been accomplished."

Unless it is so provided in the creation of the trust, a trustee does not possess the right to continue to hold the trust interest in himself, and a conveyance of it to the beneficiary may be



contemplated purpose, or the disappearance or destruction of the property held in trust, must of necessity put an end to the existence of the trust.

The mere change of the character of the trust property will not terminate the trust. The trust will attach to the product or substitute of the article or property originally subject to the trust, and will cease only when the means of identification fail.<sup>1</sup>

The term for which the trust will continue is generally fixed by the instrument creating the trust, and the mode of effecting a termination of it is, in many instances, provided by the settlor therein. Thus, a trust with power of alienation is forever ended by the execution and delivery of a conveyance under that power.<sup>2</sup> And a trust "to sell land for the benefit of creditors" ceases when the indebtedness for which the security was given has been legally discharged.<sup>3</sup>

**3. By the Act of the Parties—***a.* BY THE SETTLOR—REVOCA-TION—REVOCA-TION OF TRUSTS FOR CREDITORS.—There is little, if any, authority of weight to support the proposition occasionally contended for, that a voluntary trust once fairly created can be revoked, in the absence of a clause in the instrument reserving this power to the settlor,<sup>4</sup> or of evidence showing that the

enforced by a court of equity. *Stewart v. Chadwick*, 8 Iowa 463.

In *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320, the court, by Morton, C. J., said: "There is no doubt of the power and duty of the court to decree the termination of a trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination."

Where the beneficiary sues in equity to compel his trustee to convey the legal title to him, he may recover the rents and profits which the trustee has received to his use while in possession of the land. *Hill v. Cooper*, 8 Oregon 255.

Land was conveyed in trust for the grantor's wife, with power to appoint. Upon the grantor's death, the trustee was directed to convey to her; upon her death without having made an appointment, to the party entitled by the law of the state. She died without having exercised the power. The grantor was held to be entitled to a reconveyance, and it was held that the wife's heirs had no claim to the land. *Bond v. Moore*, 90 N. Car. 239.

On the other hand, under the operation of the *New York* statutes, a different rule prevails in that state. In *Lent v. Howard*, 89 N. Y. 181, the

court, by Andrews, C. J., said: "There are authorities that hold that it is in the power of a court of equity to decree the determination of unexecuted trusts, where the parties beneficially interested unite in the application. *Smith v. Harrington*, 4 Allen (Mass.) 566; *Perry on Trusts*, § 920, and cases cited. Whatever view may be taken of the general jurisdiction of courts of equity, in the absence of any statutory or legislative policy, to abrogate continuing trusts, created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trusts here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute."

Where by its provisions a trust has terminated on the death of the beneficiary, and the fund has never been invested in any specific property, the personal representative of the beneficiary may recover the fund. *Lynde v. Davenport*, 57 Vt. 597.

1. See *supra*, this title, *Rights and Remedies of the Beneficiary—Following the Trust Property*; *Phillips v. Overfield*, 160 Mo. 466.

2. *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

3. *Selden v. Vermilyea*, 3 N. Y. 525.

4. See *supra*, this title, *Nature of the Trustee's Estate*.

A trust voluntarily and fairly created cannot be revoked by the settlor, unless the power of revocation has been reserved in the instrument of trust. *Light v. Scott*, 88 Ill. 239; *Cobb v. Knight*, 74 Me. 253; *Smith v. Darby*, 39 Md. 278; *Taylor v. Henry*, 48 Md. 561; 30 Am. Rep. 486; *Hildreth v. Eliot*, 8 Pick. (Mass.) 293; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Sallsbury v. Bigelow*, 20 Pick. (Mass.) 183; *Sherwood v. Andrews*, 2 Allen (Mass.) 79; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505; *Ritter's Appeal*, 59 Pa. St. 9; *Tolar v. Tolar*, 1 Dev. Eq. (N. Car.) 460; 18 Am. Dec. 598; *Dawson v. Dawson*, 1 Dev. Eq. (N. Car.) 93, 396; 18 Am. Dec. 573; *Brookbank v. Brookbank*, 1 Eq. Cas. Abr. 168; *Villers v. Beaumont*, 1 Vern. 464; 1 Eq. Cas. Abr. 23, pl. 3; *Bale v. Newton*, 1 Vern. 464; 1 Eq. Cas. Abr. 24, pl. 6; *Broughton v. Broughton*, 1 Atk. 625; *Petre v. Espinasee*, 2 Myl. & K. 496; *Bill v. Cureton*, 2 Myl. & K. 503; *Rycroft v. Christy*, 3 Beav. 238; *Newton v. Askew*, 11 Beav. 145; *Smith v. Lyne*, 2 Y. & C. 345; *Paterson v. Murphy*, 11 Hare 88; *Paul v. Paul*, L. R., 19 Ch. Div. 47; *In re Way's Trust*, 10 Jur. 837; 2 De G. J. & S. 365; *Kilpin v. Kilpin*, 1 Myl. & K. 531; *Addlington v. Cann*, 3 Atk. 151.

An executed voluntary settlement, understandingly made and not affected by fraud, accident, or mistake, is valid and binding, and beyond the power of alteration, unless the power of revocation is reserved. *Sargent v. Baldwin*, 60 Vt. 17.

In *Baltimore v. Williams*, 6 Md. 235, the court, by Eccleston, J., said: "We think that, unless under some peculiar circumstances, when a deed conveys lands in trust for such uses as are declared or set out in a will already made, neither the deed or the will is revocable, if no power of revocation is reserved in the deed. And when a deed conveys lands in trust for such uses as the grantor may afterwards appoint by will or deed, if the appointment be by will, then the will may be revoked and new uses declared. But if this power is executed by such an instrument as may properly be considered a deed, and not a testamentary paper, then the appointment cannot be revoked, provided the deed executing the power reserves no authority to revoke."

In *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557, the court, by Ames, C.

J., said: "The party who makes a voluntary deed, whether of real or personal estate, without reserving the power of altering or revoking it, has no right to disturb it, and as against himself it is valid and binding, both in equity and at law." *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Bristor v. Tasker*, 135 Pa. St. 110; 20 Am. St. Rep. 853; *Sargent v. Baldwin*, 60 Vt. 17.

In *Theband v. Schermerhorn*, 61 How. Pr. (N. Y.) 200, it was held that a married woman who has deliberately created a valid trust upon her property, cannot recall it, nor can the trustee, by his act, terminate the trust; and a conveyance by the trustee to her of the trust property carries with it the trust, and the supreme court has no power to extinguish it.

In *Souverbye v. Arden*, 1 Johns. Ch. (N. Y.) 240, the court, by Chancellor Kent, said: "A voluntary settlement fairly made is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted nor intended to part with the possession of the deed; even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances besides the mere fact of his retaining it, to show that it was not intended to be absolute." See also *Shrader v. Bonker*, 65 Barb. (N. Y.) 615; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. (N. Y.) 406; *Dempsey v. Tylee*, 3 Duer (N. Y.) 96.

In *Salisbury v. Bigelow*, 20 Pick. (Mass.) 174, *Wilde, J.*, in delivering the opinion, says: "It seems to be a well-settled principle of equity that when a voluntary settlement is fairly made, it cannot be annulled by the settlor, unless a power of revocation be reserved for that purpose."

In *Souverbye v. Arden*, 1 Johns. Ch. (N. Y.) 240, the court, by Chancellor Kent, in announcing this proposition, reviews the leading English authorities in support of the doctrine, citing with approval the following cases: *Clavering v. Clavering*, 2 Vern. 473; *Lady Hudson's Case*, 1 Bro. P. C. 122; *Boughton v. Boughton*, 1 Atk. 625; *Johnson v. Smith*, 1 Ves. 314; *Villers v. Beaumont*, 1 Vern. 100; *Bale v. Newton*, 1 Vern. 464.

In *Clavering v. Clavering*, 2 Vern. 473, a voluntary deed of settlement in trust, always kept by the grantor in his custody, never published, and found among his papers after his death, was

held to control as against a subsequent settlement.

In *Lady Hudson's Case*, 1 Bro. P. C. 122, a father became displeased with his son, and had made an additional jointure on his wife, but kept it in his power; being afterward reconciled to his son, before his death, he canceled the additional jointure. Upon a suit brought after his death by the wife, the deed of jointure was held to be binding.

In *Cotton v. King*, 2 P. Wms. 358, a mother made a voluntary settlement in trust for her children, and delivered the duplicate deeds into the hands of her attorney and agent, "with the strict charge that he should not part with them," and no person was privy to the transaction. This settlement was held not to be binding.

In *Falk v. Turner*, 101 Mass. 494, the plaintiff, a married woman, brought suit to set aside a deed of trust, by which, before her marriage, she had conveyed all her property to the defendant, a trustee, for her exclusive benefit during her life, notwithstanding any marriage which she might contract; the trust to be terminable at any time when, in the opinion of the trustee, it should be for the best interest of the plaintiff to bring it to an end. But if it should continue until after the plaintiff's death, then the trust to be subject to her appointment by will, or, in default of such appointment, to be paid to her children then living, and the issue of any deceased children in equal shares, she being, at the time of executing the deed, a widow with minor children. The court, by Chapman, C. J., in deciding that the plaintiff had no right to terminate the trust, said: "The bill avers that she now desires to regain the possession and management of the property, and has the ability to manage it. Nothing appears in the case to raise a doubt as to her ability, either at present, or when she made the deed. But the ability of the *cestui que trust* to manage the property, or his desire to do so, has never been recognized as a ground for setting aside a trust. . . . Looking into the terms of the deed, we can find nothing unfair or unreasonable, which would authorize a court of equity to interfere within the principle stated in *Hildreth v. Eliot*, 8 Pick. (Mass.) 293. However desirable it may be on grounds of expediency that the present relations of the parties should cease to exist, no ground is established on which

a court of equity can interfere." See also *Viney v. Abbott*, 109 Mass. 300; *Sewall v. Roberts*, 115 Mass. 272; *Thurston, Petitioner*, 154 Mass. 506.

Where a trust deed has been actually delivered to the grantee, the rights of the *cestui que trust* attach at once, and the effect of the delivery cannot be impaired by any mental reservation on the part of the grantor, or any oral condition repugnant to the terms of the deed attaching to the delivery. *Wallace v. Berdell*, 97 N. Y. 13.

In *Skipwith v. Cunningham*, 8 Leigh (Va.) 271; 31 Am. Dec. 642, the court, by Tucker, J., said: "The instant a legal title becomes vested in the trustee, a trust arises on behalf of those in whose favor it is declared, provided there be a sufficient consideration to sustain it, and from that moment, it is beyond the power of the grantor. He cannot revoke it, nor can he even extinguish it by getting a reconveyance; for no act of the trustee can affect the rights of the *cestui que trust*. If, indeed, one *cestui que trust* renounces the trust, then it either inures solely to the benefit of the rest, or, if there be no others, it results to the grantor; but until the renunciation is made, or implied from circumstances to be made, the trust continues."

An assignee, for the benefit of creditors, converted a portion of his assignor's assets to his own use, and afterward placed choses in action belonging to himself in an envelope indorsed with the name of the assignor, and a statement to the effect that the property inclosed should take the place of that misappropriated. This was construed to be a declaration of trust in favor of the estate assigned, which could not be revoked by the executor of such assignee. *Jones v. Byland*, 23 Wkly. Law Bull. 151.

Where a married woman and her husband, by a deed which contained no power of revocation, conveyed certain property to a trustee, to pay the income to her for her sole and separate use for life, and after her death to grant and convey the property to her son by a former husband, it was held, on the joint application of herself, her husband, and the ultimate beneficiary, that the court could not order a cancellation of the deed of trust, and the subject thereof, or any part of the same, to be transferred to the ultimate beneficiary; and that she, being under disability, would be protected from the undue influence

which might have been brought to bear by her husband to destroy the trust created for her use. *Twining's Appeal*, 97 Pa. St. 36.

After a deed of trust has once taken effect, it is irrevocable, and its operations cannot be affected by any subsequent act of the grantor in exercising control over the property conveyed, or any omission on the part of the trustee to perform the duties of the trust. *Compare Wallace v. Berdell*, 97 N. Y. 13; *Fisher v. Hall*, 41 N. Y. 416; *McLean v. Button*, 19 Barb. (N. Y.) 450.

Where a husband had conveyed land by deed to his wife in trust for the husband's benefit during his life, and thereafter, the land to be sold, and the proceeds divided among his widow, if she survived him, and their children or grandchildren, it was held that the husband and wife could not revoke this trust and substitute for it another, so as to in any way affect the rights of the children and grandchildren. *Gulick v. Gulick*, 39 N. J. Eq. 401.

An improvident father conveyed his property in trust for his children to a trustee, C., who was to hold only until another could be agreed upon, when the scope and duration of the trust were to be fully settled and expressed; but C. died before the permanent trust was declared, and no provision was made for revocation. It was held that equity would not set the deed aside. *Riddle v. Cutter*, 49 Iowa 547.

If a married woman, in order to place her property beyond her husband's interference or control, voluntarily conveys it, without reserving any power of revocation, to the trustee to hold in trust for her during life, and upon her death according to her appointment by will, and fails to make such an appointment for her issue, her children have a beneficial interest in the trust fund, and she is not entitled, without such children's consent, to have the trust terminated, even after obtaining a divorce from her husband. *Thurston, Petitioner*, 154 Mass. 596.

In *Twining v. Girard L. Assur., etc., Co.*, 14 Phila. (Pa.) 74, A and his wife delivered to a trustee a sum of money for the benefit of the wife, during her life, then to T. While A's wife was still living, T brought suit to have the money paid over to him at once by the trustee, A and his wife consenting. No power of revocation had been reserved,

and it was held that T's bill should be dismissed.

An agreement constituting a declaration of trust is not revocable at the instance of the party competent to make it, merely because some of the *cestui que trustent* who joined in an instrument were minors, or under the disability of marriage at the time of its execution. *Cressman's Appeal*, 42 Pa. St. 147; 82 Am. Dec. 498.

A voluntary deed of trust was delivered by the grantor to a trustee, who communicated this fact to the *cestui que trust* and promised to have the deed recorded, but, to avoid executing the trust, the trustee afterwards returned the deed to the grantor, who destroyed it. This was held to be a complete delivery to the *cestui que trust*. *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557.

In *Stone v. Hackett*, 12 Gray (Mass.) 227, the court, by Bigelow, J., said: "It is certainly true that a court of chancery will lend no assistance toward perfecting a voluntary agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the donor or grantor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." To the same effect, see *Ellison v. Ellison*, 6 Ves. 666; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Ex p. Pye*, 18 Ves. 140; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Wheatley v. Purr*, 1 Keen 551; *Blakely v. Brady*, 2 D. & W. 311; *Brown v. Cavendish*, 1 J. & L. 637; *Kekewich v. Manning*, 1 De G. M. & G. 176.

Where a grantor has created a trust to protect her property against incumbrance or sale by herself, the trust will not be set aside merely because she has reserved no power of revocation. *Parker v. Allen* (Supreme Ct.), 14 N. Y. Supp. 265.

In *Keyes v. Carleton*, 141 Mass. 45; 55 Am. Rep. 446, a married woman, for the purpose of putting her real estate beyond the influence of her husband, conveyed it to a trustee in trust for her benefit for life, and after her death, to her children. She brought suit, upon her husband's death, to have the trust

set aside, and the court refused her petition. In this case, the court, by Morton, C. J., said: "In the case before us, the plaintiff, acting deliberately and under the advice of counsel, executed the deed of settlement, and there is no pretense of any fraud, collusion, or undue influence. The deed contains no power of revocation, and it is clear that the power of revocation was intentionally omitted. As first drafted, the deed created a dry trust in favor of the settlor, which probably could have been revoked by her at any time; but if she had retained a power of revocation, it would have defeated one of the principal objects of the settlement, which was to protect her from the threats, or importunities, or influence of her husband, and therefore the deed was altered to its present form. Both parties understood that she was not to have the power to revoke it. . . . The most that can be said is, that she did not, at the time she executed the deed, anticipate or have in her mind what would be its legal effect in the contingency of her husband's dying before her. She did not, at the time, think of this contingency; but this is not a mistake which will justify setting aside a settlement, especially when it is not shown that, if this contingency had been in her mind, she would have made a deed in any respect different. . . . We are of opinion that the plaintiff does not show sufficient cause for setting aside the settlement, voluntarily and fairly made by her."

The deposit of money in the hands of three persons, to be held in trust for the depositor's minor son, with the agreement that the trustee shall retain it for a certain length of time at a specified rate of interest, and in the meantime prepare a deed of trust, creates a complete trust, and leaves no power in the depositor to dispose of the money for his own benefit. *Sherwood v. Andrews*, 2 Allen (Mass.) 79.

**Want of Legal Advice.**—The fact that a person making a voluntary settlement did not have independent legal advice, will not warrant the setting aside of the trust, unless the beneficiary stood in some fiduciary capacity to the donor, or the trustee was benefited thereby. So held, in case of a conveyance by a drunkard in trust for the support of his family. *Riddle v. Cutter*, 49 Iowa 547.

In *Hildreth v. Eliot*, 8 Pick. (Mass.) 293, suit was brought to set aside a voluntary settlement, the circum-

stances attending the creation of the settlement being as follows: Plaintiff, who was about to be married, had put her property in the hands of her father as trustee, to be held in trust by him, or by any other trustee to be appointed by a judge of probate, for her separate use, without being liable to the debts or control of any husband she might have during the trust, and the income to be paid her during life, and the residue to be conveyed to her surviving children. She thereupon married, her husband died, and she married again, having children by her second husband. The father died, leaving several children; the judge of probate refused to appoint a new trustee; the court refused her application to set aside the settlement and ordered the appointment of a new trustee.

A deed which conveys land in trust for the support of the grantor out of the income and profits, and provides that upon his death the property shall descend to his legal representatives, cannot be revoked. *Ewing v. Warner*, 47 Minn. 446; *Ewing v. Jones*, 130 Ind. 247.

In *Sayre v. Weil*, 94 Ala. 466, the defendant had deposited in a bank certain funds to the credit of himself as trustee for certain named children. His testimony was that he had deposited the money there "for the last ten or fifteen years as a gift to those children." It was held that the trust was irrevocable, and the naked legal title remained in the defendant.

In *Ewing v. Warner*, 47 Minn. 446, the settlor had conveyed land to a trustee in trust for his heirs, to whom it was to descend upon his death. Subsequently, for the express purpose of terminating the trust, the trustee re-conveyed to the settlor, and the court held that the execution of the original trust deed created a vested estate in the settlor's heirs, which could not be destroyed, either by a revocation by the grantor, or a breach of trust by the trustee, and hence, that the deed of reconveyance was invalid.

A voluntary conveyance was accepted by the grantee by a declaration of trust reciting that the conveyance had been made in trust and accepted, and agreeing to execute the same according to the terms of the settlor's will, which was executed on the same day. By this will, the settlor, after declaring the trust to take effect after his death, to which the declaration of

instrument of trust was executed in ignorance of its effect or under mistake, duress, or fraud.<sup>1</sup>

The courts will not imply a right to revoke a trust simply from

acceptance of the trust by the grantee referred, expressly stated that "said trust property so conveyed as aforesaid, forms no portion of my estate herein by this my last will disposed." It was held that the conveyance was not a part of the will, liable to be annulled by its revocation. *Kopp v. Gunther*, 95 Cal. 63.

*Ward v. Lant*, Prec. in Ch. 182, was a case in which a father executed a voluntary bond to his daughter, unconditionally and payable immediately, but retained it in his possession. It was proved to have been his intention that no use should be made of it, and that it was only to protect him from taxes. It was set aside.

1. It has been held, however, that the omission of the power of revocation, through mistake or misunderstanding, will not deprive the grantor of that power, though he is able to set aside that mistake. Thus, where both parties to a trust instrument were under the impression that it was revocable, and the power of revocation was omitted by mistake, the courts held that the trust might be brought to an end. See *Aylesworth v. Whitcomb*, 12 R. I. 298; *Garnsey v. Mundy*, 24 N. J. Eq. 243.

Where a voluntary settlement or trust, in favor of a third person, is perfectly created, no power of revocation having been reserved, it cannot be revoked without the consent of all the parties in interest, nor will it be set aside, in the absence of fraud, mistake, or undue influence. 1 *Perry on Trusts*, § 104; *Ingram v. Kirkpatrick*, 6 Ired. Eq. (N. Car.) 463; 51 Am. Dec. 428. See note to *Oakley v. Hibbard*, 44 Am. Dec. 428.

The principal case is cited and approved in the following cases: *Smith v. Turrentine*, 8 Ired. Eq. (N. Car.) 101; *Baggarly v. Gaither*, 2 Jones Eq. (N. Car.) 82; *Stimpson v. Fries*, 2 Jones Eq. (N. Car.) 160; *Potts v. Blackwell*, 4 Jones Eq. (N. Car.) 67; *Wiswall v. Potts*, 5 Jones Eq. (N. Car.) 189; *Dixon v. Page*, 63 N. Car. 605; *Hogan v. Strayhorn*, 65 N. Car. 285. See 90 Am. Dec. 507-509 for other citations.

It was held in *Riddle v. Cutler*, 49 Iowa 547, that the omission from the trust deed of any power of revocation

did not render the trust void or voidable, where it appeared that it was the intention to make it irrevocable at the option of the donor, it appearing, also, that the deed was for the donor's benefit and that the donor was not capable of managing his property.

A trust will not be set aside on the mere ground that a direction in the trust deed as to the disposition of the settlor's property after her death, was not explained to her, and that she supposed it to be subject to subsequent modification, as a testamentary provision would be; but the deed will be reformed so as to correctly express the intention of the grantor. *Parker v. Allen* (Supreme Ct.), 14 N. Y. Supp. 265.

In *Kerr v. Couper*, 5 Del. Ch. 507, a voluntary deed of trust containing no power of revocation, executed by a young man, whereby he parted with all control over his real estate on the trust that the trustees pay over to him the rents and profits, was annulled, and a reconveyance made to the grantor direct, it appearing that the grantor had executed the deed in ignorance of its effect.

It was held in *Rick's Appeal*, 105 Pa. St. 528, that a voluntary settlement of property for the benefit of the settlor for life, and after his death to strangers to the consideration, may be revoked at will by the settlor, even though he has reserved no power of revocation; and especially where the settlement was made in ignorance of the law and the facts.

In *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159, the court held that a purely voluntary deed of trust intended to promote the grantor's convenience and protect his interests, and which passed no present interest to others, may be revoked at will, even in the absence of a power of revocation.

If a deed of trust is drawn and executed under an evident misapprehension of facts and circumstances, equity will afford relief by a decree that the deed be canceled and a new one executed, by a master appointed for that purpose. *Ginschio v. Ley*, 1 Phila. (Pa.) 383.

In *Gibbes v. New York L. Ins., etc., Co.*, 67 How. Pr. (N. Y. Supreme Ct.)

207, the court held, at the suit of the grantor in a trust deed, that the deed to her property, executed at the written request of the trustee, must be set aside, it appearing at the time it was executed, that she was in poor health, without proper advice, and with no knowledge that the settlement was irrevocable.

In *Garnsey v. Mundy*, 24 N. J. Eq. 243, the complainant, Sarah M. Garnsey, had conveyed to her mother certain property under the advice of certain relatives, given to her honestly and in good faith; but the full effect of the instrument was not understood by the grantor, and its execution was improvidently done. The court said: "She and they (her advisors), were alike under an erroneous impression as to the effect of it. From the operation of such conveyance, made under such circumstances, equity will relieve the complainants. The rigidity of the ancient doctrine, that a voluntary settlement not obtained by fraud is binding on the settlor, and will not be set aside in equity, although the settlor has not reserved a power of revocation, has been relaxed by modern decisions. . . . Recent cases have narrowed the doctrine, and have held not only that the absence of a power of revocation throws on the person seeking to uphold the settlement, the burden of proving that such a power was intentionally excluded by the settlor, and that, in the absence of such proof, the settlement may be set aside, but that equity will set aside the settlement on the application of the settlor, where it appears that he did not intend to make it irrevocable, or where the settlement would be unreasonable or improvident for the lack of provision for revocation. In *Everitt v. Everitt*, L. R., 10 Eq. 405, a case almost precisely similar in its facts to that under consideration, a voluntary settlement was set aside on the application of the donor. The court said: 'It is very difficult indeed for any voluntary settlement, made by a young lady so soon after she attains twenty-one, to stand, if she afterwards changes her mind, and wishes to get rid of the fetters which she has been advised to put upon herself.' . . . *Forsshaw v. Welsby*, 30 Beav. 243, was a case where a voluntary settlement was made by one *in extremis*, on his family. It contained no power of revocation in case of the settlor's recovery. On his recovery it was set aside on his

application, on the ground that it was not executed with the intention that it should be operative in case of his recovery from his illness." The opinion closes with the statement of the court that it is satisfied from the testimony "that the deed was not the pure, voluntary, well-understood act of the grantor's mind, but was unadvised and improvident and contrary to the intention of all of them. The fact that the infant children of the grantor are beneficiaries under the deed will not prevent the court from setting it aside."

In *Russell's Appeal*, 75 Pa. St. 269, a *feme sole*, in contemplation of marriage, made a deed of settlement with the consent of her betrothed, and under the advice of counsel, thereby conveying the bulk of her estate in trust, the income to be hers during life, and after her death, the estate to be conveyed to her children as she might thereafter determine by will, excepting such part thereof as she might devise to her husband. Under this trust, in the event she left no issue, the property was to be conveyed to her brother and sisters or their issue, as she might determine by will; if she should leave no will, one-half of the income was to go to her husband for life, and one-half to her children; but if she left no issue, or leaving any, they should die in infancy without issue, then the estate was to be conveyed to her brother and sisters in fee. No power of revocation was reserved in the deed, and the grantor did not understand that her power of appointment was limited to her brother and sisters, but believed, if she survived her husband, she could, under this deed of trust, dispose of her estate as she pleased. She gave no instructions upon these two points. She survived her husband, who died without issue. It was held that, while mere neglect of counsel to advise the insertion in the deed of the power of revocation would not authorize the court to set the deed aside, yet the omission of this power being, under the circumstances, a mistake, and the instrument being without consideration except as to the husband, the grantor was entitled to have the trust revoked, and receive from the trustee a reconveyance.

In *Ewing v. Wilson*, 132 Ind. 223, a son, upon coming of age, conveyed to his father all his property for the express consideration of \$600, to be held in trust for himself for life, and the remainder to his personal representa-

the omission to reserve such right in a deed,<sup>1</sup> although such omission is *prima facie* evidence of a mistake;<sup>2</sup> but the failure to reserve to the grantor this power of revocation is a circumstance which will be considered by the courts in connection with the other circumstances of the case, as tending to show that the deed creating the trust was improvidently executed.<sup>3</sup>

If it appears from the circumstances of the particular case that

tives. There was no actual consideration for the deed. The son was inexperienced in business, intemperate, and easily influenced; the father was a man of wealth, large experience and force of character. Afterward the father reconveyed the property to the son, who conveyed it to *bona fide* purchasers, and died. The court held that the deed of trust was unconscionable, and was revoked by the reconveyance from the father to the son. In this case, the court, by Elliott, C. J., said: "If a controversy were waged between the trustee and the creator of the trust, there would be no debatable question, for the rights of the trustee, if any he ever had, are irretrievably gone. . . . We assume with undoubting confidence that the trustee never acquired a permanent and indefeasible right to the donor's property, and that when he executed the deed in reconveying the property, he did what it was his plain duty to do." In the same case, the court goes on to say: "The rule, as it has long existed, and as affirmed by the courts of *England and America*, is this: Where there is a voluntary gift of the entire estate of the donor, a reservation of the principal beneficial interest by him, and no power of revocation, the instrument will be held ineffective as against its author, unless it appears that there was an intention to make the donation irrevocable." Quoting from Mr. Bispham, the court says: "But where the deliberate intent to make such a gift does not appear, and where no motive for such a gift is shown, the absence of a power of revocation is *prima facie* evidence of the mistake. The rule is the same when the motive has failed." Citing, to this point, Bispham's Eq. 107; Aylesworth v. Whitcomb, 12 R. I. 208; *Ex p.* Angell, 13 R. I. 630. And the court quotes with approval from Coutts v. Acworth, L. R., 8 Eq. 558: "The party taking a benefit under a voluntary settlement or gift, containing no power of revocation, has the burden thrown upon him of proving

a distinct intention on the part of the donor to make the gift irrevocable; but where the circumstances are such that the donor ought to be advised to retain the power of revocation, it is the duty of the solicitor to insist upon the insertion of such a power, and the want of it will in general be fatal to the deed."

1. See Fellow's Appeal, 93 Pa. St. 470.

Even though the grantor reserves a life estate. Fellow's Appeal, 93 Pa. St. 470.

2. In the absence of a certain intent to make the gift irrevocable, the omission of the power to revoke is *prima facie* evidence of a mistake, and casts the burden of supporting the settlement upon the party claiming thereunder. Russell's Appeal, 75 Pa. St. 269; 31 Leg. Int. (Pa.) 125; Coutts v. Acworth, L. R., 8 Eq. 558. The parties relying upon such deed must prove that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. Hall v. Hall, L. R., 14 Eq. 365. The omission to reserve such power has been held, in the absence of evidence of a motive, sufficient to set the deed aside. Everitt v. Everitt, L. R., 10 Eq. 405; Huguenin v. Basely, 14 Ves. 273.

In Miskey's Appeal, 107 Pa. St. 611, a voluntary deed of trust was set aside because it contained no power of revocation, and there was no proof of a distinct intention to make the gift irrevocable.

In Hall v. Hall, L. R., 8 Ch. 430, the court said: "The absence of a power of revocation in a voluntary deed, not impeached by any undue influence, is of course material, where it proves that the settlor did not intend to make an irrevocable settlement, or where the settlement is of such a nature, or was made under such circumstances as to be unreasonable and improvident, unless created with the power of revocation."

3. In Toker v. Toker, 3 De G. J. & S. 487, the court said: "The absence of the power of revocation is a circum-



the settlor's intention was not to make a deed irrevocable, his intention, so far as it can be determined, will control, and upon his application in a proper case, the trust will be set aside.<sup>1</sup>

As a settlor cannot directly revoke a trust which he has voluntarily created, neither can he revoke it indirectly; he cannot alter its terms or provisions by attempting to make a subsequent settlement either by deed or will, unless he has reserved this power to himself in the original instrument of trust.<sup>2</sup>

He may, however, make a subsequent deed of trust for the

stance to be taken into question, the importance of which is largely determined by the other circumstances of each case." See *Henshall v. Fereday*, 29 L. T. N. S. 46; *Cook v. Lamotte*, 15 Beav. 234; *Wollaston v. Tribe*, L. R., 9 Eq. 44.

In *Nightingale v. Nightingale*, 13 R. I. 113, suit was brought in 1880 by a married woman to set aside a trust deed which, before her marriage in 1851, she had executed to a trustee in trust to pay her income, to make sales at her request, and to reconvey to her after her husband's death, or to her heirs and devisees after her death. It was held that she was sufficiently protected by the statutes then in existence, and that the property should be reconveyed to her, and discharged of the trust.

1. *Forshaw v. Welsby*, 30 Beav. 243; *Ex p. Angell*, 13 R. I. 637; *Everitt v. Everitt*, L. R., 10 Eq. 405; *Garnsey v. Mundy*, 24 N. J. Eq. 243.

Where a single woman, not in contemplation of marriage, executed a trust deed which contained no power of revocation, in which she conveyed her property in trust to pay the income to her for life, and at her death in trust for her appointees, or, in default of appointment, in trust for her heirs, this was held to create a passive trust which she might revoke at any time, and demand a reconveyance, particularly where it appeared that there was no intention of making the gift irrevocable, and that the deed was executed without the advice of counsel and upon the assurances by the contingent beneficiaries, that it could be revoked, and that the only purposes of its execution had been accomplished. *Bristol v. Tasker*, 135 Pa. St. 110; 20 Am. St. Rep. 853. See also *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Yarnall's Appeal*, 70 Pa. St. 335.

2. *Lewin on Trusts and Trustees*, § 18, p. 104; *Perry on Trusts*, § 104;

*McDonald v. Starkey*, 42 Ill. 442; *Sewall v. Roberts*, 115 Mass. 262; *Nearpass v. Newman*, 106 N. Y. 47; *Souverbye v. Arden*, 1 Johns. Ch. (N. Y.) 256; *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547; *Sargent v. Baldwin*, 60 Vt. 17; *Rycroft v. Christy*, 3 Beav. 238; *Newton v. Askew*, 11 Beav. 145.

A son conveyed to his mother all the estate which he inherited from his father, and received from her an agreement to reconvey when he paid to her an indebtedness of a specified amount. She thereafter kept a strict and detailed account of the property and its income, and regularly paid her son the net income. She repeatedly spoke of it in her letters to him as his property; but she willed it to another to hold in trust for her son. There was no account of any indebtedness of the son to his mother, and no evidence of any save the paper she gave him when she received from him the conveyance. It was held that the mother held the property in trust for the son, and that the trust terminated at her death. She could not delegate it, nor by devise continue it. *Hinckley v. Hinckley*, 79 Me. 320.

One who has created a trust for his own use for life, with remainder over to his children, can do nothing, while in possession, to impair the remainder. Nor, unless he has expressly reserved the power, can he revoke the remainder and declare new uses. *Aubuchon v. Bender*, 44 Mo. 560. Compare *Dean v. Adler*, 30 Md. 147.

If a grantor conveys his property to a trustee, the income to be the grantee's for life, and after his death, to his wife, and after the death of both, to his executor, to be divided equally among the grantor's children, no power of revocation being retained by the grantor, this property will not pass by his will, nor by an assignment executed by one of his children, conveying after the father's

purpose of enlarging the trust estate and substituting a new trustee, so long as his later disposition is not materially inconsistent with the former settlement.<sup>1</sup>

The right of revocation or reversion may legally be reserved without affecting the validity of the trust,<sup>2</sup> and if it is not exercised during the grantor's lifetime, the trust will continue in force after his death as fully as if no such power had been reserved.<sup>3</sup> The right to revoke, if reserved, may be exercised by a formal act of revocation, or the exercise of the right may be implied from the conduct of the settlor.<sup>4</sup>

So far as the power of the grantor over the property held in

death "all my interest of whatever name under the description in the estate, real or personal, of my father, and of my share thereof under the will of my father, together with all income, benefit and advantages thereof accrued or to accrue." *Belknap v. Belknap*, 128 Mass. 14.

Where a father delivered to his son in trust certain notes to be collected, and part of the proceeds to be paid to his daughter, and the son accepted the trust, the notes passed beyond the control of the father, and could not be affected by his will making a different disposition of them. *Haxton v. McClaren*, 132 Ind. 235.

1. *Rife's Appeal*, 110 Pa. St. 232.

2. *Stone v. Hackett*, 12 Gray (Mass.) 227; *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547; *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487.

3. A woman who owned land in fee simple, subject to her father's estate by the curtesy, conveyed the same in trust for him for life, with full power to sell, and the remainder, after the father's death, to her own use, free from the control of any husband she might marry, with power of appointment by will, and, in default, to her heirs in the maternal line; both parties to have the power to revoke any or all the trusts created by the deed, "and thereupon to resettle and reconvey the trust property then remaining upon such other and different trusts . . . as to them shall seem meet." This deed not having been executed in immediate contemplation of the grantor's marriage, it was held that it was inoperative to create a separate use trust, and that its revocation, in proper form, without declaring new uses, was valid, and operated to restore to the grantor her original fee-simple estate, subject to her father's curtesy, and that their deed

conveyed a good title, free from the trusts of the former deed. *Yard v. Pittsburgh, etc., R. Co.*, 131 Pa. St. 205.

In *Stone v. Hackett*, 12 Gray (Mass.) 227, the court, by Bigelow, J., said: "A power of revocation is perfectly consistent with the creation of a valid trust. It does not, in any degree, affect the legal title to the property. That passes to the donee, and remains vested for the purposes of the trust, notwithstanding the existence of the right to revoke it. If this right is never exercised according to the terms in which it is reserved, until after the death of the donee, it can have no effect on the validity of the trusts or the right of the trustee to hold the property." See *Barlow v. Loomis*, 19 Fed. Rep. 677.

A power of revocation or reversion may be reserved, though the first use be in fee. So, where the grantor conveyed real estate in fee to a trustee in trust for the sole and separate use of the grantor's wife, with authority for her to sell and reinvest for the same use, the property to revert to the grantor if she died before him, it was held that on such death with conveyance, the property reverted to the husband. *Pollard v. Union Nat. Bank*, 4 Mo. App. 408.

Where a father gave all his personal property to his son on certain trusts, the son agreeing to reconvey on request, it was held that while the transfer was not valid as a gift *inter vivos*, it was good as a trust, and that the donor having died without revoking it, his administrator could not recover the property, beyond a sum sufficient to pay the debts and expenses of administration. *Rosenburg v. Rosenberg*, 40 Hun (N. Y.) 91.

4. A and his wife conveyed certain property in trust for themselves, the

trust is concerned, there is no difference between ordinary trust conveyances and deeds of assignments in trust for the benefit of creditors. The moment a deed of assignment has been delivered and the assignee has accepted, the trust relation of trustee and *cestui que trust* commences. It is not necessary that the creditors under an assignment accept the trust, in order that the relation may exist. Control over the debtor's property has passed out of him altogether, and a trust thus created cannot be revoked, either directly or indirectly, so long as there are debts to be paid under the terms of the assignment.<sup>1</sup>

While the rule is as has been stated, it is subject to modifications under varying circumstances, and has by no means been accepted by all the courts. Thus, in *England*, deeds of assignment for the benefit of creditors may be revoked at the pleasure of the debtor, unless the creditors are in some way made privy to the conveyance and have accepted its benefits.<sup>2</sup>

deed containing a clause reserving the right to revoke the trusts. It was held that the execution of mortgages upon the property worked such revocation, although in the mortgages no reference was made to the power. *Gaither v. Williams*, 57 Md. 625.

1. See *Ward v. Lewis*, 4 Pick. (Mass.) 521; *Sevier v. McWhorter*, 27 Miss. 442; *Walker v. Crowder*, 2 Ired. Eq. (N. Car.) 485; *Ingram v. Kirkpatrick*, 6 Ired. Eq. (N. Car.) 463; 51 Am. Dec. 428; *Messonnier v. Kauman*, 3 Johns. Ch. (N. Y.) 3; *Hall v. Denison*, 17 Vt. 318. See also notes to *Oakley v. Hibbard*, 1 Pin. (Wis.) 674; 44 Am. Dec. 426.

Where an assignment for creditors has taken effect, it cannot be revoked by the debtor himself without the consent of the assignee, unless the creditors also assent. *Es p. Conway*, 4 Ark. 359; *Forbes v. Scannell*, 13 Cal. 242; *Browne v. Chamberlain*, 9 Fla. 479; *Scull v. Reeves*, 3 N. J. Eq. 131; 29 Am. Dec. 703; *Alpaugh v. Roberson*, 27 N. J. Eq. 96; *Shepherd v. McEvers*, 4 Johns. Ch. (N. Y.) 136; 8 Am. Dec. 561; *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 363; *Sheldon v. Smith*, 28 Barb. (N. Y.) 593; *Bell v. Holford*, 1 Duer (N. Y.) 78; *Walker v. Crowder*, 2 Ired. Eq. (N. Car.) 485; *Ingram v. Kirkpatrick*, 6 Ired. Eq. (N. Car.) 463; 51 Am. Dec. 428; *Stimpson v. Fries*, 2 Jones Eq. (N. Car.) 159; *Klapp v. Shirk*, 13 Pa. St. 589; *Hall v. Denison*, 17 Vt. 318; *Golden's Appeal* (Pa.), 3 East Rep. 313.

If a debtor convey, by deed, all his property, both real and personal, to a

trustee, in trust that he will, first, make the grantor a reasonable allowance for the comfortable support and maintenance of his family, and the education of his children; second, that he will pay all the grantor's debts, and the debts incurred in the execution of the trust; and third, that he will then convey the legal title to the property undisposed of to the grantor's children; and he delivers the deed, as also the possession of the property, to the trustee, who accepts the trust, the trusts in favor of the grantor's creditors and children become perfect, and cannot be afterward divested or revoked by any act of the grantor or trustee. *Andrews v. Hobson*, 23 Ala. 219.

Securities delivered under the provisions of a trust deed, will not be decreed to be delivered at the mere will of the grantor. *Vreeland v. Van Horn*, 17 N. J. Eq. 137.

Where a firm made a trust deed for the benefit of its creditors, which was duly registered, and afterward made a second deed revoking the first, it was held that the rights of the parties to the first deed became fixed and vested by its execution and registration, subject to the election of the beneficiaries as to whether they would accept or reject its provisions, and that the firm had no power to revoke it. *Furman v. Fisher*, 4 Coldw. (Tenn.) 626; 94 Am. Dec. 210.

2. *Walwyn v. Coutts*, 3 Sim. 14; 3 Mer. 707; *Garrard v. Londerdale*, 3 Sim. 1; *Wilding v. Richards*, 1 Coll. 659; 14 L. J. N. S. Ch. 211; *Acton v. Woodgate*, 2 M. & K. 495; 3 L. J. Eq. N. S. 83.

It has been held that if a deed of assignment is made hastily, and at a time when the creditor is actually solvent, and can readily meet his obligations, it may be recalled.<sup>1</sup>

It seems to be settled, however, that after the creditors have been notified and have accepted the benefits of the assignment, it cannot be revoked.<sup>2</sup>

If a creditor refuses to accept the terms of the assignment, the grantor may revoke it.<sup>3</sup>

6. BY THE TRUSTEE.—The trustee cannot, by his own act alone, bring the trust to an end. He cannot divest himself of the trust by simply withdrawing from it with the assent of the grantor, even though the latter is a beneficiary, if there are other beneficiaries who do not consent, or, being infants, cannot consent,<sup>4</sup> or if any legitimate purpose contemplated in the creation of the trust remains unfulfilled.<sup>5</sup>

Nor will the trust cease so long as the property charged therewith is in the hands of persons who have acquired it with knowledge of its fiduciary character. Trust property passing into the hands of innocent holders escapes the trust, as we have seen,<sup>6</sup>

Where the creditors have been made a party to the deed of assignment, the deed cannot be revoked under the English decision. See *Mackinnon v. Stewart*, 20 L. J. N. S. Ch. 52.

1. See *Oakley v. Hibbard*, 1 Pin. (Wis.) 674; 44 Am. Dec. 425.

2. See *Petrikín v. Davis*, 1 Morris (Iowa) 296; *Ward v. Lewis*, 4 Pick. (Mass.) 518; *Jones v. Dougherty*, 10 Ga. 274; *Mills v. Argall*, 6 Paige (N. Y.) 577.

3. *Gibson v. Chedic*, 1 Nev. 497; 90 Am. Dec. 503.

4. *Andrews v. Hobson*, 23 Ala. 219; *Henderson v. Sherman*, 47 Mich. 267; *Matter of Jones*, 4 Sandf. Ch. (N. Y.) 615; *Cruger v. Halliday*, 11 Paige (N. Y.) 314; *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9; *Brennan v. Wilson*, 71 N. Y. 502; *Skipwith v. Cunningham*, 8 Leigh (Va.) 271; 31 Am. Dec. 642.

It was held in *Isham v. Delaware*, etc., R. Co., 11 N. J. Eq. 227, that a deed of trust conveying land for the benefit of three persons, and their children yet unborn, could not be revoked, although the trustee and all the *cestuis que trustent* in being, united to reconvey the land to the settlor free from the trust.

E. conveyed land to a trustee, in trust for his heirs, to whom it was to descend upon his death; the plaintiff, his heir, being then *en ventre sa mere*. Afterward the trustee, for the expressed purpose of terminating the trust, recon-

veyed to E. It was held that upon the execution of the trust deed, a future vested estate in the heirs of E. was created, which could not be destroyed, either by a revocation by the grantor, or a violation of the trust by the trustee, or both, and that the deed of reconveyance, being in contravention of the trust, was void. *Ewing v. Warner*, 47 Minn. 446.

If a trust has once been created and accepted, the grantor cannot revoke it without the consent of all the beneficiaries. *Hellman v. McWilliams*, 70 Cal. 449.

The trustee will not be divested of the legal estate by any arrangement made to pass the property to the beneficiaries, while one of the beneficiaries is a minor. *Jones v. McNeil*, 1 Bailey (S. Car.) 235.

A trust cannot be revoked, nor a trust estate applied to other purposes, unless the beneficiary has dissented from the trust. *Stockard v. Stockard*, 7 Humph. (Tenn.) 303; 46 Am. Dec. 79; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 531.

5. If a trustee, without the direction of the beneficiary, disposes of and releases the trust property before the purposes of the trust are performed, it does not release in equity the lien on the property. *Wolfe v. Bate*, 9 B. Mon. (Ky.) 208.

6. See *supra*, this title, *Rights and Remedies of the Beneficiary*.

but the trustee who reacquires it, at once restores its trust nature by coming into ownership or possession.<sup>1</sup>

Nor can he free the property of its trust character by an omission or refusal to perform the duties imposed upon him in relation thereto.<sup>2</sup> Neither will his death terminate the trust; for the death of the trustee vests the trust in the court.<sup>3</sup>

c. BY THE BENEFICIARY.—The united consent of all the parties in interest will, in most cases, justify a decree terminating the trust. It is necessary, however, that the purposes of the trust be held sacred,<sup>4</sup> that the beneficiaries so consenting be all *sui juris*,<sup>5</sup> and that no interest, however remote, be left out of consideration.<sup>6</sup>

If the parties in interest may legally unite to allow the rendition of a decree terminating the trust, there is no valid reason why they may not unite, if they are all *sui juris*, in a deed or in a contract, or by conduct constituting a contract, to the same effect. But it is by no means certain that an executory trust can be brought to an end altogether by the act of the parties.<sup>7</sup>

1. See *Church v. Ruland*, 64 Pa. St. 432.

2. Where lands have been conveyed to a trustee to pay debts, the deed of trust limiting his power to sell at a specified time, the mere neglect of the trustee to sell within the time limited, will not divest the lands of the trust. *Smith v. Kinney*, 33 Tex. 283.

A debtor who conveys his property in trust for the payment of his debts, by that act appropriates it to that specific purpose, and if the trustee neglects or refuses to carry out and perform that purpose, a court of equity will compel him to do so. *National Park Bank v. Halle*, 30 Ill. App. 17.

The mere neglect of a trustee to sell property conveyed to him by the grantor, cannot defeat the object of the trust. *Cowling v. Douglass*, 4 Ala. 206.

3. *Dyer v. Leach*, 91 Cal. 191.

4. If the court has power with the beneficiary's consent to terminate a trust for his maintenance and support for life, it nevertheless has no power to do so merely on evidence that he has released all claim to the fund, in a proceeding to which he is not a party, no investigation being had as to the circumstances under which this release was obtained, and no security being required for his protection in the event he should come to want in the future. *Sumner v. Newton*, 64 Wis. 210.

5. If the share of a *feme covert* in the estate of her deceased father, has been vested by a decree of court in a trustee for her sole and separate use, under

"An act to protect the rights of married women," which act provides that a married woman, for whom property has been settled under its provisions, has the right to dispose of any such property, real or personal, by will, the trust is not terminated by the death of the woman's husband and her remarriage, and the trustee has the sole right to sue to recover property which is the subject of the trust. *Parish v. Balkum*, 40 Ala. 285.

6. A deed of trust cannot be released by a part of the grantees only. *Barcroft v. Lessieur*, 48 Mo. 418.

7. It was held, in *Huckabee v. Billingsley*, 16 Ala. 414; 50 Am. Dec. 183, that the execution by the trustee to the settlor of a quit-claim deed, reinvests the latter with the legal estate.

In *Ormsby v. Dumesnil*, 91 Ky. 601, a married woman had conveyed her property to a trustee in trust for her sole use for life, "and after her death for that of her children, or survivors or survivor" thereafter, all of the children being of full age and uniting with the trustee to reconvey the property to the settlor. It was held that by this conveyance from the trustee and the beneficiaries, the settlor reacquired the absolute title in fee simple to the property discharged from the trust created by her first deed.

If a trustee, after the death of the beneficiary, assigns the trust estate to the latter's executor or administrator, who accepts the assignment, it will operate as a discharge of the trust,

**TRUSTS (CORPORATE).**—See *TRADE COMBINATIONS AND CORPORATE TRUSTS*, vol. 26, p. 229.

**TRUTH.**—See note 1.

**TUGS.**—See *TOWAGE; TUGS AND TOWS*, vol. 26, p. 80.

**TUITION.**—See note 2.

**TUMBLING.**—See note 3.

**TUMULT.**—See note 4.

**TUMULTUOUS.**—See note 5.

**TURBARY.**—(See also *COMMON*, vol. 3, p. 346; *MOSSSES*, vol. 15, p. 886; *PROFITS À PRENDRE*, vol. 19, p. 259).—A right to dig turf in another's land.<sup>6</sup>

**TURN-OUT.**—Turn-out is defined as "a short side track on a railroad which may be occupied by one train while another is passing on the main track; a siding."<sup>7</sup>

although it is made in terms, to the use of the executor or administrator in his individual capacity. *Dawes v. Boylston*, 9 Mass. 337; 6 Am. Dec. 72.

The holder of certain judgments transferred them in trust for certain purposes, the residue to be held upon such trust as the judgment debtor might appoint, and upon the failure of the judgment debtor to make any such appointment, then in trust to pay the income to him free from the liens or demands of any of his present creditors. The transfer reserved a power to revoke the trust. Afterward the judgment creditor assigned the judgment to the judgment debtor. It was held that this act terminated the trust, and that the judgments vested in the debtor absolutely, and could not be interposed as against his creditors and mortgagees. *Carter v. Hough*, 86 Va. 668.

A holding certain money and slaves in trust for his sister, appropriated the money and the proceeds of the sale of the slaves in purchasing land in *Mis-souri*, and removing his sister and her family to the place, and afterward conveyed the estate to her and her children, in satisfaction of the trust, and it was occupied by and divided among them. It was held that the trust was thereby discharged. *Hickman v. Wood*, 30 Mo. 199.

1. **Truth.**—As distinguished from "fact" when applied to pleading, see *FACT*, vol. 7, p. 658.

2. In *State v. University of Wisconsin*, 54 Wis. 159, it was held that the word "tuition," as used in a statute exempting residents of the state from

the payment of "fees for tuition" in the university, meant that no student should be required to pay anything for instruction or teaching in the university; but did not include the incidental expenses for heating, lighting public halls, etc.

3. Whether an entertainment, see *ENTERTAINMENT*, vol. 6, p. 650.

4. That the word is substantially the same as brawl, see *BRAWLS*, vol. 2, p. 515.

5. In an indictment, under a statute providing for the punishment of one who breaks the public peace "by tumultuous and offensive carriage," the first count charged "tumultuous" but not "offensive" carriage. The court animadverted upon the count and distinguished tumultuous from offensive thus: "A man's carriage might, conceivably, be 'tumultuous,' as in the noisy expression of joy over some great national good or achievement, and yet be the opposite of 'offensive,' and tend to spread rejoicing and good will rather than to disturb or break the public peace, in the true sense of that term." *State v. Archibald*, 59 Vt. 548.

6. *Tyringham's Case*, 4 Rep. 36b; *O'Hare v. Fahy*, 10 N. C. L. Rep. 318. It cannot be dug for sale. *Valentine v. Penny*, Noy 145; *Hayward v. Canning-ton*, 1 Sid. 354. It does not give the right to take green grass for making grass plots, etc. *Wilson v. Willes*, 7 East 121.

7. Webster's Dict., followed in *Appeal of River Front R. Co.* (Pa. 1890). 19 Atl. Rep. 356, in which case it was held that siding and turn-out were synonymous.

**TURNPIKES.**—(See also **STREETS** and **SIDEWALKS**, vol. 24, p. 1.)

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**I. DEFINITION AND HISTORY.**—A turnpike road is a road across which turnpike gates are erected and tolls taken, which gates or bars, originally called "turns," were first constructed about the middle of the last century. Certain individuals, with a view to the repair of particular roads, subscribed among themselves for that purpose, and erected gates upon the roads, taking tolls from those who passed through them. These were violently opposed at first, and petitions were presented to Parliament against them, and acts were passed for their regulation. This was the origin of turnpikes. The distinctive mark of a turnpike road is the right of turning back anyone who refuses to pay toll.<sup>1</sup>

It is not necessarily made of stones, as usually understood by the term. A plank road and a gravel road are properly included in the term turnpike without special mention.<sup>2</sup>

1. Northam Bridge, etc., *Co. v. London, etc.*, R. Co., 6 M. & W. 428; *State v. Haight*, 30 N. J. L. 448; *Haight v. State*, 32 N. J. L. 451; *Neff v. Mooresville, etc.*, Gravel Road Co., 66 Ind. 279. See **HIGHWAYS**, vol. 9, p. 362.

A turnpike road is a highway in which the public have a qualified easement; that is, the right to pass and repass upon the payment of a certain toll established by law. *Heyward v. Mayor, etc.*, of New York, 8 Barb. (N. Y.) 492.

A turnpike may be defined as a road owned by a private corporation or individuals, over which the public have a

common right of passage upon the payment of toll. Elliott on Roads and Streets (1890), p. 53.

2. *Craig v. People*, 47 Ill. 487; *Neff v. Mooresville, etc.*, Gravel Road Co., 66 Ind. 279.

A plank road constructed by a private company and under legislative authority, and dedicated to public travel, with gates erected thereon for the collection of tolls as a condition of such travel, may properly be termed a turnpike road, without regard to the material of which the surface of the road may be composed. *State v. Haight*, 30 N. J. L. 447; *Haight v. State*, 32 N. J. L. 449.

**II. PUBLIC HIGHWAY.**—A turnpike is a public highway differing neither in the responsibility for its proper maintenance nor in any other particular, from an ordinary highway.<sup>1</sup> It derives its powers from its charter,<sup>2</sup> and may condemn land for the construction of its road.<sup>3</sup>

No additional burden is imposed by changing a public highway into a toll road. The change is not in the character of the servitude, but in the mode of sustaining the highway; in the one case it is sustained by taxes, in the other by tolls.<sup>4</sup>

1. In *Com. v. Wilkinson*, 16 Pick. (Mass.) 175; 26 Am. Dec. 654, the leading case on this subject, Shaw, C. J., says: "We think that a turnpike road is a public highway established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance; and the cost of construction and maintenance is reimbursed by a toll, levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway." And see *Murray v. Berkshire Co.*, 12 Met. (Mass.) 455; *Parker v. New Brunswick*, 32 N. J. L. 548; *Wright v. Carter*, 27 N. J. L. 81; *Haigh v. State*, 32 N. J. L. 451; *Benedict v. Goit*, 3 Barb. (N. Y.) 459; *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.) 106; *Newbury Turnpike Corp. v. Eastern R. Co.*, 23 Pick. (Mass.) 327; *Willis v. Farley*, 24 Cal. 490; *Angell on Highways* (1886), §§ 38-40; *Highways*, vol. 9, p. 364.

The forfeiture of the charter of the turnpike company, and the consequent abandonment of the road, do not affect its existence as a public highway, which should thenceforth be maintained in good order by the municipality within which it is located. *Pittsburg, etc., R. Co. v. Com.*, 104 Pa. St. 583.

Plank roads are public highways, differing from the common highways in the mode of construction and taking of tolls, on the payment of which latter, travelers have the same right to use them as they have to use other highways. *Craig v. People*, 47 Ill. 487.

The easement is vested in the public in substantially the same manner as

that of a highway, and upon the resumption of the franchise of the turnpike company by the sovereign power, the public easement in the road is left disburdened of the tolls, but otherwise unaffected. *State v. Main*, 27 Conn. 641; 71 Am. Dec. 89.

2. A turnpike company cannot extend its road beyond the limits of its charter, nor can such a claim be established by user. *Pontiac, etc., Plank Road Co. v. Hilton*, 69 Mich. 115; *Detroit v. Detroit, etc., Plank Road Co.*, 12 Mich. 333; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400; 24 Am. Rep. 585.

In *Pontiac, etc., Plank Road Co. v. Hilton*, 69 Mich. 115, it was held that the power granted to a plank road company in its charter to construct its road from a certain village, did not authorize it to extend the road for about three-quarters of a mile within the limits of the village.

But under the *Pennsylvania* Act, June 4th, 1879 (P. L., p. 91), authorizing the court of common pleas to amend the charters of turnpike companies, they may be amended so as to extend the limits of the turnpike. *Com. v. Philadelphia, etc., Turnpike Co.*, 12 Pa. Co. Ct. Rep. 275; 2 Pa. Dist. Rep. 10.

3. A county authorized by the *Tennessee* Acts 1883, ch. 167, to construct a turnpike, may proceed to condemn land for the road under *Tennessee* Code, § 1326 providing that any corporation authorized by law to construct any railway, turnpike, etc., may take real estate for the purpose. *Knox County v. Kennedy* 92 Tenn. 1; 20 S. W. Rep. 311.

4. *Carter v. Clark*, 89 Ind. 238; *Benedict v. Goit*, 3 Barb. (N. Y.) 459; *Walker v. Caywood*, 31 N. Y. 51; *Wright v. Carter*, 27 N. J. L. 76; *Douglass v. Boonsborough, etc., Co.*, 22 Md. 219; *Callison v. Hedrick*, 15 Gratt. (Va.) 244; *Nolensville Turn-*



The obstruction of a turnpike is a public nuisance,<sup>1</sup> for which indictment will lie.<sup>2</sup> But neglect to open a road to the full width is no bar to so opening it when necessary.<sup>3</sup>

**III. GENERAL RIGHTS—1. To Use Public Highway.**—A turnpike company has the right to lay out its road upon an ancient highway, provided such power is given to it by the legislature,<sup>4</sup> and the town then ceases to be liable to keep it in repair.<sup>5</sup> But the power thus given will be strictly construed, and a charter authorizing a turnpike company to locate a road on any part of a public highway where necessary to do so, does not authorize it to appropriate the whole course of the highway.<sup>6</sup>

**2. Title to the Soil of the Road**—*a. DURING USE BY THE COMPANY.*—The title to the soil, however, remains in the owners of the adjoining land, the easement only is transferred to the turnpike company, subject to the right of the public to use the road upon payment of the toll.<sup>7</sup> The turnpike company cannot dig up and remove the earth or gravel for any use or purpose without compensation first being made to the owners of the land over

pike Co. *v. Baker*, 4 Humph. (Tenn.) 315; *Panton Turnpike Co. v. Bishop*, 11 Vt. 198; *Chagrin Falls, etc., Plank Road Co. v. Cane*, 2 Ohio St. 419.

1. *Newburyport Turnpike Corp. v. Eastern R. Co.*, 23 Pick. (Mass.) 327; *Northern Central R. Co. v. Com.*, 90 Pa. St. 300; *Murray v. Berkshire Co.*, 12 Met. (Mass.) 455; *Willis v. Farley*, 24 Cal. 490. See HIGHWAYS, vol. 9, p. 412.

2. *Com. v. Wilkinson*, 16 Pick. (Mass.) 175; 26 Am. Dec. 654; *Northern Central R. Co. v. Com.*, 90 Pa. St. 300. See NUISANCES, vol. 16, p. 962.

3. *Walker v. Caywood*, 31 N. Y. 51; *Com. v. King*, 13 Met. (Mass.) 115; *Harrow v. State*, 1 Greene (Iowa) 439; *Angell on Highways* (1886) 232.

4. *Panton Turnpike Co. v. Bishop*, 11 Vt. 198; *People v. Com'rs of Milton*, 37 N. Y. 360; *State v. Lake*, 8 Nev. 276; *Atty. Gen'l v. Detroit, etc., Plank Road Co.*, 2 Mich. 138; *Detroit, etc., Plank Road Co. v. Fisher*, 4 Mich. 38; *Groff's Appeal*, 128 Pa. St. 621; *State v. Hampton*, 2 N. H. 22; *Chagrin Falls, etc., Plank Road Co. v. Cane*, 2 Ohio St. 419.

But a public highway cannot be so located as to take a turnpike road from its owners. *Fowler v. Pratt*, 11 Vt. 369.

5. *State v. Hampton*, 2 N. H. 22; *Nolensville Turnpike Co. v. Baker*, 4 Humph. (Tenn.) 315.

6. *Com'rs of Roads v. Griffin, etc., Plank Road Co.*, 9 Ga. 475. But under a grant, in a charter to a turnpike com-

pany, of a right to establish their road on "the nearest and most practicable route," it has been held that it had a right to occupy the ground on which an old road had been laid out. *Nolensville Turnpike Co. v. Baker*, 9 Ga. 315.

Where the charter specified the *termini* of the road, but was silent as to the intermediate route, it was held that it could not appropriate an existing public highway between the *termini* to avoid the necessity of acquiring a new route through private property. *Groff v. Bird-in-Hand Turnpike Co.*, 128 Pa. St. 621; *aff'd* on reargument, in 144 Pa. St. 150.

7. *Wright v. Carter*, 27 N. J. L. 76; *Proprietors of Locks v. Nassau R. Co.*, 104 Mass. 1. The owners of the soil may maintain trespass against anyone for plowing up the land, unless it is done by direction of the turnpike corporation for the purpose of mending the road. *Robins v. Boiman*, 1 Pick. (Mass.) 122. The title to the soil is not changed by the transfer of the road from the public to the corporation, but remains in the owner of the adjoining land to have the same use and enjoyment of it as before. The right of way is transferred to the company, to hold while they work the road and keep it in good repair, subject to the right of the public to use the road upon paying the tolls established by law. *Wright v. Carter*, 27 N. J. L. 76. The company acquires no more than an easement in land belonging to the state, but otherwise if the land belongs to individuals,

which the road passes,<sup>1</sup> but it may make such excavations as may be necessary in the grading of the road.<sup>2</sup>

*b. AFTER THE FRANCHISE HAS EXPIRED*—(1) *If the Company Has Only an Easement*.—There is some conflict of opinion as to the ownership of a toll road after the franchise for its construction has expired. While some courts hold that the title remains in the turnpike company, the weight of authority seems to be that, upon the termination of the franchise, the title vests in the public, the ground for this view being that the franchise to take toll is a species of taxation and is intended to reimburse the owners of the road the expense of constructing it, and that having accepted the franchise for that purpose, there is no hardship in holding that upon its termination the road reverts to the people.<sup>3</sup>

(2) *If the Land is Owned in Fee*.—If, however, the land over which the road is constructed is owned in fee by the turnpike

and the company is empowered to purchase land and hold it forever. *Per* Cowan, J., in *Seneca Road Co. v. Auburn, etc.*, R. Co., 5 Hill (N. Y.) 170.

1. *Turner v. Rising Sun, etc.*, Turnpike Co., 71 Ind. 547. The company cannot take the herbage, and the owner of the soil over which it is laid out may maintain trespass against a servant of the turnpike road for so doing. *Adams v. Emerson*, 6 Pick. (Mass.) 57.

2. The grant for a gravel road necessarily implies the right to make such changes in the surface of the highway as will make it fit for the purpose for which the statute intended the corporation should take it. *Carter v. Clark*, 89 Ind. 238, *distinguishing* *Turner v. Rising Sun, etc.*, Turnpike Co., 71 Ind. 547. To accomplish the purpose of its incorporation, a turnpike company may dig up and move from place to place within the limits laid out for the road, any earth, sand, or gravel, and may dig and cut up sods of turf. *Per* Wilde, J., in *Adams v. Emerson*, 6 Pick. (Mass.) 57.

3. *Pittsburg, etc., R. Co. v. Com.*, 104 Pa. St. 583; *State v. Lake*, 8 Nev. 276; *State v. Curry*, 6 Nev. 75; *State v. Dayton, etc.*, Toll Road Co., 10 Nev. 155. And the only interest the company has in it, is the right and power to collect tolls as a compensation for building it. *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Craig v. People*, 47 Ill. 487. The consideration for the building for the political corporation is the franchise granted the building corporation. *Police Jury v. Bridge Co.*, 44 La. Ann. 137.

While a turnpike company exists, it has the fee in the soil of the road, but when it ceases to exist the title must, *ex necessitate*, vest in some one else, and it would seem reasonable that it should revert to the original owner. *Heyward v. Mayor, etc.*, of N. Y., 8 Barb. (N. Y.) 492; *Hooker v. Utica, etc.*, Turnpike Road Co., 12 Wend. (N. Y.) 371.

In *State v. Passaic*, 42 N. J. L. 524, *Reed, J.*, said: "The use as a street by the citizens of a municipality within which it lies, of a turnpike or plank road, gives it the character of a street, to the degree that its existence as such cannot be questioned by any party other than the company which owns the turnpike or plank road." See also *State v. Mayor, etc.*, of Jersey City, 29 N. J. L. 441; *Jersey City v. State*, 30 N. J. L. 521; *State v. Atlantic City*, 34 N. J. L. 99; *State v. New Brunswick*, 30 N. J. L. 395.

The road becomes a public highway by dedication at the time of its construction, subject to the right of the company to collect tolls for the period prescribed by statute, and at the termination of such period neither the company nor its stockholders have any interest in the road for which they are entitled to compensation. *McMullin v. Leitch*, 83 Cal. 239.

There can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be in perpetuity. Neither can the public, by non-user, release their rights. *Dawes v. Hawkins*, 8 C. B. N. S. 857; 98 E. C. L. 847.

Where an act established a road as a

company, some courts hold that the public does not have an unrestricted right of passage upon the termination of the franchise of the company,<sup>1</sup> but the weight of authority seems to be that a presumption of dedication to public use is paramount, even in this case—that the landowners have received full compensation when the road was taken, and the turnpike company has received its compensation in the tolls collected.<sup>2</sup> And an injunction will lie to prevent the closing of the road.<sup>3</sup>

**IV. POWER TO ERECT TOLLHOUSE.**—A turnpike company can, in general, do all things necessary or convenient for the enjoyment of its franchise, and may, therefore, erect a tollhouse upon the road for the convenience of its gate keeper,<sup>4</sup> but it has no

public highway forever, and gave a turnpike company authority to collect tolls for thirty-nine years, it was held that the company could not surrender its right to collect tolls to the county commissioners; it must be made in some way authorized by law; nor would an abandonment of its franchises work a discontinuance of the highway. *State v. Western N. Car. R. Co.*, 95 N. Car. 602.

A toll bridge becomes a public highway when the license to take tolls expires. The right to take tolls for a specified number of years was the consideration granted by the public to the bridge company, for placing the bridge on the highway, and the former owners have, upon the expiration of the license, no more right to remove the bridge than the owners of a turnpike have to tear it up after the franchise to take tolls has ceased. *Kansas v. Lawrence Bridge Co.*, 22 Kan. 438.

One who lays out a road over his land and permits the public to use it on payment of tolls, thereby dedicates it as a public highway and no formal acceptance by the public is necessary, *California Code*, § 2619, providing that when the franchise of a toll road has expired, the road becomes a public highway and the owners cannot claim compensation. *People v. Davidson* (Cal. 1889), 21 Pac. Rep. 538. The fact that tolls are demanded, and that the public only uses the road upon condition of paying tolls, does not affect the question of tolls. *Blood v. Woods*, 95 Cal. 78.

1. *People v. Newburgh, etc., Plank Road Co.*, 86 N. Y. 1; *Heath v. Baramore*, 50 N. Y. 302.

2. *Craig v. People*, 47 Ill. 487; *State v. Maine*, 27 Conn. 641; 71 Am. Dec. 89; *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.) 106.

3. *Craig v. People*, 47 Ill. 487.

4. *Wright v. Carter*, 27 N. J. L. 76; *Tucker v. Tower*, 9 Pick. (Mass.) 109; *Ridge Turnpike Co. v. Stover*, 6 W. & S. (Pa.) 378; *Ridge Turnpike Co. v. Stover*, 2 W. & S. (Pa.) 548. Sergeant, J., in delivering the opinion of the court in this last case, said: "We are of the opinion that although not expressly mentioned, it is a power that necessarily flows from the provisions of the act of incorporation. It is not easy to see how the business of collecting tolls and performing other duties at the gates could be conveniently conducted without houses for the accommodation of the toll gatherers. The company are expressly authorized and required to appoint toll gatherers to tend at the gates, to collect and receive the tolls appointed, and their constant attendance at all hours, and at all seasons, is indispensable for the accommodation of the public in passing over the road; and this cannot be properly done without houses there to shelter them and their families. It is true the company has the power to purchase ground adjoining the road from the owners, but it would not be so convenient for travelers and the public to have toll gatherers' residences remote from the road, and the ground might be refused or set at an exorbitant price, and, moreover would be a needless expense, for gates cannot be erected without obstructing the road by a fence or bar across so as to compel travelers to turn up and pass through the gates, and that portion might as well, so far as respects use of the summer roads, be occupied by a building as by a fence or bar."

In *Tucker v. Tower*, 9 Pick. (Mass.) 109, it is said, that all things necessary for making the tollhouse a comfortable dwelling for toll gatherers, may be

right to appropriate land outside of the road for such purpose in the absence of express authority, or a necessity therefor.<sup>1</sup> And the right to erect tollhouses must be so exercised as not to occasion unnecessary injury to the adjoining landowners.<sup>2</sup> The right of the company to build a tollhouse within the road for the occupation of its toll gatherers, does not justify it in renting it for other purposes unconnected with the road.<sup>3</sup> Where a company erected a tollhouse partly on the land of another, under a license in consideration of user of the road by such owner, and abandoned the house as a tollhouse, and removed the gate, it was held to be a nuisance both on the road and on the land, and might be removed by anyone injured.<sup>4</sup>

**V. CHANGE OF GRADE AFTER ROAD IS ESTABLISHED.**—As to whether a turnpike company may be required by the municipal authorities to change the grade of its road to conform to the grade of the city streets after having once established it, is an open question. But it would seem that whenever necessity or public safety requires a change in the grade of the road at points where it crosses the streets of a city or town, the company must make it.<sup>5</sup> But the general authority of a municipal corporation

lawfully done, such as cutting down trees, digging a cellar, well, etc.

The decisions are not unanimous, however; a few cases holding that a turnpike company cannot erect a tollhouse upon its road without making compensation to the abutting owner. But the rule, as set forth in the text, certainly seems to have both reason and authority on its side. See *Danville, etc., Gravel Co. v. Campbell*, 87 Ind. 57; *Strattan v. Elliott*, 83 Ind. 425; *Thompson v. Androscoggin Bridge*, 5 Me. 62.

In *Perkins v. Moorestown, etc., Turnpike Co.*, 48 N. J. Eq. 499, it is held that the construction of a tollhouse within the lines of the highway, without the consent of the abutting owner, is the imposition of an additional servitude which will be restrained. And it seems that the case of *Wright v. Carter*, 27 N. J. L. 76, was reversed in the court of errors and appeals on the very point that the right to erect tollgates and collect tolls did not carry with it the right to erect a house for the gatekeeper, though the decision does not appear in the reports. See *State v. Laverack*, 34 N. J. L. 208; *Perkins v. Moorestown, etc., Turnpike Co.*, 48 N. J. Eq. 499; *Freeholders v. Red Bank*, 18 N. J. Eq. 94; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380.

1. *Kemper v. Cincinnati, etc., Turn-*

*pike Co.*, 11 Ohio 392. In this case it is said, that the right to maintain tollhouses is undoubted, but the right to place them on any other land than that devoted to the road, is not conferred by the express terms of the charter, nor is any necessity shown or believed to exist for subjecting other property to this purpose. And see, to the same effect, *Detroit, etc., Plank Road Co. v. Detroit*, 81 Mich. 562.

2. *Wright v. Carter*, 27 N. J. L. 76; *Strattan v. Elliott*, 83 Ind. 425; *Danville, etc., Gravel Road Co. v. Campbell*, 87 Ind. 57; *Thompson v. Androscoggin Bridge*, 5 Me. 62.

3. *Fisher v. Coyle*, 3 Watts (Pa.) 407; *Ridge Turnpike Co. v. Stover*, 2 W. & S. (Pa.) 548; *Ridge Turnpike Co. v. Stover*, 6 W. & S. (Pa.) 378. In this last case it is said that in order to determine whether the house erected within the limits of the road be authorized, and the occupation of it be still lawful, it is only necessary to ascertain whether it was built for a tollhouse, and is still used by the company for that purpose.

4. *Lancaster Turnpike Co. v. Rogers*, 2 Pa. St. 114.

5. See *Elliott on Roads and Streets*, p. 59, where the authors of that work say: "In our judgment, a corporation which has a double character, such as a railroad or turnpike company, acquires its rights subject to the higher and domi-

to vacate, alter, or relay streets, gives it no power to alter a road owned by a turnpike company.<sup>1</sup>

**VI. RIGHT TO AID FROM TAXATION.**—It is settled by the decisions of the courts of last resort of the *United States*, and of almost all of the individual states, that the legislature has the right to authorize counties and municipal corporations to tax themselves to raise funds to aid railroad or turnpike companies by investing in their stock or bonds. This doctrine has been frequently attacked by text-book writers, but still remains the law of the land. And not only is the right to invest in stocks or bonds sustained, but the right to make absolute donations is also strongly maintained.<sup>2</sup>

nant right of public necessity, and whenever public safety or necessity requires a change in the grade of a turnpike, at points where it crosses the streets of a city or town, the company must make it. This is substantially the rule with respect to railroads, and we are unable to perceive any reason why it does not fully apply to turnpikes."

The municipality has jurisdiction over its streets for regulating, grading, and paving them, and over that part of a turnpike road within the city limits, and used as a street, as one of those streets; but it has no right to regulate or grade the street so as to injure the turnpike or interfere with its chartered rights. *State v. New Brunswick*, 30 N. J. L. 397; *State v. New Brunswick*, 32 N. J. L. 548; *Chambersburg v. Manko*, 39 N. J. L. 500.

1. *Quinn v. Patterson*, 27 N. J. L. 35.

2. As early as 1837, the question was settled, or at least decided, by a court of last resort in *Virginia*. *Goodin v. Crumps*, 8 Leigh (Va.) 120. See also *Harrison v. Holland*, 3 Gratt. (Va.) 247 (a navigation case); *Langhorne v. Robinson*, 20 Gratt. (Va.) 661.

In 1843, in *Connecticut*, *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475. See also *Society for Savings v. New London*, 29 Conn. 174; *Douglas v. Chatham*, 41 Conn. 211.

In 1846, in *Pennsylvania*, *Harvey v. Lloyd*, 3 Pa. St. 331. See also *Com. v. McWilliams*, 11 Pa. St. 62 (a turnpike case); the great case of *Sharpless v. Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759; *Moerrs v. Reading*, 21 Pa. St. 188; *Com. v. Allegheny County*, 32 Pa. St. 218; *Com. v. Pittsburgh*, 41 Pa. St. 278; *Com. v. Perkins*, 43 Pa. St. 400.

In *Tennessee*, in 1848, *Nichol v. Nashville*, 9 Humph. (Tenn.) 271. See also *Louisville, etc., R. Co. v. David-*

*son County*, 1 Sneed (Tenn.) 637; *Hord v. Rogetsville, etc., R. Co.*, 3 Head (Tenn.) 208; *Byrd v. Ralston*, 3 Head (Tenn.) 477; *Campbell County v. Knoxville, etc., R. Co.*, 6 Coldw. (Tenn.) 598.

In *Kentucky*, in 1849, *Talbot v. Dent*, 9 B. Mon. (Ky.) 526. See also *Justices, etc. v. Paris, etc., River Turnpike Co.*, 11 B. Mon. (Ky.) 143; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Shelby County v. Cumberland, etc., R. Co.*, 8 Bush (Ky.) 209.

In *Illinois*, in 1851, *Ryder v. Alton, etc., R. Co.*, 13 Ill. 516. See also *Prettyman v. Tazewell County*, 19 Ill. 406; 71 Am. Dec. 230; *Robertson v. Rockford*, 21 Ill. 451; *Johnson v. Stark County*, 24 Ill. 75; *Perkins v. Lewis*, 24 Ill. 208; *Butler v. Dunham*, 27 Ill. 474; *Clarke v. Hancock County*, 27 Ill. 305; *Piatt v. People*, 29 Ill. 54; *Keithsburg v. Frick*, 34 Ill. 405; *Quincy, etc., R. Co. v. Morris*, 84 Ill. 410.

In *Florida*, in 1852, *Cotton v. Leon County*, 6 Fla. 610; *Columbia County v. King*, 13 Fla. 451.

In *Ohio*, in 1852, *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Steubenville, etc., R. Co. v. North Tp.*, 1 Ohio St. 105. See also *Cass v. Dillon*, 2 Ohio St. 607; *Thompson v. Kelly*, 2 Ohio St. 647; *State v. Van Horne*, 7 Ohio St. 327; *State v. Union Tp.*, 8 Ohio St. 394; *State v. Hancock County*, 12 Ohio St. 596; *Knox County v. Nichols*, 14 Ohio St. 260; *State v. Perrysburg*, 14 Ohio St. 472; *State v. Goshen Tp.*, 14 Ohio St. 509; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24.

In *Louisiana*, in 1853, *Police Jury v. McDonogh*, 8 La. Ann. 341. See also *New Orleans v. Graible*, 9 La. Ann. 562; *Parker v. Scogin*, 11 La. Ann. 629; *Vicksburg, etc., R. Co. v. Ouachita*, 11 La. Ann. 649.

In *Iowa*, in 1853, *Dubuque v. Dubuque*, etc., R. Co., 4 *Greene (Iowa)* 1. See also *State v. Bissell*, 4 *Greene (Iowa)* 328; *Clapp v. Cedar County*, 5 *Iowa* 15; *Ring v. Johnson County*, 6 *Iowa* 265; *McMillen v. Boyles*, 6 *Iowa* 304; *McMillen v. Lee County*, 6 *Iowa* 391; *Whittaker v. Johnson County*, 10 *Iowa* 161; *Bonnifield v. Bidwell*, 32 *Iowa* 149.

In *Alabama*, in 1854, *Stein v. Mobile*, 24 *Ala.* 591. See also *Wetumpka v. Winter*, 29 *Ala.* 651 (a plank-road case); *Gibbons v. Mobile*, etc., R. Co., 36 *Ala.* 410; *Fielder v. Montgomery*, etc., R. Co., 51 *Ala.* 178.

In *Mississippi*, in about the year 1854, *Strickland v. Mississippi Cent. R. Co.*, not reported, but referred to in the case of *Williams v. Cammack*, 27 *Miss.* 224; 61 *Am. Dec.* 508; *New Orleans*, etc., R. Co. *v. McDonald*, 53 *Miss.* 240.

In *North Carolina*, in 1855, *Taylor v. Newberne*, 2 *Jones Eq. (N. Car.)* 141 (a navigation case). See also *Caldwell v. Burke County*, 4 *Jones Eq. (N. Car.)* 323; *Hill v. Forsythe County*, 67 *N. Car.* 368.

In *Missouri*, in 1856, *St. Louis v. Alexander*, 23 *Mo.* 483. See also *Flagg v. Palmyra*, 33 *Mo.* 440; *St. Joseph*, etc., R. Co. *v. Buchanan County*, 39 *Mo.* 485; *Osage Valley R. Co. v. Morgan County*, 53 *Mo.* 156.

In *New York* in 1857, *Grant v. Courter*, 24 *Barb. (N. Y.)* 232, *Benson v. Albany*, 24 *Barb. (N. Y.)* 248; *Clarke v. Rochester*, 24 *Barb. (N. Y.)* 446. See also *Bank of Rome v. Rome*, 18 *N. Y.* 38; *Gould v. Venice*, 29 *Barb. (N. Y.)* 442; *Starin v. Genoa*, 23 *N. Y.* 439; *Clarke v. Rochester*, 28 *N. Y.* 605; *People v. Mitchell*, 45 *Barb. (N. Y.)* 208; *People v. Mitchell*, 35 *N. Y.* 551.

In *South Carolina*, in 1857, *State v. Charleston*, 10 *Rich. (S. Car.)* 491.

In *Georgia*, in 1857, *Winn v. Macon*, 21 *Ga.* 275; *Powers v. Dougherty County*, 23 *Ga.* 65.

In *Indiana*, in 1857, *Aurora v. West*, 9 *Ind.* 74. See also *Evansville*, etc., R. Co. *v. Evansville*, 15 *Ind.* 395; *Bartholomew County v. Bright*, 18 *Ind.* 93; *Aurora v. West*, 22 *Ind.* 88; 85 *Am. Dec.* 413; *Lafayette*, etc., R. Co. *v. Geiger*, 34 *Ind.* 185.

In *Wisconsin*, in 1859, *Clark v. Janesville*, 10 *Wis.* 136. Also see *Bushnell v. Beloit*, 10 *Wis.* 195; *Oleson v. Green Bay*, etc., R. Co., 36 *Wis.* 383; *Bound v. Wisconsin Cent. R. Co.*, 45 *Wis.* 546.

In *California*, in 1859, *Pattison v. Yuba County*, 13 *Cal.* 175; also *Hobart v. Butte County*, 17 *Cal.* 23; *Robinson v. Bidwell*, 22 *Cal.* 379; *French v. Teschemaker*, 24 *Cal.* 518; *People v. Coon*, 25 *Cal.* 635; *People v. San Francisco*, 27 *Cal.* 655; *Stockton*, etc., R. Co. *v. Stockton*, 41 *Cal.* 147.

In *Maine*, in 1860, *Augusta Bank v. Augusta*, 49 *Me.* 507.

In *Kansas*, in 1864, *Burnes v. Atchison*, 2 *Kan.* 454; *Atchison v. Butcher*, 3 *Kan.* 104; *Leavenworth County v. Miller*, 7 *Kan.* 479; 12 *Am. Rep.* 425.

In *West Virginia*, in 1865, *Goshorn v. Ohio County*, 1 *W. Va.* 308.

In *Texas*, in 1866, *San Antonio v. Jones*, 28 *Tex.* 19; *San Antonio v. Gould*, 34 *Tex.* 49.

In *Nevada*, in 1869, *Gibson v. Mason*, 5 *Nev.* 283.

In *Vermont*, in 1870, *Danville v. Montpelier*, etc., R. Co., 43 *Vt.* 144.

In *Minnesota*, *Davidson v. Ramsey County*, 18 *Minn.* 482.

In the *United States Supreme Court* in 1858, *Knox County v. Aspinwall*, 21 *How. (U. S.)* 539; *Knox County v. Wallace*, 21 *How. (U. S.)* 547. See also *Zabriskie v. Cleveland*, etc., R. Co., 23 *How. (U. S.)* 381; *Bissell v. Jeffersonville*, 24 *How. (U. S.)* 287; *Amey v. Alleghany City*, 24 *How. (U. S.)* 365; *Knox County v. Aspinwall*, 24 *How. (U. S.)* 376; *Woods v. Lawrence County*, 1 *Black (U. S.)* 386; *Moran v. Miami County*, 2 *Black (U. S.)* 722; *Mercer County v. Hackett*, 1 *Wall. (U. S.)* 83; *Gelpecke v. Dubuque*, 1 *Wall. (U. S.)* 175 (a leading case); *Seybert v. Pittsburgh*, 1 *Wall. (U. S.)* 272; *Van Hostrup v. Madison City*, 1 *Wall. (U. S.)* 291; *Meyer v. Muscatine*, 1 *Wall. (U. S.)* 384; *Sheboygan County v. Parker*, 3 *Wall. (U. S.)* 93; *Havemeyer v. Iowa County*, 3 *Wall. (U. S.)* 294; *Thomson v. Lee County*, 3 *Wall. (U. S.)* 327; *Rogers v. Burlington*, 3 *Wall. (U. S.)* 654; *Mitchell v. Burlington*, 4 *Wall. (U. S.)* 270; *Larned v. Burlington*, 4 *Wall. (U. S.)* 275; *Van Hoffman v. Quincy*, 4 *Wall. (U. S.)* 535; *Riggs v. Johnson County*, 6 *Wall. (U. S.)* 166; *Weber v. Lee County*, 6 *Wall. (U. S.)* 210; *U. S. v. Keokuk*, 6 *Wall. (U. S.)* 514; *Riggs v. Johnson County*, 6 *Wall. (U. S.)* 518; *Lee County v. Rogers*, 7 *Wall. (U. S.)* 181; *Kenosha v. Lamson*, 9 *Wall. (U. S.)* 477.

In *Iowa*, however, the courts at one time decided that such acts were unconstitutional. *State v. Wapello County*, 13 *Iowa* 388; *Chamberlain v.*

**VII. LOCATION OF GATES—1. Location Within City Limits.**—A turnpike company has the right to establish and maintain gates and collect tolls from all passing through, save those who are exempt; and it may maintain its gates within the limits of a city, provided they were established before the city limits embraced

Burlington, 19 Iowa 395; McClure v. Owen, 26 Iowa 243. But the Supreme Court of the *United States* has overruled all these decisions, Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, and the cases subsequent to it. The leading case of Hanson v. Vernon, 27 Iowa 28; 1 Am. Rep. 215, was virtually overruled by Stewart v. Polk County, 30 Iowa 10; 1 Am. Rep. 238; King v. Wilson, 1 Dill. (U. S.) 555.

**Donations.**—A distinction has been made by some courts, however, between subscriptions and donations, and there are four decisions against the validity of donations. Sweet v. Hulbert, 51 Barb. (N. Y.) 312; Hanson v. Vernon, 27 Iowa 28; 1 Am. Rep. 215; Whiting v. Sheboygan, etc., R. Co., 25 Wis. 167; 3 Am. Rep. 30; People v. Salem, 20 Mich. 452; 4 Am. Rep. 400. The first is not by a court of last resort, the second has been overruled, and the other two still stand, but are subject to the disapproval of the Supreme Court of the *United States*.

In Leavenworth County v. Miller, 7 Kan. 479, Valentine, J., said: "While there is an obvious distinction between subscriptions and donations, still we do not suppose that the *Wisconsin* and *Michigan* decisions are founded entirely upon the doctrine that donations to railroad companies are illegal, simply because they are donations. The power of governments and governmental organizations to make donations has been exercised ever since governments were instituted and we presume always will be. Swords, banners, and all other mementoes for meritorious conduct have always been, and, we suppose, always will be, donated by governments and municipal organizations. Money and land were donated to General LaFayette in 1824 by the general government. Millions of dollars and millions of acres of land have been donated to the soldiers of the republic since its organization. Homesteads are given to actual settlers; and many million acres of the public lands have been donated to railroad companies by the general government. . . .

And, if the right to make county and municipal subscriptions to railroad companies is founded on no other power except the power of taxation, we admit it has no foundation whatever, and must of course fall. But on the other hand, if it be conceded that every other objection to the making of said subscriptions is removed—that nothing else stands in the way—that everything else is favorable—that the right of the government is otherwise perfect—then everything is virtually conceded, for the power of taxation (or the want of such power) can never be in the way of the exercise of any of the other powers of government, but must always, when necessary, contribute thereto. Whenever the government can act at all, it can resort to the power of taxation, if necessary, to make its action effective. And, although the government has no right to interfere in private affairs at all, yet whenever the public interest, the public honor, the public gratitude, or public charity requires it, the government may resort to its sovereign power of taxation without limit, until its interest, its honor, its gratitude, or charity is entirely satisfied. Then it is that the power of the government and the power of the legislature, acting for the government, becomes unbounded; for the courts, whose duty it is simply to expound and declare the law have no scales by which to determine the amount of the public interest, the amount of the public honor, the amount of the public gratitude, or the amount of the public charity, which will support and sustain taxation. This duty rests upon another branch of the government—the legislature; and it rests wholly in their discretion."

This distinction between a donation and an investment is not recognized by the *United States* courts, and both are put upon the same basis. Chicago, etc., R. Co. v. Otoe County, 16 Wall. (U. S.) 667; Queensbury v. Culver, 19 Wall. (U. S.) 83; Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678; New Buffalo v. Cambria Iron Co., 105 U. S. 73.

them.<sup>1</sup> But if the city limits be established, it will require a very clear grant of power to authorize a turnpike company to erect gates within the city.<sup>2</sup>

**2. Right to Change Location.**—A turnpike company, under a general act allowing it to erect gates and receive toll, may, from time to time, alter the location of such gates, and there can be no prescriptive right in the public to have the gates remain in any particular place; and it may increase their number, provided they are not placed in any position prohibited by the charter.<sup>3</sup>

Some courts, have, however, ruled that after the gates have been once located they cannot be changed. Most of these cases rest either on a special charter, or on a provision in the charter giving the company the right "to erect and establish" gates, and this being construed to give the power to do so but once.<sup>4</sup>

**VIII. TOLL**—1. **Definition and Origin.**—Toll is a tribute or custom paid for passage, not for carriage—always something taken for a liberty or privilege, not for a service.<sup>5</sup> The right to exact toll is usually acquired by legislative grant, though it may be

1. *Chope v. Detroit, etc., Plank Road Co.*, 37 Mich. 195; 26 Am. Rep. 512; *Atty. Gen'l v. Detroit, etc., Plank Road Co.*, 2 Mich. 138; *Corporation of St. Catherine v. Gardiner*, 21 Up. Can. C. P. 190, *affirming* 20 Up. Can. C. P. 107; *Conestoga, etc., Turnpike Co. v. Lancaster*, 151 Pa. St. 543; 31 W. N. C. 146.

A charter forbidding the erection of tollgates within the city limits, does not oblige the company to remove gates brought within the limits of a city by their subsequent extension. *Detroit v. Detroit, etc., Plank Road Co.*, 43 Mich. 140; *Detroit v. Detroit, etc., Plank Road Co.*, 12 Mich. 333.

A provision in the charter of the company empowering it to collect tolls by suit, does not warrant the removal of the gate by the city; the remedy is intended only to enable the company to collect tolls from persons avoiding the gate after using the road. *Conestoga, etc., Turnpike Co. v. Lancaster*, 151 Pa. St. 543; 31 W. N. C. 146.

In *Snell v. Chicago*, 133 Ill. 413, it was held that where a turnpike company holds under the general plank-road law of the state and the highway on which a tollgate is located becomes annexed to an incorporated city, the right to maintain the gate is terminated; it being considered that the company accepted its charter upon the implied understanding that the right to use the highway for a toll road should give way as to such part thereof as

might afterward become subjected to the control and government of an incorporated city.

2. *Stormfeltz v. Manor Turnpike Co.*, 13 Pa. St. 555.

3. *Fowler v. Pratt*, 11 Vt. 369; *Cheshire Turnpike Co. v. Stevens*, 10 N. H. 133; *Farmers Turnpike Co. v. Coventry*, 10 Johns. (N. Y.) 389; *Chope v. Detroit, etc., Plank Road Co.*, 37 Mich. 195; 26 Am. Rep. 512; *Somerville v. O'Neill*, 114 Mass. 353; *Barber v. Rorabeck*, 36 Mich. 399; *Atty. Gen'l v. Detroit, etc., Plank Road Co.*, 2 Mich. 138.

It has power to change the location of gates and erect new ones unless specially restricted. *Detroit v. Detroit, etc., Plank Road Co.*, 12 Mich. 333.

When the president and directors of a company are authorized by statute to change the location of any of its gates, they cannot, if acting in good faith, be restrained, at the suit of the stockholders, from exercising such power and selling the abandoned tollhouse. *Bardstown, etc., Turnpike Co. v. Rodman* (Ky. 1890), 13 S. W. Rep. 917.

4. *Griffen v. House*, 18 Johns. (N. Y.) 397; *State v. Norwalk, etc., Turnpike Co.*, 10 Conn. 157; *Hartford, etc., Turnpike Co. v. Hosmer*, 12 Conn. 361; *Hartford, etc., Turnpike Corp. v. Baker*, 17 Pick. (Mass.) 432; *Snell v. Chicago*, 133 Ill. 413.

5. *Boyle v. Philadelphia, etc., R. Co.*, 54 Pa. St. 314, where it is said that no one supposes that tolls taken by a turnpike company or canal company



derived from prescription,<sup>1</sup> and the amount exacted may be subject to state regulation.<sup>2</sup> The grant of a franchise to collect tolls on a particular road does not, by implication, prohibit the construction of roads parallel to the one vested with the franchise.<sup>3</sup>

**2. Payment—*a.* HOW COLLECTED.**—The decisions as to the respective rights of turnpike companies and the individual, in regard to the payment of tolls, are somewhat contradictory. A number of authorities hold that the law will not imply a promise to pay tolls from the mere use of a turnpike, but that they must be collected at the gates and cannot be recovered by a suit unless an agreement to pay is alleged and proved.<sup>4</sup> Again, it has been

include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way. And see, to the same effect, *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 210.

*Elliott on Roads and Streets*, p. 68, defines toll to be a price paid for the privilege of passage over a road open to the public.

1. Toll is of two kinds: toll traverse and toll thorough. Toll thorough is in the highway, but toll traverse is for passing over another's land, yet it seems if a highway be in a city or town, toll thorough may be by prescription. Toll traverse may be by prescription or grant, but toll thorough cannot be by either prescription or grant. *Pelham v. Pickersgill*, 1 T. R. 660; *Fitzherbert's Nature Brevium*, 518 N; *Truman v. Walgam*, 2 Wils. 296; *Paton Turnpike Co. v. Bishop*, 11 Vt. 198.

But in *Fales v. Whiting*, 7 Pick. (Mass.) 232, it was said that there had been no actual existence of the road for a period long enough to establish a prescriptive right to take toll, if such right could, by any length of time, be established.

For the right to collect toll claimed by prescription, a consideration must be shown, which is usually to keep the road or bridge in repair. *Pelham v. Pickersgill*, 1 T. R. 660; *Warren v. Pridaux*, 1 Mod. 104; *Harput v. Wills*, 1 Mod. 47.

Toll thorough cannot be prescribed for without showing a consideration, but toll traverse may. *Truman v. Walgam*, 2 Wils. 296; *Yarmouth v. Eaton*, 3 Burr. 1402.

In *Pelham v. Pickersgill*, 1 T. R. 660, it was held that if a person claiming a toll for passage over a highway can show that the liberty of passing, and taking of toll for such passage, are both

immemorial, and that the soil and tolls were, before the time of legal memory, in the same hands, though severed since, it shall be presumed that the soil was originally granted to the public in consideration of the toll, and such original grant is a good consideration to support the demand.

**Penalty for Collecting Excessive Toll.**

—Penalties are often provided for the collection of excessive toll, but where a plaintiff at one time paid for driving over the bridge at various times prior to the payment, it was held that only one penalty was incurred under *Pennsylvania Act, 1874* (P. L. 73), p. 31, cl. 3, although the account embraced many items of overcharge. *Porter v. Dawson Bridge Co.*, 157 Pa. St. 367.

2. The charter may exempt the turnpike company from state regulations of its tolls, but if subject to state regulations, the courts will not consider the question whether the tolls provided by the legislature are reasonable. *Covington, etc., Turnpike Road Co. v. Sandford* (Ky. 1893), 20 S. W. Rep. 1031.

The fact that the tolls are under the supervision of the county commissioners does not affect the right of the county to tax the road. *East Park Toll Road Co. v. Edwards* (Colo. App. 1893), 32 Pac. Rep. 549.

3. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Bartram v. Central Turnpike Co.*, 25 Cal. 283.

4. *Russell v. Muldrugs Hill, etc., Turnpike Co.*, 13 Bush (Ky.) 307; *Huntington, etc., Turnpike Co. v. Brown*, 2 P. & W. (Pa.) 462.

The law will imply no promise to pay for the use of a turnpike road where a statutory remedy is given through the medium of toll. *Dorman v. Turnpike Co.*, 3 Watts (Pa.) 128; *Chestnut Hill Turnpike Co. v. Martin*, 12 Pa. St. 361. To found an action at law for the

held that the authority given to turnpike companies to stop and detain travelers until the tolls are paid is merely a cumulative remedy; <sup>1</sup> that an agreement to pay will be implied from the use of the road, <sup>2</sup> and that *assumpsit* will lie for the toll without any demand from the company, <sup>3</sup> or agreement proved; <sup>4</sup> and this, even though the traveler deny his liability and refuse to pay. <sup>5</sup>

**b. FULL TOLL CAN BE CHARGED.**—A turnpike company is authorized to charge toll for the full distance between its gates without regard to the actual distance traveled, <sup>6</sup> and the toll may,

recovery of such debts, an express undertaking to pay is necessary, *Beeler v. Turnpike Co.*, 14 Pa. St. 164; and in the absence of an express contract, and where the means of enforcing payment is given by the act of incorporation, the statutory remedy is exclusive of all others. *Kidder v. Boom County*, 24 Pa. St. 196.

The only method by which the company can collect its toll, is by receiving it at the gates. If a person travels the whole extent between the gates ever so often, but does not pass the gate, no toll can be exacted of him. *Central Turnpike Co. v. Vandusen*, 10 Vt. 197. He is not liable for tolls if he does not pass the gate, or pass around it in order to avoid the payment of toll, and then re-enter and travel the road. *Lexington, etc., Turnpike Co. v. Red*, 2 B. Mon. (Ky.) 30; *Lincoln Ave., etc., Gravel Road Co. v. Daun*, 79 Ill. 299. And see *Kennedy v. Crum* (Ky. 1894), 26 S. W. Rep. 190.

In *Chestnut Hill Turnpike Co. v. Martin*, 12 Pa. St. 361, Bell, J., in delivering the opinion of the court, said: "Experience has taught that it is best for all parties to confine turnpike companies to the summary mode of collecting their tolls usually provided by the several acts incorporating them, and that the inconveniences and injuries which it was suggested in the argument might flow from this rule, are seldom felt in practice. Against the use of fraud or force, the law affords ample protection, and the fullest enjoyment of their privileges is not, in any degree, jeopardized by denying them the right to sustain civil actions in cases like the present. But were they thus subjected to some chance of injury, it were better so than to accord to them the power of harassing travelers by petty suits."

**Special Provision in Charter.**—There may be a special provision in the charter of the company authorizing it to collect tolls by means of suit.

*Conastoga, etc., Turnpike Co. v. Lancaster*, 151 Pa. St. 543.

1. *Chesley v. Smith*, 1 N. H. 20; *Bear Camp River Co. v. Woodward*, 2 Me. 404.

2. *New Albany, etc., Plank Road Co. v. Lewis*, 49 Ind. 161; *Petterson v. Indianapolis, etc., Plank Road Co.*, 56 Ind. 20; *Stults v. Brunswick Turnpike Co.*, 48 N. J. L. 596.

A turnpike company need not even erect gates. In *Nicholson v. Williamstown Turnpike Co.*, 28 N. J. L. 143, Ogden, J., said: "The law creates the duty for the traveler to pay the legal toll, irrespective of the aids which it gives the company for enforcing the performance of the duty. There is an implied promise upon the part of those who are subject to the exaction, when they enter upon and travel a turnpike road, that they will pay the toll which the charter of the company authorizes to be exacted."

3. *Newport v. Saunders*, 3 B. & Ad. 411; 23 E. C. L. 108; *Nicholson v. Williamstown Turnpike Co.*, 28 N. J. L. 142; *Chesley v. Smith*, 1 N. H. 20.

4. *Seward v. Baker*, 1 T. R. 616; *Exeter v. Trimlet*, 2 Wills. 95; *Peacock v. Harris*, 10 East 104; *Yarmouth v. Eaton*, 3 Burr. 1402; *Chesley v. Smith*, 1 N. H. 20; *Bear Camp River Co. v. Woodman*, 2 Me. 404; *Newburgh, etc., Turnpike Co. v. Belknap*, 17 Johns. (N. Y.) 33; *Medford Turnpike Co. v. Torrey*, 2 Pick. (Mass.) 538; *New Albany, etc., Plank Road Co. v. Lewis*, 49 Ind. 161; *Ayres v. Turnpike Co.*, 9 N. J. L. 33.

In *Bear Camp River Co. v. Woodman*, 2 Me. 404, the statute gave the company the right to "demand and recover" the tolls.

5. The right to receive the tolls arises from the use of the road, and the duty to pay is not the less imperative because the defendant himself supposed he was not liable, and refused to pay. *Proprietors of Turnpike Road v. Taylor*, 6 N. H. 499.

6. *Mallery v. Austin*, 7 Barb. (N.

in some instances, be demanded in advance.<sup>1</sup> But there is a conflict of authority as to whether it is necessary for a gate to be passed in order to make the toll payable.<sup>2</sup>

c. **WAIVER AND COMMUTATION OF TOLL.**—The right to collect toll may be waived or commuted by contract under ordinary circumstances,<sup>3</sup> but a company should not make unjust or unfair discriminations any more than a common carrier should.<sup>4</sup>

d. **PENALTY FOR FAILURE TO PAY TOLL.**—For passing through a tollgate without paying toll a penalty is usually pro-

Y.) 627; *People v. Kingston, etc., Turnpike Co.*, 23 Wend. (N. Y.) 193; *Stuart v. Rich*, 1 Cal. (N. Y.) 182. In this last case, Kent, J., in delivering the opinion of the court, said: "The idea that the company must vary the toll at every ten-mile gate on the suggestion that a person has used the road for a less distance than ten miles, is inadmissible, because impracticable. The toll gatherer has no means of knowing whether the traveler has rode ten miles, or a less distance, previous to his arrival at the gate. If this suggestion was allowed to be a ground of reduction of toll, it would open a door to the greatest imposition and fraud upon the company."

1. *Rives v. Wood* (Ky. 1891), 15 S. W. Rep. 131.

The turnpike company can make reasonable regulations for its own protection, such as requiring a traveler who pays toll beyond the next gate to present a ticket at the gate to show what he has paid. *State v. Brumfiel*, 83 Ind. 136.

2. The following cases hold the traveler liable for toll, even if no gate is passed: *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4; *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213; *Fitch v. Lothrop*, 2 Root (Conn.) 524.

On the other side are: *Lexington, etc., Turnpike Co. v. Redd*, 2 B. Mon. (Ky.) 30; *Buncombe Turnpike Co. v. Mills*, 10 Ired. (N. Car.) 30.

3. The tolls may be commuted for an annual sum, providing the charter does not forbid it, and it is done with an honest purpose. *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185. And see *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131; *Adams v. Fort Gaines*, 80 Ga. 85.

In *Com. v. Delaware, etc., Canal Co.*, 43 Pa. St. 295, it was held that an agreement between a canal company and a coal company providing for a rate

of toll to be ascertained by the market price of coal in every year, instead of fixed tolls to be collected at the locks according to the charter, was valid, as the canal company had the right to commute its tolls, and no public grievance was involved. Nor was it a valid objection that, on account of the uncertainty of the toll, the company could not always know how much to demand of others and could not thus do equal justice to all, where there was no evidence that the public or any private person had suffered wrong thereby.

In *Park v. Richmond, etc., Turnpike Co.* (Ky. 1888), 9 S. W. Rep. 423, a parol contract by which the plaintiff sold land to a turnpike company, in consideration of the right for himself and family to pass perpetually through certain gates free of charge, was held valid.

But an agreement between a turnpike company and individuals, that if they withdraw their opposition to an act touching the company's interest, they should pass over the road toll free, is against sound policy and void. *Pingry v. Washburn*, 1 Aik. (Vt.) 264.

4. In *Elliott on Roads and Streets*, p. 71, it is said that, "A turnpike company would, as we suppose, have no right to unjustly discriminate in favor of individuals so as to give them undue advantages over competitors, under pretext of relieving them from the payment of toll, or by reducing it below the legal rate. The principle which applies to common carriers ought to apply to turnpike corporations. The reason for the application of the principle is as strong in the one case as in the other, and public policy forbids either a common carrier or a turnpike corporation from making a discrimination that will enable one citizen to secure undue advantage over another."

vided, which can be recovered by an action at law,<sup>1</sup> but the penalty must be fixed by an act of assembly, a mere by-law of the turnpike company having no validity.<sup>2</sup> It has been held that the penalty cannot be collected if the individual merely rides through the gate without force, but this would probably depend on the wording of the statute.<sup>3</sup>

*e. GATE CAN BE CLOSED IF TOLL IS NOT PAID.*—A turnpike company may close its gates against a traveler, liable to pay toll, who attempts to pass without payment; <sup>4</sup> and one who forcibly saws open the gate and passes through is guilty of malicious trespass.<sup>5</sup> But if the gate be unlawfully across the road, it is a nuisance which the traveler may abate without subjecting himself to an action.<sup>6</sup>

*f. DEFENSE TO ACTION FOR TOLL.*—In an action brought to recover toll, the defendant may not question the regularity of the organization of the turnpike company, nor may he aver a belief that the gate is illegal,<sup>7</sup> but he may show that the franchise has been repealed or surrendered, or has expired by limitation.<sup>8</sup>

1. *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4. But the company cannot collect a penalty for forcibly passing a gate which it had no right to maintain; and when suing for a penalty, the burden is on the company of proving the existence of such a state of facts as entitles it to its enforcement; any testimony tending to disprove the existence of such facts, being admissible in defense of the action. *Pontiac, etc., Plank Road Co. v. North Hilton*, 69 Mich. 115.

2. In *Wayne Pike Co. v. Bosworth*, 91 Ind. 210, it was held that a gravel road company had no power, under an act allowing it to enact by-laws, and providing a penalty for anyone violating the same, to fix a greater penalty for the non-payment of tolls than a sum fixed by law.

A by-law enacted by the directors of a company regulating the payment of tolls and prescribing a penalty for a violation of the by-law, is invalid. *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4.

3. *Columbia Turnpike Co. v. Woodworth*, 2 Cal. (N. Y.) 97.

In *Green Mountain Turnpike Co. v. Hemmingway*, 2 Vt. 512, it was held that a person exempted from the payment of toll, does not incur the penalty by refusing to pay, and forcibly passing the gate without notifying the toll gatherer of his exemption. He may open the gate himself, so that he does not commit a breach of the peace. *Pingry v. Washburn*, 1 Aik. (Vt.) 264.

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Demanding a written receipt and threatening litigation, thereby inducing a tollgate keeper to allow one to pass without paying toll, is not an offense against the General Statutes of *Kentucky* imposing a penalty for defrauding by going around a tollgate, or otherwise evading the payment of toll. *Rives v. Wood* (Ky. 1891), 15 S. W. Rep. 131.

4. In *Bock v. State*, 50 Ind. 281, it is said that the statute authorizing the company to erect tollgates, by necessary implication gives it the power to close them against all travelers who are liable, but who refuse to pay toll. See *Green Mt. Turnpike Co. v. Hemmingway*, 2 Vt. 512; *Pingry v. Washburn*, 1 Aik. (Vt.) 264.

5. *Bock v. State*, 50 Ind. 281. In *Pingry v. Washburn*, 1 Aik. (Vt.) 264, it is said that a person who is not liable to pay toll, has a right to open the gate and pass, so that he does not commit a breach of the peace; and if he breaks the peace, although the law will inflict punishment upon him, it will not impose the statutory penalty.

6. *Adams v. Beach*, 6 Hill (N. Y.) 272; *Hart v. Albany*, 9 Wend. (N. Y.) 589; 24 Am. Dec. 165; *Pontiac, etc., Plank Road Co. v. Hilton*, 69 Mich. 115; *James v. Hayward*, Cro. Ch. 184.

7. *Detroit, etc., Plank Road Co. v. Mahoney*, 68 Mich. 265; *Hunter v. Burnsville, etc., Co.*, 56 Ind. 213.

8. *People v. Manhattan Co.*, 9 Wend. (N. Y.) 382. But not that it

He may also show that the road is not in proper repair in those cases in which the good order of the road is made one of the conditions upon which the company is allowed to collect toll.<sup>1</sup> But in some cases this latter defense is not admissible.<sup>2</sup>

**3. Exemption from Toll.**—Exemption from toll is usually created by special statute and is granted for various reasons, such as "ordinary domestic business of family concerns," "going to or from church," "the inhabitants of a village," "going to or from mills," "purposes of husbandry;" particular kinds of vehicles are sometimes exempt.<sup>3</sup> These exemptions are always construed most

has been forfeited. *Adams v. Beach*, 6 Hill (N. Y.) 271.

1. *State v. Huggins*, 47 Ind. 586; *Western Plank Road Co. v. Central Union Teleph. Co.*, 116 Ind. 229; *State v. Flannagan*, 67 Ind. 140.

2. *Stults v. East Brunswick, etc.*, *Turnpike Co.*, 48 N. J. L. 596; *Detroit, etc., Plank Road Co. v. Mahoney*, 68 Mich. 265; *Canal Street Gravel Road Co. v. Paas*, 95 Mich. 372.

3. There are many cases upon exemption, depending upon the particular terms of the exemption, or the special circumstances of the case to which reference can be made. Those in relation to particular kinds of vehicles: *Pardee v. Blanchard*, 19 Johns. (N. Y.) 442; *Moss v. Moore*, 18 Johns. (N. Y.) 128; *Merrick v. Phelps*, 5 Conn. 465; *Middlesex Turnpike Co. v. Freeman*, 14 Conn. 85; *Housatonic Turnpike Co. v. Frink*, 15 Pick. (Mass.) 443; *Turnpike Co. v. Newland*, 4 Dev. (N. Car.) 463; *Cincinnati, etc., Turnpike Co. v. Neil*, 9 Ham. (Ohio) 11; *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658.

Going to or from mills: *Chestney v. Coon*, 8 Johns. Ch. (N. Y.) 150; *Bates v. Sutherland*, 15 Johns. Ch. (N. Y.) 510.

In favor of husbandry: *Cumings v. Waring*, 39 Barb. (N. Y.) 630; *Rex v. Adams*, 6 M. & S. 52; *Harrison v. James*, 2 Chitty 547; *King v. Gough*, 2 Chitty 655; *Pratt v. Brown*, 8 C. & P. 244; *Chambers v. Eaves*, 2 Campb. 393; *Harrison v. Brough*, 6 Term. 706; *Stevens v. Duffits*, 4 Burr. 2258; *Camden, etc., Turnpike Co. v. Fowler*, 24 N. J. L. 205; *Nicholson v. Williamstown, etc., Turnpike Co.*, 28 N. J. L. 142.

Going to church: *Lewis v. Hammond*, 2 B. & Ald. 206.

Ordinary domestic business of family concerns: *Green Mountain Turnpike Co. v. Hemmenway*, 2 Vt. 512; *Centre Turnpike Co. v. Smith*, 12 Vt.

212; *Kent v. Newburyport Turnpike Co.*, 4 Pick. (Mass.) 388; *Medford Turnpike Co. v. Torrey*, 2 Pick. (Mass.) 538; *Proprietors of Second Turnpike v. Taylor*, 6 N. H. 499; *Newburgh, etc., Turnpike Co. v. Belknap*, 17 Johns. Ch. (N. Y.) 33; *Nicholson v. Williamstown Turnpike Co.*, 28 N. J. L. 143.

The act imposing tolls upon "coaches and chariots, and other four-wheeled pleasure carriages," includes the stage coaches used for the conveyance of the mail or passengers. *Cincinnati Turnpike Co. v. Neil*, 9 Ohio 11.

A one-horse wagon with a single fixed seat and two full-grown persons sitting thereon, is a wagon, but not a loaded wagon. *Merrick v. Phelps*, 5 Conn. 465.

A one-horse wagon with a spring seat and panel sides, used only for carrying persons, is a "pleasure carriage" within the meaning of the charter of a turnpike company, and is liable for toll. *Moss v. Moore*, 18 Johns. (N. Y.) 128. But a light one-horse wagon, with a framed box and swelled sides, painted in imitation of panel work, a crooked bolster, and a chair seat with wooden springs, in which are two passengers, a trunk, a box, a bag of oats, and a bottle, is not a "chair or pleasure carriage with one horse." *Pardee v. Blanchard*, 19 Johns. (N. Y.) 442.

Where an act provided for certain toll to be paid "for each coach, chariot, and phaeton, or other four-wheeled spring carriage," it was held that the term "coach" was not controlled by the words, "other four-wheeled spring carriage," and that a stage coach, the top of which was suspended on thorough braces attached to four-braced iron jacks, was a coach within the provision of the statute. *Housatonic, etc., Turnpike Co. v. Frink*, 15 Pick. (Mass.) 443.

strongly against the company;<sup>1</sup> thus, an act exempting carts loaded with manure, also exempts them when empty going for manure.<sup>2</sup> Those in relation to husbandry are also favorably looked upon,<sup>3</sup> and an exemption from toll "going to and from mills" includes saw as well as grist mills.<sup>4</sup> But the reason for the exemption must be *bona fide*; a person going to a blacksmith shop to pay for work previously done is not exempt under an act relieving from toll those "going to and from a blacksmith shop to which they usually resort,"<sup>5</sup> nor is he exempt if he carries goods to market and stops at the shop on his return to have work done.<sup>6</sup> A privilege given to the inhabitants of a certain village of half toll on going to and returning from market, is not good on the return trip if the goods of others are carried.<sup>7</sup>

A person carrying the *United States* mail under contract is subject to the same toll as anyone else,<sup>8</sup> but owing to the act of Congress prohibiting the obstruction of the mails, a tollgate keeper is not authorized in stopping the mail carrier for non-payment of toll; his only redress is by suit.<sup>9</sup>

4. *Shun-pikes*.—A road intended to furnish a way of evading a tollgate and constructed for that particular purpose is called a

1. Where a vehicle is within the general description of vehicles subject to a certain toll, and also embraced by a specific description of vehicles subject to a less toll, the latter is to determine the amount of toll. *Middlesex Turnpike Co. v. Freeman*, 14 Conn. 85.

Although the statute speaks in the singular number, and mentions "his" horses, carriages, etc., yet the exemption extends to any firm or copartnership sending "their" horses, teams, etc., or to any person sending his servants or children. *Passumpsic Turnpike Co. v. Langdon*, 6 Vt. 546. An act exempting "all persons drawing firewood for family use" was held to extend as well to a person drawing his firewood at one time, with the assistance of his neighbors and others hired for the purpose, as if he himself drew but one load a day. *Wooster v. Van Vechten*, 10 Johns. (N. Y.) 467.

2. *Harrison v. James*, 2 Chitty 547.  
3. *Hickinbotham v. Perkins*, 3 Moore 185.

4. *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179.

5. *Stratton v. Herrick*, 9 Johns. (N. Y.) 356.

6. *Stratton v. Hubbel*, 9 Johns. (N. Y.) 357.

7. *Hearsay v. Boyd*, 7 Johns. (N. Y.) 183; *Passumpsic Turnpike Co. v. Langdon*, 6 Vt. 546. Nor does an exemption of persons going to and from the mill with grain and flour for family use,

apply to a wagon loaded with other articles and some grain or flour. *Bates v. Sutherland*, 15 Johns. (N. Y.) 510.

8. *Derby Turnpike Co. v. Parks*, 10 Conn. 522; *Newland v. Buncombe Turnpike Co.*, 4 Ired. (N. Car.) 372; *Turnpike Co. v. Newland*, 4 Dev. (N. Car.) 463; *Dickey v. Maysville, etc.*, *Turnpike Co.*, 7 Dana (Ky.) 113; *Proctor v. Crozier*, 6 B. Mon. (Ky.) 269.

9. *Hopkins v. Stockton*, 2 W. & S. (Pa.) 163, Sergeant, J., in delivering the opinion of the court, said: "Is it reasonable to infer, although the legislature have not said so, that they intended, when they passed the Act of 1836, that these tolls on the mail stages should be enforced by stopping the mail stages at the tollgates, in case the right of the state to levy should be contested? We think not; and the reason which operates upon us is, that knowingly and willfully to obstruct the passage of the mail, is an offense made penal by act of Congress. The State of *Pennsylvania*, in levying a disputable toll, would hardly authorize a proceeding which might bring its toll gatherers within the penalty of an act of Congress, where there was no necessity for doing so, as the tolls could be recovered by suit, and when, if the act of Assembly were unconstitutional, it would furnish no defense to the tollgatherers for obstructing the mails under it."

"shun-pike."<sup>1</sup> While the construction of roads in the vicinity of a turnpike established by charter, will not be permitted where intended to diminish the profits of such turnpike, and may be enjoined,<sup>2</sup> yet a community in the neighborhood of a turnpike will not be restrained from the construction of roads obviously

1. Elliott on Roads and Streets (1890), p. 74; Cheshire Turnpike v. Stevens, 10 N. H. 133.

2. Newburgh, etc., Turnpike Co. v. Miller, 5 Johns. Ch. (N. Y.) 101; Croton Turnpike Co. v. Ryder, 1 Johns. Ch. (N. Y.) 611; Gates v. McDaniels, 2 Stew. (Ala.) 111.

If the injury to the turnpike is great, without producing a corresponding public advantage, the new road will be considered a nuisance and ordered closed. Hall v. Ragsdale, 4 Stew. & P. (Ala.) 259.

A temporary injunction will not be dissolved on an answer denying that the road was intended merely as a shun-pike, the *quo animo* being immaterial if the fact exists, and this although the proposed road does not intercept the turnpike at all. White's Creek Turnpike Co. v. Davidson County, 3 Tenn. Ch. 396.

In Franklin, etc., Turnpike Co. v. Maury County Court, 8 Humph. (Tenn.) 342, it was held that county courts have no power to order the opening of a road intercepting a chartered turnpike road so as to enable a traveler to evade the payment of toll, and that if it makes such an order and the road is opened, the court of chancery will order it to be closed as a violation of chartered rights.

In Newburgh, etc., Turnpike Road v. Miller, 5 Johns. Ch. (N. Y.) 101, the Chancellor said: "It is a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near it as to draw away its custom, it was a nuisance for which the injured party had his remedy by action. The same law and remedy were applied to the case of a fair or market, in which an individual had a freehold interest, if another fair or market was erected or used within its vicinity. The same doctrine applies to any exclusive privilege created by statute; all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to af-

fect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great and expensive and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant to an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful."

In Auburn, etc., Plank Road Co. v. Douglass, 9 N. Y. 444, reversing 12 Barb. (N. Y.) 553, and disapproving Croton Turnpike Co. v. Ryder, 1 Johns. Ch. (N. Y.) 611, and Newburgh v. Miller, 5 Johns. Ch. (N. Y.) 101, it was held that a plank-road company was not entitled to an injunction restraining an adjoining landowner from opening a way over his own lands by the use of which travelers might avoid one of its tollgates; that the company, having no legal right to restrict the owner in the legal use of his own property, it was immaterial what might be his motives in the matter. Selden, J., in delivering the opinion of the court in this case, said: "It may be added that the Plank Road Acts give to the corporation in cases of this kind a remedy against those who avail themselves of the facilities afforded by the adjoining proprietors. Every traveler upon a plank road who passes around or avoids the gates of the company, for the purpose of evading the payment of toll, subjects himself to a penalty at the suit of the corporation. If this remedy be not sufficient, it is for the legislature to provide some other. The courts cannot with propriety be called upon, however strong the apparent equity of the case, to adopt the novel principle that the motives with which a man conducts his own business, or deals with his own property, may be inquired into, in order to hold him responsible for the consequences to another, when he has violated no law nor any established legal right of the party injured."

demanding by the situation of the country and the wants of the neighborhood.<sup>1</sup>

If the officials of a town lay out a highway around a turnpike gate for the purpose of enabling those who travel on the road to evade the payment of toll, they are liable to the company in damages.<sup>2</sup>

**IX. REPAIR—1. Duty to Keep in Repair.**—The same general rules as to the responsibility for the proper maintenance of highways to keep them safe for all ordinary travel, and the same duty to prevent their obstruction, apply to turnpikes. The same defenses and the same rights, as to removing obstructions, exist in the one case as in the other.<sup>3</sup> This liability of the company to keep the road in repair extends to all parts of the road over which it appears to have control, such as bridges forming part of its way, unless direct notice is given to the traveler as to the ownership of the bridge.<sup>4</sup> It is not an insurer of the safety of its road, however, but is only bound to use ordinary care and diligence in keeping it in repair.<sup>5</sup>

**2. Penalty for Failure.**—If a turnpike company does not keep

1. *Hall v. Ragsdale*, 4 Stew. & P. (Ala.) 252; *Charles River Bridge Co. v. Warren River Bridge Co.*, 11 Pet. (U. S.) 420.

In *Crawfordsville, etc., Turnpike Co. v. Smith*, 89 Ind. 290, it was held that a gravel-road company, organized under the general laws of *Indiana*, could not prevent by injunction the construction of another competing line of turnpike, which was to be made free from tolls.

In *Nashville Bridge Co. v. Shelby*, 10 Yerg. (Tenn.) 280, it was held that if a public bridge was sufficient at all times to permit transportation freely and without delay for all persons and effects, the mere fact that a ferry at, or near, the bridge would produce competition and thereby reduce the tolls of the bridge below the amount allowed by law, was not such a "public convenience" as would authorize the county courts to establish the ferry.

2. *Cheshire Turnpike v. Stevens*, 10 N. H. 133.

3. See *HIGHWAYS*, vol. 9, p. 378; *STREETS*, vol. 24, p. 1.

4. Where a bridge upon a turnpike road becomes unsafe from the gradual decay of the timbers, and there is no open or visible danger in passing, the owners of the road are responsible for the sufficiency of the bridge so long as they continue to take toll and keep the road open to the public, although notice is given to those who pass that

there is danger. *Randall v. Proprietors of Cheshire Turnpike*, 6 N. H. 147.

The defendants are bound to bestow ordinary care and diligence in the construction and preservation of their bridges. They are not responsible for accidents, if those accidents do not arise from the want of this ordinary care and skill. *Townsend v. Susquehanna Turnpike Road*, 6 Johns. (N. Y.) 90. And see *BRIDGES*, vol. 2, p. 540.

5. *Talmadge v. Zanesville County*, 17 Ohio 197; *Parnaly v. Lancaster*, 11 Ad. & El. 223.

It is bound to bestow ordinary care and diligence in the construction of its bridges and in keeping them in repair, but is not responsible for accidents which do not arise from its neglect or want of ordinary care and skill. *Townsend v. Susquehanna Turnpike Co.*, 7 Johns. (N. Y.) 90.

It is bound to keep its road in a state of ordinary safety for the use of travelers day and night so far as it can be done by ordinary diligence. The same diligence is required which is demanded of towns to insure the safety of travelers upon the highway, and turnpike companies, as well as towns, are primarily liable to the traveler. *Matthews v. Winooski Turnpike Co.*, 24 Vt. 480.

It is the duty of the proprietor of a toll bridge to exercise ordinary care in keeping it in safe condition for travel; but he is not bound to go beyond this, and a charge imposing an additional



its road in a reasonably safe condition for public travel, it is liable in damages to any one injured,<sup>1</sup> and also, under some statutes, it forfeits the right to collect toll.<sup>2</sup> In some states it even forfeits its franchise,<sup>3</sup> while in still others, it may be subjected to a fine for every week the road is left in a defective condition.<sup>4</sup>

**3. Repair by Municipality.**—When a turnpike is within the limits of a city, it would seem that the municipality may, under its general police power, require the road to be kept in repair, but its liability would not extend to the point of liability in damages for omission to do so.<sup>5</sup> It cannot repair the turnpike and assess the

obligation upon him is error. *Tift v. Jones*, 74 Ga. 469.

Upon the trial of an indictment for failure to keep its road in repair, proof by the company that it had no funds with which to repair the road, is not a valid defense. *Waterford, etc., Turnpike Co. v. People*, 9 Barb. (N. Y.) 161.

1. *People v. Plymouth Turnpike Co.*, 32 Mich. 248; *Riddle v. Proprietors of Locks, etc.*, 7 Mass. 169; *Bartlett v. Crozier*, 15 Johns. (N. Y.) 250; *Russell v. Men of Devon*, 2 T. R. 671; *Lynn v. Turner*, Cowp. 86; *Born v. Allegheny, etc., Plank Road Co.*, 101 Pa. St. 334; *Norristown v. Moyer*, 67 Pa. St. 355; *Goshen Turnpike Co. v. Sears*, 7 Conn. 86; *Frankfort Bridge Co. v. Williams*, 9 Dana (Ky.) 403; *Noyes v. White River Turnpike Co.*, 11 Vt. 531; *Randall v. Proprietors of Cheshire Turnpike*, 6 N. H. 147; *Com. v. Worcester, etc., R. Co.*, 3 Pick. (Mass.) 327; *State v. Wayne County*, 1 Hawks (N. Car.) 451; *State v. Patton*, 4 Ired. (N. Car.) 16; *Baltimore v. Cassell*, 66 Md. 419; *Brookville County v. Pumphrey*, 59 Ind. 78; *Wayne, etc., Co. v. Henry*, 5 Ind. 286; *Carver v. Detroit, etc., Plank Road Co.*, 61 Mich. 584; *Zucarello v. Nashville County*, 3 Baxt. (Tenn.) 364.

But not where the party injured is guilty of contributory negligence. *Haven v. Pittsburg, etc., Bridge Co.*, 151 Pa. St. 620; 31 W. N. C. 191. The question as to the plaintiff's contributory negligence is usually for the jury. *Carver v. Detroit, etc., Plank Road Co.*, 69 Mich. 616; *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573.

The question whether the road is unsafe and dangerous to travelers, and the company is guilty of negligence, is for the jury. *Carver v. Detroit, etc., Plank Road Co.*, 69 Mich. 616; *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573.

Expert evidence is inadmissible. *Brown v. Cape Girardeau, etc., Plank Road Co.*, 89 Mo. 152.

Evidence that there has been no complaint as to the condition of the road during the thirty years the witness has been president of the company, is inadmissible. *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573.

2. It is also usually provided in the statutes governing turnpike companies, that if the road is not kept in repair, the company cannot collect tolls, and a method is provided by which, upon the decree of the proper authorities, varying in each locality, that the gates shall be thrown open and so remain until the road is put into proper condition. The public is not bound to this alone, but may proceed by information against the company. *People v. Hillsdale Turnpike Road*, 23 Wend. (N. Y.) 254.

Under *Ontario Rev. St.*, ch. 159, as amended by 53 Vict., ch. 42, it may, on the report of an engineer that its road is out of repair, be restrained from the collection of tolls. *Atty. Gen'l v. Vaughan Road Co.*, 21 Can. S. C. R. 631.

3. Under *Kentucky Gen. St.*, ch. 110, § 8, if a turnpike company is convicted of allowing its road to get out of repair, its franchise may be adjudged forfeited; but the court must adjudge it forfeited, the fact of conviction alone being insufficient. *Kennedy v. Crum* (Ky. 1894), 26 S. W. Rep. 190.

4. *Francis v. Weaver* (Md.), 25 Atl. Rep. 413.

5. *McCain v. State*, 62 Ala. 138. In *State v. New Brunswick*, 32 N. J. L. 548, *Beasley, C. J.*, said: "There does not appear to be any good reason why such roads should not be held to be subject, when they lie in cities, to the regulation, in a manner not inconsistent with their use as turnpikes, of such local authority."

costs to the abutting owners ;<sup>1</sup> but if the work is done in the performance of its general duty to keep its streets in repair, it may recover the amount expended from the company, provided it is not in excess of the sum necessary to be expended to keep the road in the condition required by the company's charter.<sup>2</sup> And it has been held that the use of a turnpike or plank road as a street by the citizens of the municipality within which it lies, gives it the character of a street to the degree that its existence as such cannot be questioned by one other than the company owning the road.<sup>3</sup>

And in *State v. New Brunswick*, 30 N. J. L. 377, it was said, that a city had, for police purposes, authority to make such municipal regulations as to it appeared expedient, but had no power to require a turnpike company to grade its road or to repair it.

1. A plank road is private property, and not a public street in any proper sense; and the power to purchase or condemn it is usually a different power from that to improve a public street, and the laws relative to the improvement of streets cannot be applied to a plank road. *Wilson v. Allegheny City*, 79 Pa. St. 272.

A city cannot, under an authority to extend and widen certain streets, widen a turnpike road within its limits, and assess the costs on the abutting owners. *Breen v. Alleghany*, 85 Pa. St. 214.

But in *State v. New Brunswick*, 30 N. J. L. 395, it was held that a turnpike road was practically one of the streets of the city, notwithstanding the fact that toll was collected by the company for passing over it, and that if, in the judgment of the city, its health, comfort, or prosperity required it, it might order the street to be regulated, graded, and paved at the expense of the owners or occupants of the lots fronting on it, and it was no excuse for the owners to say that the rights of the turnpike company were infringed; that the improvement was presumed to be for the benefit of the owners and to increase the intrinsic value of their lots, and there was no injustice in requiring them to pay the expense of an improvement, which was to contribute to their enjoyment and to promote their interests; and that there was no vested right in the owners of adjacent lands to require the turnpike company to bear that expense, nor to have the road continued at its original grade.

See *State v. New Brunswick*, 32 N. J. L. 548, where the decision was affirmed upon the ground that a dedication by

the turnpike company of that part of its road within the city to the use of a public street was to be implied, the question as to the power of a municipality to improve a turnpike within its limits and assess the expense on the abutting owners being left for future determination.

In *Elliott on Roads and Streets*, p. 60, note, it is said, in speaking of this decision, that, "We cannot assent to the doctrine that the property of a private corporation, although a toll road, can be improved at the expense of adjoining property owners under a statute authorizing the improvement of streets and highways, for we think the term highways means public ways in the strict sense;" also, "We think it clear that under an authority to improve streets, a municipal corporation would have no right to improve a turnpike road, since the right to take tolls imposes upon a private corporation the imperative duty of keeping its road in proper condition for travel, and the municipality cannot cast the burden upon the property owners."

2. In *Versailles, etc., Turnpike Co. v. Versailles* (Ky. 1889), 10 S. W. Rep. 280, it is said, that while the duty is imposed upon the town to keep its streets in a condition fit for public use, and a power is given to levy and collect necessary taxes for that purpose, including the street upon which the company's road is, the company is not released from its obligation, nor can it claim exemption from its original undertaking to keep in proper repair that part of its road within the town limits until it clearly appears that it has ratably diminished its toll; it cannot claim and enjoy the benefit of the full amount of tolls on its road, and at the same time shift the burden of keeping it, or any part of it, in repair, to the town.

3. *State v. Passaic*, 42 N. J. L. 524; *State v. New Brunswick*, 32 N. J. L. 548, affirming 30 N. J. L. 395; *Jersey*

**X. LIABILITY FOR NEGLIGENCE.**—A turnpike company, like other employers, is liable for the negligence of its agents; such as letting down a bar upon a traveler, etc.<sup>1</sup>

### TURN-TABLES.

#### I. Injuries to Children by Turn-Tables, 344.

1. *General Rule of Liability*, 344.
2. *Evidence*, 347.

#### 3. *Contributory Negligence of Child*, 348.

#### II. Injuries to Employés by Turn-Tables, 349.

**I. INJURIES TO CHILDREN BY TURN-TABLES—1. General Rule of Liability.**—The general rule of liability, as laid down by the Supreme Court of the *United States* and adopted by the great majority of the state courts, is, that if a railway company leaves a turntable, or other like machinery upon its own property likely to attract children, so unsecured that children may put it in motion, the company is negligent, and if a child is injured thereby, will be liable in damages;<sup>2</sup> it is immaterial whether the turn-table, at the time of the accident, was operated by the child injured or by a

*City v. State*, 30 N. J. L. 521; *State v. Jersey City*, 29 N. J. L. 441; *State v. Atlantic City*, 34 N. J. L. 99.

In *Elliott on Roads and Streets*, p. 61, it is said that, "If the citizens are compelled to treat the way as a street, by paying the expenses of improving and repairing it, the private corporation must certainly lose its right to claim the way as its private property, since it cannot be both a turnpike and a street. It may be that, as against the municipality, the citizens might, in some cases, be estopped while the private corporation would not be; but certainly, if the private corporation knows that the way is claimed as a street and that money is expended upon it as such, it may, on the same principle which is held to estop the property owner, be estopped to aver that it is not a street, but a turnpike."

1. *Nolensville v. Gause*, 76 Ind. 142; 40 Am. Rep. 224; *Dudley v. Canal Bank*, 5 La. Ann. 297, where a gate was closed at an unusual hour, and instead of a gate, a bar was used, which was not easily discernible at night, and against which plaintiff's horse struck his head and was killed.

But where a gate keeper, to prevent the passage of travelers apparently attempting to drive by without the payment of toll, suddenly lowers the gate, whereby an occupant of the carriage is injured, the company is not held liable as for a willful injury. *Brannen v. Kokomo*, etc., *Gravel Co.*, 115 Ind. 115.

2. In *Stout v. Sioux City*, etc., R. Co., 17 Wall. (U. S.) 657, it was held that a child could recover in an action brought in his own name for injuries received while playing on a turntable, when it appeared that the land on which the turn-table was situated was uninclosed, and that the company had failed to lock or otherwise secure the turn-table from interference by trespassers. See also *Gulf*, etc., R. Co. v. *Styron* (Tex. 1886), 1 S. W. Rep. 161; *Bridger v. Asheville*, etc., R. Co., 25 S. Car. 24; *Callahan v. Eel River*, etc., R. Co., 92 Cal. 89; *O'Malley v. St. Paul*, etc., R. Co., 43 Minn. 289.

The doctrine of the Supreme Court of the *United States* has been followed in *Gulf*, etc., R. Co. v. *Styron* (Tex. 1886), 1 S. W. Rep. 161; *Evansich v. Gulf*, etc., R. Co., 61 Tex. 24; *Houston*, etc., R. Co. v. *Simpson*, 60 Tex. 103; *Gulf*, etc., R. Co. v. *McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755; *Fort Worth*, etc., R. Co. v. *Measles*, 81 Tex. 474; *Keffe v. Milwaukee*, etc., R. Co., 21 Minn. 207; *O'Malley v. St. Paul*, etc., R. Co., 43 Minn. 289; *Twist v. Winona*, etc., R. Co., 39 Minn. 164; 37 Am. & Eng. R. Cas. 336; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418; 10 Am. & Eng. R. Cas. 702; *Barrett v. Southern Pac. R. Co.*, 91 Cal. 296; *Callahan v. Eel River*, etc., R. Co., 92 Cal. 89; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1; 34 Am. & Eng. R. Cas. 88; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686;

*Bridger v. Asheville, etc.*, R. Co., 25 S. Car. 24; *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 146; 22 Am. St. Rep. 169; 45 Am. & Eng. R. Cas. 68; *Ferguson v. Columbus, etc.*, R. Co., 75 Ga. 637; *Bates v. Louisville, etc.*, R. Co., 90 Tenn. 36; *Atchison, etc.*, R. Co. v. Bailey, 11 Neb. 332; 10 Am. & Eng. R. Cas. 742; *Walsh v. Fitchburg R. Co.*, 67 Hun (N. Y.) 604; *Koons v. St. Louis, etc.*, R. Co., 65 Mo. 592; *Kolsti v. Minneapolis, etc.*, R. Co. (Minn. 1894), 19 Am. & Eng. R. Cas. 140.

For a railroad company to leave a dangerous machine, such as a turn-table, unfastened in a city lot which is not securely inclosed, and where people and children are wont to visit and pass through, is negligence. And if an infant of ten or twelve years of age resorts to the turn-table, and in riding upon it is seriously injured, the railroad company is liable in damages for such injuries to the infant, and this is so notwithstanding the father of the infant permitted her to go near the turn-table to carry breakfast to a brother who had been left by the father to protect other property of the company. The fault, if any, of the father, is not attributed to the infant, the action being brought by the infant herself. *Ferguson v. Columbus, etc.*, R. Co., 75 Ga. 637.

In *Keffe v. Milwaukee, etc.*, R. Co., 21 Minn. 207, *Young, J.*, said: "We agree with the defendant's counsel that a railroad company is not required to make its lands a safe playground for children. It has the same right to maintain and use its turn-table that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care, in any case, must, in general, be a question for the jury, upon all the circumstances of the case." The same judge also said: "To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situate in a public (by which we understand, an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of them were in the habit

of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turn-table by the defendant's own conduct, and that, as to him, the turn-table was a hidden danger, a trap."

In *St. Louis, etc.*, R. Co. v. Bell, 81 Ill. 76, the turn-table was a skeleton structure not covered with planks, and not protected by a wall, except where the rails of the switch intersected it. The turn-table was not near any public street nor in a place where the public were in the habit of passing. It was fastened with a latch which prevented it from being turned by accident, but was not locked, so as to render it impracticable for boys to open or withdraw the latch and move the table. The court, after an examination of the testimony, decided that in view of the isolated position in which the turn-table was located, the proofs failed to show that the railway company was guilty of such want of care as could lawfully charge it with damages for the accident.

**Security Required in Fastening.**—In *Bates v. Louisville, etc.*, R. Co., 90 Tenn. 36, it was held that while a railway company should secure a turn-table sufficiently to keep it in place, it is not incumbent on the company to fasten it so that a boy, or boys, could not displace the fastening and put it in motion.

In an action against a railway company for negligence in not properly securing a turn-table, whereby a child of six years of age received injuries causing death, the fact that prior to the accident, an agent of the company tied the turn-table with a rope so that it could not be revolved unless the rope were cut or untied, does not relieve the company from liability for its negligence in not adopting more secure fastenings, where it is shown that the agent knew children were attracted to the machine and were in the habit of

playmate.<sup>1</sup> To render the company liable, it is not necessary to show that it was the owner of the turn-table. It is sufficient if it appear that the turn-table was in charge of, or under the control of, the company.<sup>2</sup> It is for the jury to decide whether the company exercised due care in keeping the turn-table fastened.<sup>3</sup>

But the rule of the *United States* Supreme Court is not followed in either *Massachusetts* or *New Hampshire*, it being held in

playing on it, and that this method of securing it had in the past proved insufficient. *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169; 45 Am. & Eng. R. Cas. 68.

1. *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418; 10 Am. & Eng. R. Cas. 702; *Barrett v. Southern Pac. R. Co.*, 91 Cal. 296.

**Negligence of Responsible Person.**—A railway company is liable for its negligence in leaving a turn-table unguarded and unfastened, even if the negligence of a responsible person who turned it, contributed to the accident. *Gulf, etc., R. Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755.

2. *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418; 10 Am. & Eng. R. Cas. 702. In this case it was held that where a petition stated in substance that the defendant railroad company "used and operated a turn-table in connection with its railroad, and that it was the duty of the company to keep the turn-table locked and fastened," the averments are equivalent to a charge that the defendant company controlled the turn-table.

3. The question of due care, when negligence is charged against a railroad company on account of leaving its turn-table unfastened, is one for the jury, and the charge that the failure of the company to fasten its table under a condition of facts stated would be negligence, would be an invasion of the province of the jury and was properly refused. *Houston, etc., R. Co. v. Simpson*, 60 Tex. 103.

The questions whether the defendant had anything to do with the turn-table, whether the defendant was negligent or not, and whether the plaintiff was guilty of contributory negligence or not, are questions of fact to be determined by the jury from the evidence. *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686. It should be left to the jury to find from the testimony whether, under all the circumstances, the defendant was guilty of negligence in erecting the turn-table at the place

it did, and allowing it to remain in the condition, as shown by the testimony. *Atchison, etc., R. Co. v. Bailey*, 11 Neb. 332; 10 Am. & Eng. R. Cas. 742.

In *Walsh v. Fitchburg R. Co.*, 67 Hun (N. Y.) 604, Herrick, J., said: "In this case, while the turn-table was on the defendant's own land, yet it allowed the public to use that land for many of the purposes of a highway; while situated in a populated neighborhood it was, so far as ease of access was concerned, substantially uninclosed; it was, to an extent, overgrown with grass and weeds, a place where the children of the neighborhood might naturally go for amusement; the turn-table was easily handled, and as was demonstrated by this case and others, was, when in motion, liable to inflict injury; children came there from time to time to play with it; under such circumstances, it seems to me, that it was a question for the jury to say whether, under all the circumstances, the defendant had invited, allured, or enticed the plaintiff upon its premises, or to play with the turn-table, and if it had, whether such turn-table was left in such a condition as to charge it with any resulting injury."

**Instructions.**—An instruction that, if the jury believes from the evidence that the plaintiffs negligently permitted their son to wander from his home and go upon the turn-table of the defendant railway company, and he was killed by said turn-table, that the child was so young and inexperienced as not to possess sufficient judgment to warn him of the danger of the place, or the character of the machinery, that he was killed by the negligence and carelessness of the defendants in not properly guarding or protecting their turn-table, and keeping children from playing on the same, they will find for the plaintiffs, is erroneous. It would be equivalent to saying, that if the parents sent their boy and encouraged him to resort to this machine as a playground, they would still be entitled to recover, notwithstanding their negligence, be-

those states that a railroad company is not liable for injuries sustained by a child while playing upon a turn-table, either upon the ground of an implied invitation to come there, or of a duty on the part of the company to refrain from ordinary negligence in its management of the turn-table.<sup>1</sup>

**2. Evidence.**—Persons who are experts, or have been employed

cause the machine was, through the negligence of the railroad company, left so that it could be used by children for such purposes. Thus the plaintiffs would be allowed to recover for their own negligence, without which the accident could not have happened. *Koons v. St. Louis, etc., R. Co.*, 65 Mo. 592.

If there is evidence tending to show that the table was well fastened, and that it could not have been unfastened by a child of tender age, it is the duty of the court to give an instruction fairly submitting to the jury whether the servants of the corporation had so fastened its turn-table that children *non sui juris* could have unfastened it, and used it. *Evansich v. Gulf, etc., R. Co.*, 61 Tex. 24.

1. *Daniels v. New York, etc., R. Co.*, 154 Mass. 349. In this case, it was held that a railroad company was not liable for injuries to a child playing upon a turn-table situate upon its own premises, about six hundred feet from two highways, and left unlocked and unguarded, on the ground that it was an attractive object to children, where the only thing to show that it was attractive, was that it had large upright standards or guys twelve or fifteen feet in height, which could be seen for a considerable distance.

In *Frost v. Eastern R. Co.*, 64 N. H. 220, Clark, J., said: "The ground of the action is, that the defendants were guilty of negligence in maintaining a turn-table insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turn-table by the noise of the older and larger boys turning and playing upon it. The turn-table was situated on the defendant's land, about sixty feet from the public street, in a cut with high, steep embankments on each side; and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever, to which was attached a

switch padlock, which being locked prevented the lever from being used unless the staple was drawn. At the time of the accident the turn-table was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle and not locked with the padlock, the turn-table could not be set in motion by a boy of the age and strength of the plaintiff. Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turn-table, and it is not claimed that the defendants were guilty of any active misconduct towards the plaintiff. The right of a landowner in the use of his own land is not limited or qualified, like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license.

At the time of his injury, the plaintiff was using the defendant's premises as a playground without right. The turn-table was required in operating defendant's railroad. It was located on its own land so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. Under these circumstances, the defendant owed no duty to the plaintiff; and there can be no negligence or breach of duty where there is no act of service which a party is bound to perform or fulfill. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. . . . We are not prepared to adopt the doctrine of *Sioux City, etc., R. Co. v. Stout*, 17 Wall. (U. S.) 657, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer

in railroading, are competent to give their opinions as to the practicability of securely fastening or fencing a turn-table.<sup>1</sup> Proof of a custom of railroads to keep their turn-tables locked, is immaterial upon the question of negligence of the defendant in failing to do so;<sup>2</sup> and so is evidence of a custom to keep them unfastened at all times,<sup>3</sup> but evidence that the fastenings were similar to those in general use by railways, is admissible.<sup>4</sup> It may be shown that the company had notice of the lack of proper fastenings on its turn-table,<sup>5</sup> but a witness may not be asked whether, if the child injured had been strong and healthy, he would have survived.<sup>6</sup>

### 3. Contributory Negligence of Child.—Although a minor, killed

of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling. . . . The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

The court of appeals of *New York*, in *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555, said, in speaking of *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657, and similar decisions: "We are not now called to express an opinion as to the soundness of these decisions in such a case, and, while we are not prepared to uphold them, it is enough to say that the facts are by no means analogous."

But in the late case of *Walsh v. Fitchburg R. Co.*, 67 Hun (N. Y.) 604, the supreme court of the same state held that it was for the jury to say whether, under all the circumstances, the company had invited, allured, or enticed the plaintiff upon its premises or to play with the turn-table, and, if it had, whether the turn-table was left in such a condition as to charge the defendant with any resulting injury.

1. Evidence.—A witness who has been employed in railroad work for twenty-five years, part of the time in charge of a turn-table, is competent to answer the question, "Would it be practicable to lock or fence turn-tables?" *Kolsti v. Minneapolis, etc., R. Co.* (Minn. 1884), 19 Am. & Eng. R. Cas. 140. But witnesses who are not experts cannot give their opinion as to whether or not a turn-table is a dangerous machine, or as to whether or not it was negligence on the part of the company to leave it unfastened or without covering. *Koons v. St. Louis, etc., R. Co.*, 65 Mo. 592. Though if a witness is personally ac-

quainted with the character and location of a turn-table, he may testify that it was dangerous for children to ride thereon. *Bridger v. Asheville, etc., R. Co.*, 25 S. Car. 24.

2. *Koons v. St. Louis, etc., R. Co.*, 65 Mo. 592.

3. Evidence of the custom of railways to keep turn-tables unfastened at all times, whether in actual use or not, and whether inclosed or in an open public place, is inadmissible. The question is, whether the defendant secured the turn-table as careful and prudent men would ordinarily do under like circumstances. *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169; 45 Am. & Eng. R. Cas. 68.

But where the plaintiff had been allowed to show that one railroad kept its turn-table locked, it was held proper to allow the defendant to show in reply, as bearing on the question of negligence, that other companies did not keep their turn-tables locked. *Bidgen v. Asheville, etc., R. Co.*, 27 S. Car. 456; 13 Am. St. Rep. 653.

4. *Kolsti v. Minneapolis, etc., R. Co.* (Minn. 1884), 19 Am. & Eng. R. Cas. 140.

5. It is competent to prove allegations that a railway company had notice of the lack of proper fastenings on one of their turn-tables, by the testimony of a boy, that he and other boys had played about a year and a half before the trial on the turn-table, and that it was unfastened, and by the production of an appearance docket, showing that suit had been instituted against the company for injuries suffered by one of the boys, who was at that date playing on the turn-table. *Fort Worth, etc., R. Co. v. Measles*, 81 Tex. 474.

6. Where the attending physician had testified that the child, who was frail and weak, died from the injuries received from the turn-table, it was

while playing upon the turn-table of a railroad company, has sufficient knowledge to know that it is wrong to trespass upon a turn-table, yet, if he had no knowledge that playing there was unsafe or dangerous, it cannot be said that he was guilty of contributory negligence.<sup>1</sup> If, however, a child knows that he has no right to play upon a turn-table, and that it is dangerous to do so, he is guilty of such contributory negligence as will bar a recovery for injuries sustained.<sup>2</sup>

**II. INJURIES TO EMPLOYEES BY TURN-TABLES.**—Whatever the character or capacity of a turn-table, if it is sufficient to do the work required, without danger to those servants of the company required to be present and about it while in use, the company is not liable for an injury sustained by an employé.<sup>3</sup> The question

not error for the court to exclude a question put to such witness, as to whether or not, if the child had been healthy, it would have survived the injury. *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169; 45 Am. & Eng. R. Cas. 68.

1. In *Union Pac. R. Co. v. Dunden*, 37 Kan. 1; 34 Am. & Eng. R. Cas. 88, Horton, C. J., said: "As to the question whether the deceased knew it was wrong to play upon the turn-table, an answer either way would not have affected the case. He might have known that it was wrong to trespass upon the property of the railroad company, and yet have had no knowledge that the use of the turn-table was dangerous, or even unsafe. If the company had presented the inquiry whether the deceased knew that it was dangerous, or unsafe to play upon the turn-table, a wholly different question would be before us for determination."

2. If a boy nearly ten years and a half old, of average intelligence, who has been frequently in the vicinity of a railway turn-table, and has a general knowledge of its structure and operation, who has been repeatedly warned by his father that it is dangerous to play upon it, and told not to do so, who also knows that the railway company prohibits children from playing on the table, and that he has no right to play upon it, that it is dangerous to do so, engages with other boys in swinging upon it while in motion, and is injured by his foot being caught between the arm of the table and the stationary abutments, he is guilty of such contributory negligence as will bar a recovery for the injuries sustained, even though he may not be of sufficient age and discretion to under-

stand and comprehend the full extent of the danger to which his conduct exposes him. *Twist v. Winona, etc., R. Co.*, 39 Minn. 164; 37 Am. & Eng. R. Cas. 336.

In a suit by a child for damages claimed on account of injuries inflicted by the turn-table of a railway company, after the court had properly instructed the jury as to the degree of care requisite in the child to avoid injury, it was not error to charge them, "If you believe, from the evidence, that the plaintiff had intelligence enough to appreciate the peril of getting on the defendant's turn-table in the manner that the evidence shows he did; or if you believe that he was warned by defendant's employé not to get on such table, that it was dangerous to do so, and said plaintiff understood and appreciated such warning, but did nevertheless get on such turn-table, and is thereby the direct cause of his injury, you will find for the defendant." *Houston, etc., R. Co. v. Simpson*, 60 Tex. 103.

3. *East Tennessee, etc., R. Co. v. Toppins*, 10 Lea (Tenn.) 58; 11 Am. & Eng. R. Cas. 222.

In an action against the owner of a railroad, brought by a servant to recover damages for a personal injury sustained by reason of a locomotive running upon the plaintiff from a turn-table, while turning upon it, in consequence of the want of a sufficient brake, evidence is competent on the part of the owner of the road to show that the person who had charge for him of all the engines on the road, had given instructions to the engineers before the accident to have the wheels of their engines blocked while turning on the turn-table, and that the accident



of negligence in the company in providing a defective turn-table, and of the contributory negligence of an employé injured thereon, is for the jury.<sup>1</sup>

**TUTOR**—(See *GUARDIAN AND WARD*, vol. 9, p. 85).—In civil law, a person to whom is committed the care and custody of the person and estate of a minor. Tutrix is the feminine form of the word.<sup>2</sup>

**TWELVEMONTH**.—See note 3.

**TWELVE MONTHS**.—See note 4.

**TWICE IN JEOPARDY**.—See *JEOPARDY*, vol. 11, p. 926.

**TYPEWRITER**.—See *STENOGRAPHER*, vol. 23, p. 556.

**ULLAGE**.—See note 5.

**ULTIMATE**.—See note 6.

occurred from the failure of some of the defendant's servants to obey such instructions, although such instruction was not known to the plaintiff. *Durgin v. Munson*, 9 Allen (Mass.) 396.

If a watchman employed by a railway company, on passing along an adjoining street on a dark night, falls into a turn-table and is injured, he cannot recover, if it appear that he had known of the location of the turn-table since its erection more than fifteen years previous, and there was no statute requiring a railway company to fence its depot grounds. *Early v. Lake Shore, etc.*, R. Co., 66 Mich. 349; 30 Am. & Eng. R. Cas. 163.

1. Where an employé, who was turning an engine upon a turn-table with the assistance of another engine upon an adjoining track, was injured by the breaking of a stick with which the engine was being turned, the questions as to whether the railway company was guilty of negligence in allowing the turn-table to be in a defective condition, and whether the plaintiff was guilty of contributory negligence, are for the jury. *McDonald v. Chicago, etc.*, R. Co., 41 Minn. 439; 16 Am. St. Rep. 711.

**Turn-Tables in Streets**.—Where a sleigh was injured by the projecting catch of the turn-table of a street-car company, it was held to be a question for the jury, whether it was negligence in the company to retain that style of turn-table. *Fitts v. Cream City R. Co.*, 50 Wis. 323; 15 Am. & Eng. R. Cas. 462.

Persons operating a turn-table in a public highway, are bound to such vigilance as may be reasonably necessary

to prevent collisions. *Schureman v. Missouri Pac. R. Co.*, 7 Mo. App. 570, note.

2. See *And. L. Dict.*

3. In *Crooke v. M'Tavish*, 1 Bing. 307; 8 E. C. L. 521, it is said that while "twelve months" standing alone would be construed to refer to lunar months, "twelvemonth" would embrace the whole year. See also *MONTH*, vol. 15, p. 712.

4. As to the meaning of "twelve months certain" in an agreement, see *CERTAIN*, vol. 3, p. 58.

5. As to whether "ullage" is included in the exemption from liability for loss by "leakage" in marine insurance policies, see *Cory v. Boylston Ins. Co.*, 107 Mass. 145.

6. **Ultimate and Ultimately in Guaranties**.—In *National Exch. Bank v. Gay*, 57 Conn. 235, it was held that a guaranty of the "ultimate" payment of a note, meant that the "obligor should continue bound to the end of all substitutions, renewals, and extensions."

In *Seaver v. Bradley*, 6 Me. 64, it was held that "ultimately" did not mean that the obligor should pay at some definite period, but should be bound for advances made on the faith of the guaranty, upon due notice of the principal's failure to comply with his engagement.

**Ultimate Facts**.—In the expression "ultimate facts," "ultimate" is opposed to probative and evidential, and as the probative or evidential facts are such as serve to establish or disprove the issues, the issues are, therefore, the ultimate facts." *And. L. Dict., citing Kahn v. Central Smelting Co.*, 2 Utah 379; *Pio Pico v. Cuyas*, 47 Cal. 174.

**ULTRA VIRES.**—(See also AGENCY, vol. 1, p. 331; BANKS AND BANKING, vol. 2, p. 89; BENEFICIAL OR BENEVOLENT ASSOCIATIONS, vol. 2, p. 171; BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 604; CARRIERS OF GOODS, vol. 2, p. 771; CARRIERS OF PASSENGERS, vol. 2, p. 738; CARRIERS OF LIVE STOCK, vol. 3, p. 1; CORPORATIONS (PRIVATE), vol. 4, p. 184; FOREIGN CORPORATIONS, vol. 8, p. 329; FORFEITURE, vol. 8, p. 443; FRANCHISES, vol. 8, p. 584; MANUFACTURING CORPORATIONS, vol. 14, p. 269; MUNICIPAL CORPORATIONS, vol. 15, p. 949; NATIONAL BANKS, vol. 16, p. 143; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 17, p. 39; QUO WARRANTO, vol. 19, p. 660; RAILROADS, vol. 19, p. 775; SAVINGS BANKS, vol. 21, p. 716; SCIRE FACIAS, vol. 21, p. 852; STOCK, vol. 23, p. 582; STOCKHOLDERS, vol. 23, p. 776; STREET RAILWAYS, vol. 23, p. 940; TELEGRAPHS AND TELEPHONES, vol. 25, p. 744.)

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**I. INTRODUCTORY—SCOPE OF ARTICLE.**—The law of *ultra vires*, in its application to municipal corporations, has been treated in a former part of this work, and reference is made thereto, as illustrating that branch of the subject.<sup>1</sup> Cases bearing upon the powers of such corporations, and the validity and effect of their transactions, in this connection, will be used only when the principles involved are equally applicable to private corporations. This article will be confined to private corporations aggregate, using the expression in its broadest signification. The general powers of corporations, what transactions they are authorized by their charters or constating instruments to engage in, the principles governing the construction of such instruments, and the

1. See MUNICIPAL CORPORATIONS, vol. 15, p. 949; MUNICIPAL SECURITIES, vol. 15, p. 1204.

powers of corporate officers and agents, are matters which properly belong to a work on the general law of corporations, and have already received full treatment.<sup>1</sup> These questions will be touched upon only so far as is necessary to a clear apprehension of the main subject. This statement, together with the synopsis above given, sufficiently indicates the scope of the article.

**II. DEFINITION AND GENERAL PRINCIPLES.**—The term *ultra vires* means, literally, beyond the powers or capacity—that is, the lawful authority—of a corporation, company, or person. The expression *extra vires* denotes the same thing. Opposed to these are the phrases *intra vires* and *infra vires*, meaning within the power or legal competence of the corporation, company, or person in question.<sup>2</sup>

The term *ultra vires* has, unfortunately, been employed in the law of corporations in many senses. First, to denote acts which are beyond the authority of the directors, officers, or agents, but within the scope of the powers of the corporation itself. Cases of this kind properly belong to the law of agency.<sup>3</sup>

Second, acts that are outside the powers, not of a particular corporation, but of every corporation, being forbidden by positive law or public policy. In this sense, by-laws in restraint of trade are said to be *ultra vires*.<sup>4</sup> Strictly speaking, this is not a proper use of the term. As a rule, when corporate acts are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders that the affairs shall be managed and the funds applied solely to the carrying out of the objects for which the corporation was created. The words "*ultra vires*" and "illegality" represent totally different and distinct ideas.<sup>5</sup>

Third, acts which, although within the powers granted, are per-

1. See the table of cross references, *supra*.

2. Cent. Dict.; Brown's L. Dict.; Anderson's L. Dict.

"**ULTRA VIRES**: beyond their powers; the doctrine by which corporations cannot exceed the powers specially conferred by, or reasonably implied from, their charters." Stimson's Common Law Glossary, p. 289.

"There is nothing of mystery or of sanctity in the use of the words of a dead language—*ultra vires*—and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unau-

thorized act of a corporation." Lord, J., in National Pemberton Bank v. Porter, 125 Mass. 333; 28 Am. Rep. 235.

3. Norwich v. Norfolk R. Co., 4 El. & Bl. 397; 82 E. C. L. 396; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331; Taylor v. Chichester, etc., R. Co., L. R., 2 Ex. 356; Canal, etc., R. Co. v. St. Charles St. R. Co., 44 La. Ann. 1069; Boyce v. Montauk Gas Co., 37 W. Va. 73. See *infra*, this title, *Ratification and Acquiescence*.

4. Green's Brice's Ultra Vires, p. 35. See *infra*, this title, *Contracts Expressly Forbidden or Contrary to Public Policy; To Forfeit Charter—When Enforced*.

5. Whitney Arms Co. v. Barlow, 63 N. Y. 68; 20 Am. Rep. 504.

In Bissell v. Michigan Southern R.

formed in a manner different from that prescribed by the terms of the grant.<sup>1</sup>

Fourth, acts which are outside the objects for which the corporation was created, as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature.<sup>2</sup> This is the proper use of the term, and its employment in any other sense simply occasions confusion. Yet, as it has been employed in other senses, it becomes necessary to consider it in those connections, though the real technical meaning should be kept in mind.

Co., 22 N. Y. 258, Comstock, C. J., said: "The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors, and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it still would be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse, or a place of worship, for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business." See also *Kent v. Quicksilver Min. Co.*, 78 N. Y. 185.

• And in *Ashbury R., etc., Co. v. Riche*, L. R., 7 H. L. 653, Cairns, L. C., says: "I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression 'illegality.' In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a con-

tract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."

1. *Farmer's, etc., Bank v. Harrison*, 57 Mo. 503; *McSpedon v. New York*, 7 Bosw. (N. Y.) 601; *Matthews v. Skinker*, 62 Mo. 329; 21 Am. Rep. 425. See *infra*, this title, *Contracts Executed in Unauthorized Manner*.

2. *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 59.

"The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action." Gray, J., in *Leslie v. Lorillard*, 110 N. Y. 531.

In *Miner's, etc., Co. v. Zellerbach*, 37 Cal. 578; 99 Am. Dec. 30, the court, by Sawyer, C. J., said: "The term *ultra vires*, whether with strict propriety or not, is used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the right of strangers dealing with corporations may vary, according as the act is *ultra vires* in one, or the other, of these senses. All these distinctions must be constantly

The decisions upon the subject are so very conflicting—some absolutely irreconcilable—that it is extremely difficult, if not impossible, to formulate general rules.

It has been said that “it is often impossible to predicate beforehand what acts and contracts will be adjudged *ultra vires*, and what *intra vires*,” of a given corporation; and that the principle has become, “if not an excrescence upon, at least a very disturbing element in, the legal system.”<sup>1</sup>

The reasons upon which the doctrine of *ultra vires* rests, have been thus stated: first, the interest of the public that the corporation shall not transcend the powers granted; second, the interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and, therefore, not authorized by the stockholders in subscribing for the stock; third, the obligation of everyone entering into a contract with a corporation, to take notice of the legal limits of its powers.<sup>2</sup>

borne in mind in considering a question arising out of dealings with a corporation.” *Approved* in *McPherson v. Foster*, 43 Iowa 65; 22 Am. Rep. 215.

1. Green's Brice's *Ultra Vires*, p. x. Here Mr. Brice illustrates the uncertainty that shrouds the application of the doctrine, thus: “It is *ultra vires* of the Great Eastern Railway Company to run steam packets from Harwich, *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; but not of the South Wales Railway Company to run them from Milford Haven. *South Wales R. Co. v. Redmond*, 10 C. B. N. S. 675; 100 E. C. L. 674. It is *ultra vires* of a steamship company to sell the whole of its vessels except two, *Gregory v. Patchett*, 33 Beav. 597; but perfectly legal thus to dispose of every one of them. *Wilson v. Miers*, 10 C. B. N. S. 348; 100 E. C. L. 348. It is *ultra vires* of railway companies to enter into partnership, *Charlton v. New Castle, etc., R. Co.*, 5 Jur. N. S. 1097; but not *ultra vires* to make arrangements for dividing the whole of the joint profits among themselves in fixed proportions. *Hare v. London, etc., R. Co.*, 2 J. & H. 80. It is *ultra vires* of the town of Southampton, *Atty. Gen'l v. Andrews*, 2 Mac. & G. 225; or *Sheffield, Reg. v. Sheffield, L. R.*, 6 Q. B. 652, to incur expense in order to obtain a proper supply of water for their respective inhabitants; but not so for *Ashton-under-Lyne*. *Bateman v. Ashton-under-Lyne*, 3 H. & N. 323, or *Wigan, Atty. Gen'l v. Wigan*, 5 De G. M. & G. 52, to do exactly the same thing.”

It is interesting to note the history

of two quite recent cases—the discordance of opinion between the different tribunals, and between the members of the same tribunal, is very marked. In the first case, the contract in question was adjudged valid by all the barons in the court of exchequer. *Taylor v. Chichester, etc., R. Co.*, 4 H. & C. 409. But this judgment was reversed in the exchequer chamber, four judges being for, and two against, the reversal; and four opinions were delivered, two judges taking views of the principles governing the powers of corporations to make contracts, the opposite of those taken by the others. *Taylor v. Chichester, etc., R. Co., L. R.*, 2 Ex. 356. Subsequently, on appeal to the House of Lords, the judgment of the court of exchequer was sustained, and that of the exchequer chamber reversed. *Taylor v. Chichester, etc., R. Co., L. R.*, 4 H. L. C. 628. In the second case, in the court of exchequer, two of the three judges were of opinion that the plaintiff should have judgment, and when the case came before the exchequer chamber, it was heard before six judges, and they being equally divided in opinion, the judgment was affirmed. *Riche v. Ashbury R., etc., Co., L. R.*, 9 Exch. 224. On appeal to the House of Lords, the judgment was reversed, pronouncing the contract *ultra vires*, and declaring that it was without the power of the shareholders to validate it by their acquiescence. *Ashbury R., etc., Co. v. Riche, L. R.*, 7 H. L. 653.

2. *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371.

Where the transaction which is *ultra vires* is merely an incident, and the principal matter is *intra vires*, the latter may be sustained.<sup>1</sup>

It seems that, when authority to do a particular act is conferred, whether rightfully or not, it cannot be said that such act is *ultra vires*, within the proper meaning of that expression; it is otherwise, however, if the law is invalid in attempting to confer the power.<sup>2</sup>

The dealings of corporations which, on their face, or according to their apparent import, are within the powers granted, are not to be considered as illegal or unauthorized, without some evidence tending to show that they are of such a character. In the absence of proof, there is no presumption that the law has been violated.<sup>3</sup> For example, the rule in respect to the exercise by corporations of the right conferred upon them by law to purchase, hold, and convey real estate is thus stated: When the corporation is authorized to hold and convey real estate under certain circumstances, or for certain purposes, it will be presumed, in the absence of proof to the contrary, that real estate conveyed by it was held and conveyed in pursuance of its powers.<sup>4</sup>

The question of *ultra vires* is mainly one of construction, but there has been some difference of opinion as to the principles which should control in the construction of corporate charters. It may be stated as a general rule that the charter of a corporation, read in connection with the general laws applicable thereto, is the true measure of its powers, and a transaction manifestly beyond those powers is *ultra vires*; yet, whatever under the charter and general laws, reasonably construed, may fairly be considered as incidental to the purposes for which the corporation was created, is not to be taken as prohibited, but is as much granted as that which is expressed.<sup>5</sup>

Another general rule of importance in this connection is that

See also *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441.

1. *Scott v. Colburn*, 26 Beav. 276; *Philadelphia, etc., R. Co. v. Lewis*, 33 Pa. St. 33; 75 Am. Dec. 574; *Grand Gulf Bank v. Archer*, 8 Smed. & M. (Miss.) 151.

2. *Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. St. 504.

3. *Chautauqua County Bank v. Rissley*, 19 N. Y. 371; 75 Am. Dec. 347; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 129; 41 Am. Dec. 260; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621.

4. *Alward v. Holmes*, 10 Abb. N. Cas. (Buffalo Super. Ct.) 96; *Ohio, etc., R. Co. v. McCarthy*, 96 U. S. 258.

5. *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 385; *Green Bay, etc., R. Co. v. Union Steam Boat Co.*, 107 U. S. 100; *Davis v. Old Colony R. Co.*, 131 Mass. 258; 41 Am. Rep. 221.

In *Atty. Gen'l v. Great Eastern R. Co.*, L. R., 5 App. 473, *Selborne, L. C. J.*, said: "I agree with Lord Justice James that this doctrine (*ultra vires*) ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, and consequential upon, those things which the legislature has authorized, ought not, unless

every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity.<sup>1</sup> But this principle does not require him, in every instance, to know whether the general powers of the corporation may be properly exercised in the particular case.<sup>2</sup>

Corporations are liable for every wrong committed by them, and in such cases, the doctrine of *ultra vires* has no application.<sup>3</sup>

In the case of municipal corporations, the rule is stricter than in private corporations, against the validity of *ultra vires* contracts.<sup>4</sup>

**III. HISTORY AND DEVELOPMENT OF THE DOCTRINE.**—The expression *ultra vires*, as used in the discussion of legal questions, is of comparatively modern invention. It is first found, so far as can be ascertained, in Lord Kames' Principles of Equity, originally published in 1776; the author observing: "A deed or covenant being void at common law as *ultra vires*, can a court of equity afford any relief? A principle in logics that will, without power, cannot produce any effect, is applicable to matters of law, and is thus expressed, that a deed *ultra vires* is null and void, etc."<sup>5</sup> The doctrine of *ultra vires*, in the strictly proper sense of the phrase, is entirely the creation of the courts. In early times,

expressly prohibited, to be held by judicial construction to be *ultra vires*." Quoted approvingly in *Ellerman v. Chicago Junction R., etc., Co.*, 49 N. J. Eq. 217.

To the point that a corporation possesses no power except what is given by its charter or governing act, either expressly or as incidental to its existence, see *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 636; *Betts v. Menard*, 1 Ill. 395; *State v. Stebbins*, 1 Stew. (Ala.) 299; *Beatty v. Knowler*, 4 Pet. (U. S.) 152; *Beatty v. Marine Ins. Co.*, 2 Johns. (N. Y.) 109; 3 Am. Dec. 401; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *White's Bank v. Toledo Ins. Co.*, 12 Ohio St. 601; *McMasters v. Reed*, 1 Grant Cas. (Pa.) 36; *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1; *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Kinzie v. Chicago*, 3 Ill. 187; 33 Am. Dec. 443; *Jacksonville v. McConnel*, 12 Ill. 138; *Petersburgh v. Metzker*, 21 Ill. 205; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294; *Baltimore v. Baltimore, etc., R. Co.*, 21 Md. 50; *Whitman Gold, etc., Min. Co. v. Baker*, 3 Nev. 386.

1. *Davis v. Old Colony R. Co.*, 131 Mass. 258; 41 Am. Rep. 721; *Relf v. Rundle*, 103 U. S. 226; *Salt Lake City*

*v. Hollister*, 118 U. S. 263; *Bohmer v. City Bank*, 77 Va. 445; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Haden v. Farmers', etc., F. Assoc.*, 80 Va. 683; *Spence v. Mobile, etc., R. Co.*, 79 Ala. 576; *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 443; *Knoxville v. Knoxville, etc., R. Co.*, 22 Fed. Rep. 758; *Lucas v. White Line Transfer Co.*, 70 Iowa 541; 59 Am. Rep. 449; *Alexander v. Cauldwell*, 83 N. Y. 480; *Memphis Grain, etc., Elevator Co. v. Memphis, etc., R. Co.*, 85 Tenn. 703; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Jemison v. City Sav. Bank*, 122 N. Y. 143; 19 Am. St. Rep. 482; *Alexander v. Cauldwell*, 83 N. Y. 480; *Hoyt v. Thompson*, 19 N. Y. 207, 222; *Fitzburgh v. Franco-Texas Land Co.*, 81 Tex. 306.

2. See *infra*, this title, *Contracts Ultra Vires Because of Facts Peculiarly Within Knowledge and Intention of Corporation*.

3. *First Nat. Bank v. Graham*, 100 U. S. 699. See *infra*, this title, *Liability of Corporation for Ultra Vires Torts*.

4. *Nashville v. Roy*, 19 Wall. (U. S.) 468. See MUNICIPAL CORPORATIONS, vol. 15, p. 949.

5. *Green's Brice's Ultra Vires* (2d Am. ed.), p. viii. It is also here said that the phrase does not appear in Angell and Ames on Corporations

corporations were considered to have most of the powers—the due exercise of such powers being secured by the imposition of certain formalities—and to be subject to the greater part of the obligations, of ordinary citizens.<sup>1</sup> Its appearance as a principle in the legal system of *England*, was made less than fifty years since, arising in a case in equity in 1846,<sup>2</sup> and at law in 1851.<sup>3</sup> But the courts of this country much earlier discussed the powers of private corporations aggregate, and announced rules relative thereto.<sup>4</sup> The doctrine, as first announced, was drawn from the artificial nature of corporations, being based upon the supposed axiom, that as a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law,” it possesses only those qualities with which its charter endows it, and is non-existent, except for the purposes for which it was created. Accordingly, an *ultra vires* act was held to be not the act of the

until the fifth edition, published in 1855.

1. Green's Brice's *Ultra Vires* (2d Am. ed.), p. 28; Sutton's Hospital Case, 10 Coke 1. It was here resolved by the court that, “When a corporation is duly created all other incidents are tacite annexed . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out: As, first, by the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, etc., and it need not, for it is incident; second, to sue and be sued, implead and be impleaded; third, to have a seal, etc.; that is also declaratory, for when they are incorporated they may make or use what seal they will; fourth, to restrain them from aliening or demising, but in a certain form; that is, an ordinance testifying the King's desire, but it is but a precept and does not bind in law.” Referring to this, Blackburn, J., in *Riche v. Ashbury R., etc., Co., L. R.*, 9 Exch. 263, said: “This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And, further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.”

And Bowen, L. J., in *Wenlock v. River Dee Co.*, 36 Ch. Div. 674, ob-

serves: “At common law a corporation created by the King's charter has *prima facie*, and has been known to have ever since the Sutton Hospital Case, 10 Coke 1, the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation, the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the king might be enforced through the Attorney General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created.”

2. *Colman v. Eastern Counties R. Co.*, 10 Beav. 13, where Lord Langdale says: “I think it right to observe that companies of this kind, possessing most extensive powers, have so recently been introduced into this country, that neither the legislature nor courts of justice have been yet able to understand all the different lights in which their actions ought properly to be viewed.”

3. *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; 21 L. J. C. P. 23.

4. *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338; *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 373; *Bulkley v. Derby*



corporation, and, therefore, a nullity so far as it was concerned.<sup>1</sup> It is now admitted, however, that a corporation is not a mere fiction, but a body of individuals, and may perform acts foreign to the purposes of its creation.<sup>2</sup> The very foundation of the proceeding by *quo warranto*, for usurpation and abuse of power, is that corporations can, and do, perform acts and usurp franchises

Fishing Co., 2 Conn. 252; 7 Am. Dec. 271; Chester Glass Co. v. Dewey, 16 Mass. 102; 8 Am. Dec. 128; Little v. O'Brien, 9 Mass. 423.

1. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 636. In this case, Marshall, C. J., defined a corporation as, "an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. Among the most important (properties) are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyance for the purpose of conveying it from hand to hand."

And in Bank of U. S. v. Danbridge, 12 Wheat. (U. S.) 92, the same judge, speaking of a corporation, inquires: "Can such a being speak or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolution, or declare its will, without the aid of some adequate substitute for these organs?"

Again, in Straus v. Eagle Ins. Co., 5 Ohio St. 60, in the execution of an unauthorized contract, the corporation had taken by indorsement from the other party to the contract the promissory note of a third party, against whom it tried to enforce it. Ranney, J., in delivering the opinion of the court, observes: "If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of indorsement, and without capacity to take or hold title. As well might a dead man, by the mere act of the indorser, be invested with the legal interest as a corporation, which only lives for the purposes and objects intended by the legislature. Beyond

these limits it has no existence, and its acts are neither more nor less than a nullity."

2. "The statement that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body: a corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact." 1 Morawetz on Corp., § 227. See also Stockton v. Central R. Co., 50 N. J. Eq. 54.

In State v. Standard Oil Co. (Ohio), 36 Am. & Eng. Corp. Cas. 19, the court uses this language: "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by anyone who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders."

In Life, etc., Ins. Co. v. Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31, Sutherland, J., said: "This would be a most convenient distinction for corporations to establish, that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." And Miller, J., in Salt Lake City v. Hollister, 118 U. S. 256, said: "The argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all."

beyond the rightful authority conferred by their charter.<sup>1</sup> Moreover, they are held liable for torts, and certain criminal offenses.<sup>2</sup>

In a leading case in *New York*,<sup>3</sup> which has had much influence upon the courts of the country, the court considered the unauthorized contract in two aspects: first, as a breach of the agreement among the shareholders, and a perversion of property held on a *quasi* trust according to the terms of that agreement; second, as a breach of the condition on which the charter was granted, for which the state might exact forfeiture; and denied that the contract was illegal in the ordinary sense of the term, and declared that where a corporation has received the consideration of its unauthorized contract and restitution will not do complete justice, suit may be brought by the other party directly on the contract.

And now the defense of *ultra vires* is very generally regarded

1. *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 265, *per* Comstock, C. J.

2. *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 202. This was an action for libel by Quigley against the company for the publication of a letter addressed to the company in the course of an investigation by the directors, in regard to the conduct of some of its subordinates. This letter contained statements in regard to the plaintiff's skill and capacity as a mechanic, very disparaging in that respect. This, with much other testimony, was printed and published by the board of directors, and the court held that the corporation could be held liable for the publication. The argument that only the individuals who ordered the publication should be made responsible was urged; but the court held that if it was a libel, the corporation was responsible for it in damages. It was also insisted that the existence of malice was a necessary element in an action for libel, and that the abstract entity which constituted the corporation, was incapable of malice, which could only be predicated of the officers who ordered the publication. This was also overruled, it being held that if the act implied malice, the corporation was liable for it. After examining the authorities, the court said: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is,

that for acts done by the agents or the corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a more early period, it was decided in *Great Britain*, as well as in the *United States*, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety."

In *Reed v. Home Sav. Bank*, 130 Mass. 443; 39 Am. Rep. 468, the bank was held liable in an action for malicious prosecution. Another well-considered case in which the corporation was held liable for malicious prosecution, is *Copley v. Grover, etc., Sewing Mach. Co.*, 2 Woods (U. S.) 494.

In *Salt Lake City v. Hollister*, 118 U. S. 260, Miller, J., for the court, said: "The truth is, that with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are *quasi-criminal*, the corporation may be held to a pecuniary responsibility for them to the party injured." See *infra*, this title, *Liability of Corporation for Ultra Vires Torts*.

3. *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 265.

by the courts as an ungracious and odious one,<sup>1</sup> and it is very well settled that neither party to the contract can avail himself of such a defense, when the contract has been fully performed by the other party, and he has received the full benefit of the performance and of the contract. If an action cannot be brought directly upon the contract, either equity will grant relief, or an action in some other form will prevail.<sup>2</sup>

Generally speaking, the rule of *ultra vires* prevails in full force only where the contracts of corporations remain wholly executory.<sup>3</sup>

1. In *Hawkes v. Eastern Counties R. Co.*, 1 De G. M. & G. 760, Lord St. Leonards said: "In my opinion, nothing can be more indecent than for a great company like this to allege by way of defense that a solemn contract which they have entered into is void, on the ground of its not being within their powers, not from any mistake, misapprehension, or subsequent accident, but because they thought fit to enter into it, and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract proved onerous and they should desire to get rid of it." "A sentiment," says Lord Campbell, in *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 445; 82 E. C. L. 396, "in which we should all concur."

And Lord St. Leonards again says: "The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds. . . . The opinions of some of the judges in the *Norwich* case favor the disposition which I felt to restrain the doctrine of *ultra vires* to clear cases of excess of power with the knowledge of the other party, express or implied, from the nature of the corporation and the contract entered into." *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331.

In *Cary v. Cleveland, etc., R. Co.*, 29 Barb. (N. Y.) 36, Allen, J., said: "Contracts should be palpably *ultra vires* before they should be held to be void for that reason, at the instance of the company, as against innocent third persons dealing with it. The corporations should be restricted so far as courts can, in the exercise of their powers, limit them, to the exercise of their legitimate functions; but the plea is not a gracious one that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power

in them to make it. Eminent judges have expressed regret that covenants entered into deliberately, and with fair intentions on both sides, should be resisted on the ground of *ultra vires*."

In *Wright v. Antwerp Pipe Line Co.*, 101 Pa. St. 204; 47 Am. Rep. 701, Paxson, J., said: "The defense of *ultra vires* by a corporation comes with better grace if made before it has discovered that it has made a bad bargain."

In *Third Ave. Sav. Bank v. Dimock*, 24 N. J. Eq. 26, the court denied an application for leave to file supplemental answers setting up *ultra vires* as a defense to a bill to foreclose a mortgage, on the ground that the defense was an unconscionable one, which the court would not extend its indulgence to admit.

The hardships and inconveniences incident to a rigid application of the doctrine led the court, in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504, to observe: "The plea of *ultra vires* should not, as a general rule, prevail, whether it is interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong." Quoted approvingly in *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550; *Dewey v. Toledo, etc., R. Co.*, 91 Mich. 351; *Ohio, etc., R. Co. v. McCarthy*, 96 U. S. 258. See also *Bateman v. Ashton-under-Lyne*, 3 H. & N. 323, *per Martin, B.*; *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 16 Beav. 441, *per Romilly, M. R.*; *South Yorkshire, etc., R. Co. v. Great Northern R. Co.*, 9 Exch. 55, *per Parke, B.*; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397; 82 E. C. L. 396, *per Erle, J.*

2. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504. See *infra*, this title, *Contracts Impliedly Forbidden—Executed—On One Side*.

3. See *Thompson v. Lambert*, 44

The ground upon which the defense of *ultra vires* is most generally excluded is that of estoppel—that the corporation or other party to the contract, having received the fruits of the same, should not be permitted to plead want of power in the corporation and thus escape liability.<sup>1</sup>

**IV. CLASSIFICATION OF ULTRA VIRES CONTRACTS—1. Contracts Impliedly Forbidden—***a. EXECUTORY.*—Contracts of corporations involving an unauthorized exercise of their powers, so long as they remain purely executory, are not enforceable, either by an action for specific performance or for damages.<sup>2</sup> Where neither party has acted upon the contract, the only injustice caused by a refusal to enforce it, is the loss to the parties of prospective profits, and this is too slight a consideration to weigh against the reasons of public policy for declaring it void and not enforceable.

Iowa 239. See also *infra*, this title, *Contracts Impliedly Forbidden—Executory*.

1. *Dewey v. Toledo, etc., R. Co.*, 91 Mich. 351; *Schurr v. New York, etc., Investment Co. (C. Pl.)*, 18 N. Y. Supp. 454; *Campbell v. Argenta Gold, etc., Min. Co.*, 51 Fed. Rep. 1; *Kinkler v. Junica*, 84 Tex. 116; *Chicago, etc., R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Memphis, etc., R. Co. v. Dow*, 19 Fed. Rep. 388; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504; *Hays v. Galion Gas Light, etc., Co.*, 29 Ohio St. 330; *Matt v. Roman Catholic, etc., Soc.*, 70 Iowa 455; *Safford v. Wyckoff*, 1 Hill (N. Y.) 11; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 454; *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 346; 95 Am. Dec. 595; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69; *Oregonian R. Co. v. Oregon R., etc., Co.*, 22 Fed. Rep. 245; *Auerbach v. LeSueur Mill Co.*, 28 Minn. 291; 41 Am. Rep. 285; *Jones v. National Bldg. Assoc.*, 94 Pa. St. 215; *North Hudson Mut. Bldg. Assoc. v. First Nat. Bank*, 79 Wis. 31.

2. *Simpson v. Building, etc., Assoc.*, 38 Ohio St. 349; *Nassau Bank v. Jones*, 95 N. Y. 115; 47 Am. Rep. 14; *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146; 58 Am. Rep. 563; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 142; 19 Am. St. Rep. 482; *Atty. Gen'l v. Great Eastern R. Co.*, L. R., 5 App. Cas. 473; *Hall v. Paris*, 59 N. H. 71; *NorthWest-*

*ern Union Packet Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781; *Camden, etc., R. Co. v. Mays Landing, etc., R. Co.*, 48 N. J. L. 530; *Easun v. Buckeye Brewing Co.*, 51 Fed. Rep. 156; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *Thompson v. Lambert*, 44 Iowa 239; *Parish v. Wheeler*, 22 N. Y. 508; *Wright v. Hughes*, 119 Ind. 329; 12 Am. St. Rep. 412; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *State Board v. Citizens, etc., R. Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Oil Creek, etc., R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 166; *Morgan v. Donovan*, 58 Ala. 241; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Coppin v. Greenlees Co.*, 38 Ohio St. 275; 43 Am. Rep. 425; *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare 306; *Shrewsbury, etc., R. Co. v. Birmingham R. Co.*, 6 H. L. Cas. 113; *Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co.*, 7 Wis. 59; *Memphis, etc., R. Co. v. Grayson*, 88 Ala. 572; 16 Am. St. Rep. 69.

In *Simmons v. Troy Iron Works*, 92 Ala. 427, the declaration of the defendant company stated its business to be "the manufacturing, repairing, buying, selling, and operating machinery of all kinds, and all such other business pertaining or belonging to machine shops or foundries." The plaintiff sued for damages for the company's breach of contract to furnish him with ice weekly. It was held that the contract was *ultra vires* and the plaintiff could not recover.

A corporation chartered to deal in copper ore made a contract to supply the other party with iron rails, the latter to supply the sections by which the rails were to be made. The corpora-

The completion of such a contract by the corporation will be enjoined at the instance of a shareholder.<sup>1</sup> A bank having, under its charter, no right to purchase lands for the purpose of selling them again, a contract entered into for such a purpose will not be enforced.<sup>2</sup>

Where a bank, through its president, subscribed to a creamery, but before any act was done or any expenditures were made in reliance upon the subscription, it was canceled, it was held that the subscription could be withdrawn by the bank without incurring liability.<sup>3</sup>

The court will not decree the conveyance of land to a corporation which it cannot, consistently with its charter, receive and own; yet if the title has already vested, and the corporation is in possession and ownership, it will hesitate to declare it void on the principle that the corporation had no authority to take such land.<sup>4</sup>

A devise of lands to a corporation beyond its power to take, is void, and may be attacked by the heirs and next of kin of the testator.<sup>5</sup>

Where a continuing contract has been partly performed on one side, it is treated as executory in respect of its future and further performance, and will not support an action for failure to go on with it. A lease is a continuing contract in this sense, and the

tion sued in *assumpsit*, alleging that the defendant had failed to furnish sections so as to enable it to supply the rails. It was held that the contract was *ultra vires* and would not sustain the action. *Governor, etc., of Copper Miners v. Fox*, 16 Q. B. 229.

A company incorporated for the purpose of keeping a hose carriage and hose with which to extinguish fires, cannot recover damages for the breach of a contract on the part of a steamboat company in failing to furnish its boat to convey said company and its friends on an excursion of pleasure and profit—the contract being beyond the objects contemplated by its charter. *Screven Hose Co. v. Philpot*, 53 Ga. 629.

1. *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; *Bagshaw v. Eastern Counties Union R. Co.*, 7 Hare 114; *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264; *Young v. Rondout, etc., Gaslight Co.* (Supreme Ct.), 15 N. Y. Supp. 443; *Lyde v. East Bengal R. Co.*, 36 Beav. 10; *Tippecanoe County v. Lafayette R. Co.*, 50 Ind. 85; *McCray v. Junction R. Co.*, 9 Ind. 358; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 174; *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 348; *Easun v. Buckeye Brewing Co.*, 51 Fed. Rep.

156; *Coffin v. Greenlees Co.*, 38 Ohio St. 275; 43 Am. St. Rep. 425. See also, *infra*, this title, *Restraining Ultra Viros Acts—Stockholders and Creditors*.

2. *Bank of Michigan v. Niles*, 1 Doug. (Mich.) 401; 41 Am. Dec. 575; *Pacific R. Co. v. Seely*, 45 Mo. 212; 100 Am. Dec. 369. See also *Chapman v. Colby*, 47 Mich. 51.

3. *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

4. *Case v. Kelly*, 133 U. S. 21, *aff'g* 13 Am. & Eng. R. Cas. 70. And a bond to convey land to a corporation which has no right to acquire the same, is void. *Coleman v. San Rafael Turnpike Co.*, 49 Cal. 517. See also *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

5. *Starkweather v. American Bible Soc.*, 72 Ill. 50; 22 Am. Rep. 133; *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437; 18 Am. Dec. 516; *In re McGraw's Estate*, 111 N. Y. 66, *aff'g* 45 Hun (N. Y.) 354; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 686. See also *U. S. Trust Co. v. Lee*, 73 Ill. 142; *Barnes v. Suddard*, 117 Ill. 237. There is a wide distinction between these cases and cases where there has been a grant to a corporation for a valuable consideration, and the grantor seeks to avoid on the ground that the

lessee may throw up an unexpired term without liability for damages.<sup>1</sup> So one who has furnished part of the goods called for by a contract *ultra vires* the corporation, may refuse to deliver the remaining portion.<sup>2</sup>

And one who is engaged to act as salesman for a stated term for a corporation in an *ultra vires* business, may repudiate the contract before the expiration of the term.<sup>3</sup>

*b. EXECUTED*—(1) *On One Side*.—The distinction taken between *ultra vires* contracts purely executory and those fully executed on one side, is founded in reason. When the contract has been fully performed by one of the parties, the infraction of the law has already taken place, which eliminates all questions of public policy from the case, and allows the courts to deal with the contract on equitable principles. Furthermore, the only justification for the plea of *ultra vires* by an individual sued upon a contract with a corporation is that the obligation is not mutual, as the other party, the corporation, would not be bound by it. But when the contract has been fully performed by the corporation, the mutuality of the obligation becomes an immaterial question, for the reason that the other party can have no occasion to seek its enforcement.<sup>4</sup>

According to the weight of authority, a corporation may not

power of the corporation to take is exhausted. *American, etc., Christian Union v. Yount*, 101 U. S. 353. Or where property has been used for purposes different from those allowed by charter. *Barrow v. Nashville, etc., Turnpike Co.*, 9 Humph. (Tenn.) 304. Or obtained when not necessary for its business. *Cowell v. Colorado Springs Co.*, 100 U. S. 61. Or cases where national banks have taken securities not authorized by the law of their incorporation. *National Bank v. Natchez*, 98 U. S. 621; *Union Nat. Bank v. Whitney*, 103 U. S. 99. The element of estoppel would seem to be strongly applicable in such cases.

1. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Mallory v. Hanau Oil Works*, 86 Tenn. 598. In this last case it was held that where only two of the three years for which an unauthorized contract of partnership between two corporations was entered into, have expired, the contract is unexecuted as to the remaining year, in the sense that it may be repudiated as *ultra vires*, and property delivered to the committee appointed by the two corporations for the use of

the partnership recovered at once by the corporations.

In *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, an action of covenant for rent of a railroad failed, the rent being payable in advance. But see *Heims Brewing Co. v. Flannery*, 137 Ill. 309. Here the plaintiff leased his liquor saloon to a wholesale brewing company for five years. The company threw up the lease before the expiration of the term. In an action for rent for the residue of the term, it was held that the contract was *ultra vires*, but that the plaintiff, having performed his part, should be allowed to recover. In this case, it appeared that the plaintiff had changed his position in other ways on the strength of the contract.

2. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146; 58 Am. Rep. 563. See also *Governor, etc., of Copper Miners v. Fox*, 16 Q. B. 229.

3. *Boorman Dairy Co. v. Mooney*, 41 Mo. App. 665. In this case, the application of the corporation for an injunction restraining the defendant from abandoning the contract and going into other business, was refused.

4. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504; *Bowman Dairy Co. v. Mooney*, 41 Mo. App.

avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and of the contract; and, conversely, if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. If an action cannot be brought directly upon the agreement, either equity will grant relief, or an action in some other form will prevail.<sup>1</sup> And it is upon this point, viz., the character of the remedy available to the aggrieved party, that the authorities are not agreed. In some jurisdictions, suit

665; *Fishmongers Co. v. Robertson*, 5 M. & G. 131.

1. See cases cited in the succeeding notes to this section. In *Darst v. Gale*, 83 Ill. 137, an insurance company executed a deed of trust to secure the payment of certain bonds from which the company had received the money. The bill was filed to enjoin the trustee from selling the premises, and to declare the deed of trust void. The court refused to allow the plea of *ultra vires* to prevail, on the ground that a private corporation cannot be heard in such a defense where the contract has been performed by the other party, and the corporation has had the benefit of the contract and the performance. The following language of Chief Justice Lawrence, in *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656, was quoted with approbation: "It would be pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender knew that the corporation was transacting a business beyond its chartered powers, provided the business itself was free from any intrinsic immorality or illegality."

In *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656, Lawrence, C. J., said further that, "when the contract is executed, the doctrine of estoppel is applied for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, after whatever mischief may belong to the performance of the *ultra vires* act has been accomplished." This case was one in which money was borrowed and notes given by a corporation to enable it to prosecute a business, which the lender knew it had no right to undertake.

In *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 129; 41 Am. Dec. 260, it was held that although the charter of a corporation may not give the power

of banking or issuing checks to pass as currency, and it may be a penal offense to issue such notes or checks, still the corporation is bound to pay for plates and notes or checks procured to be made by the officers of such corporation.

In *Hood v. New York, etc., R. Co.*, 22 Conn. 1, suit was brought on a special contract by the defendant to carry the plaintiff safely to a point beyond its own line. The alleged contract was not, however, proved, so it was not necessary to pass upon the question of *ultra vires*. The court expressed a doubt as to whether the plea of *ultra vires* should, in all cases, be allowed to prevail. On the second appeal (*Hood v. New York, etc., R. Co.*, 22 Conn. 502), the question was whether the defense of *ultra vires* could be set up, and it was held that the defendants were not estopped to claim that under their charter they had no power to enter into the alleged contract, and that it was not obligatory upon them. A bill in equity was thereafter brought, upon the theory that in equity at least, the defendant should be prevented from interposing the defense; but the bill was dismissed, it being held that the defendants would not be estopped in equity, any more than at law, from setting up their want of power. *Hood v. New York, etc., R. Co.*, 23 Conn. 609.

See also *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166. Here the question raised was whether a contract to carry beyond the company's lines was *ultra vires*, and for that reason not enforceable. In the opinion of the court no such contract was proved, and the question was therefore not material. In both of these cases, however, the court sustained a strict construction of powers conferred upon the corporation, quite at variance with opinions of courts in other cases.

may be brought directly upon the contract and relief given according to its terms.<sup>1</sup>

Thus, a corporation has been held liable on a note given by it

1. *Homestead Bank v. Wood* (C. Pl.), 20 N. Y. Supp. 640; *Chicago etc., R. Co. v. Derkes*, 103 Ind. 520; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Edwards v. Fairbanks*, 27 La. Ann. 449; *Sherman Center Town Co. v. Fletcher*, 46 Kan. 524; *Mitchell v. Beckman*, 64 Cal. 117; *Cunningham v. Massena Springs, etc., R. Co.* (Supreme Ct.), 18 N. Y. Supp. 600; *Wood v. Corry Waterworks Co.*, 44 Fed. Rep. 146; *Allen v. Freedman's Sav., etc., Co.*, 14 Fla. 418; *Brown v. Scottish - American Mortgage Co.*, 110 Ill. 235; *Beecher v. Marquette Rolling Mill Co.*, 45 Mich. 103; *Campbell v. Argenta Gold, etc., Min. Co.*, 51 Fed. Rep. 1; *Amerman v. Wiles*, 24 N. J. Eq. 13; *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172; *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448; *Main v. Casserly*, 67 Cal. 127; *Argenti v. San Francisco*, 16 Cal. 255; *Zottman v. San Francisco*, 20 Cal. 96; *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548; *Trenton Mut. L. & F. Ins. Co. v. McKelway*, 12 N. J. Eq. 133; *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 179; 90 Am. Dec. 617; *Hays v. Gallion Gas Light, etc., Co.*, 29 Ohio St. 340; *Cozart v. Georgia R., etc., Co.*, 54 Ga. 379; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Dec. 656; *Ehrman v. Union L. Ins. Co.*, 35 Ohio St. 324; *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378; *Silver Lake Bank v. North, & Johns. Ch. (N. Y.)* 370; *Allegheny City v. McClurkan*, 14 Pa. St. 83; *Rutland, etc., R. Co. v. Proctor*, 29 Vt. 93; *Perkins v. Portland, etc., R. Co.*, 47 Me. 573; 74 Am. Dec. 507; *Union Water Co. v. Murphy's Flat Plumbing Co.*, 22 Cal. 631; *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530; *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187; *DeGross v. American Linen Thread Co.*, 21 N. Y. 127; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *North Hudson Mut. Bldg., etc., Assoc. v. First Nat. Bank*, 79 Wis. 31; *Darst v. Gale*, 83 Ill. 136; *Heims Brewing Co. v. Flannery*, 137 Ill. 309.

In *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 567, *Van Syckel, J.*, in delivering the opinion of the court, said: "In my judg-

ment, the true rule is, that when the transaction is complete, and the party seeking relief has performed his part, the plea of *ultra vires* by the corporation which has acquiesced in it, is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status."

In *State Board of Agriculture v. Citizens, etc., R. Co.*, 47 Ind. 407; 17 Am. Rep. 709, the railway company was held bound to pay a subscription promised to the State Board of Agriculture in consideration that the state fair should be located upon its line, where the plaintiff had performed its part of the contract.

In *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, the defendant promised the plaintiff that if he would remove his factory to a certain town upon its line, it would transport the products of the factory for certain rates. In an action of contract for failure to transport the plaintiff's goods, the defendant was not allowed to set up the plea of *ultra vires*.

A contract by a railroad company to pay a pipe line company a certain rate per barrel for all oil delivered by the latter to the former for transportation, though *ultra vires*, is enforceable, the plaintiff having fully performed his part. *Oil Creek, etc., R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160.

Where stock is issued on the vote of the directors, and used by them as a pledge to obtain a loan, the corporation is estopped from objecting that the issue of stock not paid up is prohibited by the constitution, and the holder will be entitled to the same to the extent of the loan. *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 496.

In *Mitchell v. Beckman*, 64 Cal. 117, it is held that where the stockholders of a bank have received the dividends paid by it on deposits transferred to it by another bank in consideration of its assumption of all the latter's liabilities, they may not plead *ultra vires* in a suit by one of the depositors to enforce their individual liability, after the



for property purchased, and used without authority.<sup>1</sup> And when a corporation buys land and receives a deed in which an express lien is reserved for its price, it cannot retain the land and escape paying in money because of its incapacity to contract or pay in anything but warrants on its treasury.<sup>2</sup>

So, when a corporation receives the benefit of money borrowed on a corporate mortgage, and the stockholders know of it and do not object in a reasonable time to the want of authority to make the loan, neither the corporation nor the creditors can plead want of authority in a suit on the mortgage; nor can the receiver of the corporation do so for them.<sup>3</sup>

Where a corporation takes a lease in excess of its charter powers, and holds possession of the land, the lessor is entitled to recover the rent stipulated in the lease.<sup>4</sup>

Where a bank creates an investment department, under which parties loaning money to the bank or making deposits are secured by a deed of trust for the repayment of their loans or deposits, and the bank receives large sums of money on the faith of the security, which goes into its general business, it will not be allowed, after having the full benefit of the contract, to interpose the defense of *ultra vires* to defeat the execution of the trust.<sup>5</sup>

And one who has rendered services to a corporation in an *ultra vires* transaction may recover compensation therefor.<sup>6</sup>

It has been held that where a corporation having authority to contract for the erection of a certain building, makes a contract for such purpose and receives the benefit thereof by the erection of the building, it cannot escape liability in an action for the

bank to which the deposits were transferred has stopped payment.

A purchaser of property from the corporation may not, when sued for the price, object that the corporation had no authority to buy and sell the property. *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448.

1. *Dewey v. Toledo, etc., R. Co.*, 91 Mich. 351; *Carson City Sav. Bank v. Carson City Elevator R. Co.*, 90 Mich. 550.

Where a corporation, although prohibited by its charter, enters into a contract for the purchase of shares of stock in another corporation, and the contract is executed by the delivery of the stock, it may not plead in defense to a suit on a promissory note given for the price of the stock, and in the hands of a *bona fide* purchaser, that the contract was *ultra vires*. *Wright v. Antwerp Pipe Line Co.*, 101 Pa. St. 204.

2. *Natchez v. Mallery*, 54 Miss. 499.

3. *Manhattan, etc., Co. v. Phalen*, 128 Pa. St. 110.

4. *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Camden, etc., R. Co. v. Mays Landing, etc., R. Co.*, 48 N. J. L. 530; *Canal, etc., R. Co. v. St. Charles R. Co.*, 44 La. Ann. 1069. See also *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137.

5. *Ward v. Johnson*, 95 Ill. 215.

6. *Schurr v. New York, etc., Investment Co. (C. Pl.)*, 18 N. Y. Supp. 454. In this case, the corporation was organized for the purpose of "purchasing, taking, holding, possessing, selling, improving, and leasing real estate and buildings, the manufacture, lease, sale, and use of building stone, lumber, and other materials." It contracted with a party to pay him for services in organizing stock companies to locate and engage in business upon its land. It was held that, while the contract was *ultra vires*, the corporation, having received the benefit thereof, could not avail itself of such a defense.

money due upon the contract by showing that the provision of its charter authorizing the erection of the building is invalid.<sup>1</sup>

On the other hand, when a corporation has fully performed, on its part, a contract to manufacture and deliver certain articles, and sues for the price, the other party may not set up want of authority in the corporation.<sup>2</sup>

A corporation may enforce a mortgage given by the defendant as security for a contract of guaranty entered into by the corporation without authority.<sup>3</sup>

A corporation may recover upon a promissory note given for the repayment of money loaned by it, notwithstanding it exceeded its powers in making the loan.<sup>4</sup>

When, by the charter, the corporate surplus is to be invested in mortgages on certain real estate, or in certain classes of bonds, it is not competent for one who, in another state, has obtained a loan on personal security, nor his surety, to set up the plea of want of power.<sup>5</sup>

The obligor in a bond in the hands of a corporation, will not be allowed to show, for the purpose of defeating a recovery thereon, that the corporation has no power to hold or sue upon it.<sup>6</sup>

Where one, who has contracted with a corporation for the exclusive right to manufacture and sell a certain patented article, has received the full benefit of the contract, he may not, in an action for the royalties, deny the authority of the corporation to make the contract.<sup>7</sup>

In other jurisdictions, the mere fact that the corporation has received the consideration of, or otherwise derived benefits from, the contract, is held not to involve it in any direct liability thereon;<sup>8</sup>

1. *Prairie Lodge v. Smith*, 58 Miss. 301.

2. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504.

3. *Macon, etc., R. Co. v. Georgia R. Co.*, 63 Ga. 103.

4. *Poock v. Lafayette Bldg. Assoc.*, 71 Ind. 357; *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172; *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378. In this last case, the court, after examining a number of authorities, concludes the opinion as follows: "I am happy to come to the conclusion that the law will not sustain this most unconscionable defense. It ill becomes the defendant to borrow from the plaintiff one thousand dollars for a single day, to relieve their immediate necessities, and then to turn around and say, 'I will not return you this money, because you had no power, by your charter, to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the

extent of the plaintiff's chartered privileges. We shall lose our respect for the law when it so far loses its character for justice as to sanction the defense here attempted." The following cases are cited and examined in the opinion and relied upon in support of the ruling: *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Indiana v. Woram*, 6 Hill (N. Y.) 33; *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 128; *Baltimore, etc., Steam Boat Co. v. McCutcheon*, 13 Pa. St. 13; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Potter v. Ithaca Bank*, 5 Hill (N. Y.) 490; *Suydam v. Morris Canal, etc., Co.*, 5 Hill (N. Y.) 491, note; *Sacket's Harbor Bank v. Lewis County Bank*, 11 Barb. (N. Y.) 213.

5. *Mutual L. Ins. Co. v. Wilcox*, 8 Biss. (U. S.) 203.

6. *Franklin Ave. German Sav. Inst. v. Board of Education*, 75 Mo. 408.

7. *Hall Mfg. Co. v. American R. Co.*, 48 Mich. 331.

8. *Congress, etc., Spring Co. v.*

that the other party, being bound to constructive notice of the limits of the corporation's capacity, is taken to have parted with

Knowlton, 103 U. S. 49; Nashville v. Ray, 19 Wall. (U. S.) 468; Hancock v. Louisville, etc., R. Co., 145 U. S. 409; Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371; Louisiana v. Wood, 102 U. S. 294; Parkersburg v. Brown, 106 U. S. 487; Chapman v. Douglas County, 107 U. S. 348; Salt Lake City v. Hollister, 118 U. S. 263; Pennsylvania, etc., R. Co. v. St. Louis R. Co., 118 U. S. 290; Hitchcock v. Galveston, 96 U. S. 350; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24; Thomas v. West Jersey R. Co., 101 U. S. 71; Dill v. Wareham, 7 Met. (Mass.) 438; White v. Franklin Bank, 22 Pick. (Mass.) 81; Morville v. American Tract Soc., 123 Mass. 129; 25 Am. Rep. 40; Bangor Boom Corp. v. Whiting, 29 Me. 123; Buckeye, etc., Co. v. Harvey, 92 Tenn. 115; Simmons v. Troy Iron Works, 92 Ala. 427; Chuvacua Lime Works v. Dismukes, 87 Ala. 344; Sherwood v. Alvis, 83 Ala. 115; 3 Am. St. Rep. 695; Smith v. Alabama L. Ins. Co., 4 Ala. 558; Montgomery v. Montgomery, etc., Plank Road Co., 31 Ala. 76; Waddill v. Alabama, etc., R. Co., 35 Ala. 323; Grand Lodge v. Waddill, 36 Ala. 313; Chambers v. Falkner, 65 Ala. 448; Wilkes v. Georgia Pac. R. Co., 79 Ala. 180; Westinghouse Mach. Co. v. Wilkinson, 79 Ala. 312; Marion Sav. Bank v. Durkin, 54 Ala. 471; Farmers, etc., Bank v. Baldwin, 23 Minn. 198; South Yorkshire R., etc., Co. v. Great Northern R. Co., 3 De G. M. & G. 576; Simpson v. Denison, 10 Hare 51; Salomons v. Laing, 13 Beav. 339; Munt v. Shrewsbury, etc., R. Co., 13 Beav. 1; East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 803; 73 E. C. L. 775; Norwich v. Norfolk R. Co., 4 El. & Bl. 397; 82 E. C. L. 396; Scottish Northeastern R. v. Stuart, 3 Macq. H. L. Cas. 382. See Dover v. London, etc., R. Co., 3 De G. F. & J. 543; Brooks v. Blackburn, etc., Bldg. Soc., 9 App. Cas. 857; Murray v. Scott, 9 App. Cas. 517; *In re* German Min. Co., 4 De G. M. & G. 19; *In re* Cork, etc., R. Co., L. R., 4 Ch. 748; *In re* National Bldg. Soc., L. R., 5 Ch. 309; *Ex p.* Bignold, 22 Beav. 143; Throup's Case, 29 Beav. 353; Hoare's Case, 30 Beav. 225; Lowndes v. Garnet, etc., Mfg. Co., 32 L. J. Ch. 418; *In re* Exmouth Dock Co., L. R., 17 Eq. 181; *In re* Worcester Corn Ex-

change, 3 De G. M. & G. 180; *In re* Pooley Hall Colliery Co., 18 W. R. 201; English Channel S. S. Co. v. Rolt, 17 Ch. Div. 715; Yorkshire R. Wagon Co. v. Maclure, 21 Ch. Div. 309; MacGregor v. Dover, etc., R. Co., 18 Q. B. 618; 83 E. C. L. 618; Taylor v. Chichester, etc., R. Co., L. R., 2 Exch. 356; Gage v. Newmarket R. Co., 18 Q. B. 457; 83 E. C. L. 456; Preston v. Liverpool, etc., R. Co., 5 H. L. Cas. 605; Webb v. London, etc., R. Co., 1 De G. M. & G. 521; Stuart v. London, etc., R. Co., 1 De G. M. & G. 721. And *à fortiori*, equity will refuse to decree specific performance of such contracts. Webb v. London, etc., R. Co., 1 De G. M. & G. 521; Stuart v. London, etc., R. Co., 1 De G. M. & G. 721; Shrewsbury, etc., R. Co. v. London, etc., R. Co., 4 De G. M. & G. 115; Shrewsbury, etc., R. Co. v. Birmingham R. Co., 6 H. L. Cas. 113.

*In Memphis Grain, etc., Elevator Co. v. Memphis, etc., R. Co.*, 85 Tenn. 703, the court refused to enforce a contract of guaranty by the defendant to a subscriber to its stock, that the dividends should not fall below a certain per cent.

*In Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare 306, specific performance of a contract regarding the use of the lines and stations of the defendant railroad was refused.

*In Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, it was stated as the result of the previous cases in that court that, "a contract made by a corporation which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid; but the proper remedy for the party aggrieved is by disaffirming the contract, and suing to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of."

The ground and the limits of the rule concerning the remedy in the case of a contract *ultra vires* which has been partly performed, and under which property or money has passed, is thus summed up by Mr. Justice Miller in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 317: The rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse

his property with full knowledge that the contract was illegal and void, and has no claim to enforce it.<sup>1</sup>

Thus, in these jurisdictions, a railroad company and an organ manufacturing establishment are not liable upon a contract to guarantee the expenses of a musical festival, although it is made with the reasonable belief that the holding of the proposed festival will be of great pecuniary advantage to the corporation by increasing its proper business, and the festival is held, and expenses incurred, in reliance upon the guaranty;<sup>2</sup> nor a manufacturing

any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands."

1. *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. (U. S.) 381; *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. Rep. 493; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Branch v. Jesup*, 106 U. S. 468; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290; *Salt Lake City v. Hollister*, 118 U. S. 256; *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191; *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *Sutliff v. Lake County*, 147 U. S. 230; *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, 92 U. S. 642; *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S. 674; *Chaffee County v. Potter*, 142 U. S. 355; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393; *Bailey v. M. E. Church*, 71 Me. 472; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Hood v. New York, etc., R. Co.*, 22 Conn. 17; *Hood v. New York, etc., R. Co.*, 23 Conn. 622; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 482; *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 570; *In re Cork, etc., R. Co.*, L. R., 4 Ch. 748; *Greeley v. Nashua Sav. Bank*, 63 N. H. 145; *Hall v. Paris*, 59 N. H. 74; *Simmons v. Troy Iron Works*, 92 Ala. 427; *Sherwood v. Alvis*, 83 Ala. 115; 3 Am. St. Rep. 695; *Smith v. Alabama L. Ins., etc., Co.*, 4 Ala. 558; *Montgomery v. Montgomery, etc.,*

*Plank Road Co.*, 31 Ala. 76; *Waddill v. Alabama, etc., R. Co.*, 35 Ala. 323; *Grand Lodge v. Waddill*, 36 Ala. 313; *Chambers v. Falkner*, 65 Ala. 448; *Wilkes v. Georgia Pac. R. Co.*, 79 Ala. 180; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781; *Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co.*, 7 Wis. 59; *Dietrich v. Madison Relief Assoc.*, 45 Wis. 79; *Luthe v. Farmers' Mut. F. Ins. Co.*, 55 Wis. 543.

In *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 258, *Selden, J.*, uses this language: "When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such defense will not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends, not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation will be estopped from denying that which, by assuming to make the contract, it had virtually affirmed." Quoted approvingly in *Monument Nat. Bank v. Globe Works*, 101 Mass. 58; 3 Am. Rep. 322.

2. *Davis v. Old Colony R. Co.*, 131 Mass. 258; 41 Am. Rep. 221. In this case the court said: "A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Morville v. Ameri-*

company on a contract to promote a railroad enterprise;<sup>1</sup> nor a turnpike company for the purchase of coaches to be used on a stage line;<sup>2</sup> nor a steamboat company on a contract to tow another vessel to a point off its own route,<sup>3</sup> or to aid in the im-

can Tract Soc., 123 Mass. 129; 25 Am. Rep. 40; *In re Cork*, etc., R. Co., L. R., 4 Ch. 748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; 73 E. C. L. 775; *Macgregor v. Dover*, etc., R. Co., 18 Q. B. 618; 83 E. C. L. 618; *Ashbury R., etc., Co. v. Riche*, L. R., 7 H. L. 653; *Thomas v. West Jersey R. Co.*, 101 U. S. 71."

Where a corporation established for the purpose of constructing a plank road, guarantees the payment of a loan of money made by another corporation of similar character, for the purpose of enabling it to build its road, the building of which would be advantageous to the former, and on default in the payment of the loan the guarantor pays the amount thereof, the other party is not estopped from setting up want of authority in the guarantor to make the contract of guaranty. *Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co.*, 7 Wis. 59.

1. *Ashbury R., etc., Co. v. Riche*, L. R., 7 H. L. 653, reversing L. R., 9 Exch. 224. Here the company was incorporated under the Companies' Act of 1862 to make and sell railway carriages and all kinds of railway apparatus. The company, by its directors, entered into an agreement with Riche to give him the construction of a railway between certain points. After Riche had entered upon the work, and executed it in part, the company repudiated the contract as being *ultra vires*. Riche then brought an action to recover damages for breach of contract. In the court of exchequer, two of the three judges were of opinion that the plaintiff should have judgment, and when the case came before the exchequer chamber it was heard before six judges, and they being equally divided

in opinion, the judgment was affirmed. On appeal to the House of Lords, the judgment was reversed, pronouncing the contract *ultra vires*, and without the power of the shareholders to validate it by their acquiescence.

2. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

In *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441, two corporations, created by the laws of *Indiana* to construct distinct, though connecting, lines of railroad in that state, were consolidated by agreement, and conducted the business of both lines under a common board of management, which gave notes in the name of the consolidated company in payment for a steamboat to be run in connection with the railroads. After the execution of the notes and the acquisition of the steamboat, this relation between the corporations was legally dissolved. It was held that an action brought by an indorsee against the two corporations upon the notes, could not be maintained.

3. *Pennsylvania, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248. In this case, it was said that the circumstance that the corporation has entered into a contract, does not estop it from denying its authority to do so in an action against it founded upon such contract. If such were the case in reference to the corporation, the estoppel would apply equally to the other contracting party, and thus in effect limitations upon the powers of corporations would be of no avail. *Approved* in *Weckler v. First Nat. Bank*, 42 Md. 595; *Boyce v. M. E. Church*, 46 Md. 373.

In *Maryland Hospital v. Foreman*, 29 Md. 532, it is said that if a party makes a contract with the corporation, which is beyond the powers of the latter, he may recover the money paid thereon, whether the contract be executed or executory. The contract in all such cases, will be regarded as void, and the party who delivered the property or advanced the money to such corporation will be entitled to his legal remedy (not founded upon but in repudiation of the contract), to recover the property or the money from the corporation, upon the principle that it

provement of a harbor off the line of its route;<sup>1</sup> nor a national bank upon a guaranty of the payment for land conveyed by the plaintiff to a third person.<sup>2</sup>

A life insurance company is not liable on policies of marine insurance issued by it, but the holders of such policies may recover the premiums paid in an appropriate action.<sup>3</sup>

And a company limited to insurance against accidents sustained "in traveling," is not liable on a policy insuring the holder "against external bodily injuries effected through external violence and accidental means," regardless of whether the injury was sustained "in traveling" or not.<sup>4</sup>

A fire insurance company is not liable on a policy against damage by lightning, unless the damage happened by fire.<sup>5</sup>

But, while refusing to maintain an action upon the contract, these courts have, at the same time, always striven to do justice between the parties by permitting property or money parted with on the faith of the contract, to be recovered, or compensation to be made for it. In such cases, however, the action is not on the contract, nor according to its terms, but on an implied contract of the defendant to return, or failing in this, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the *ultra vires* contract.<sup>6</sup> Accordingly, if a corporation in excess of its powers, receives a sum of money on condition that it will return it if an additional sum is not raised within a given time, and the condition

had acquired no right or title to either under the contract.

1. *Abbott v. Baltimore, etc., Steam Packet Co.*, 1 Md. Ch. 541.

2. *Norton v. Derry Nat. Bank*, 61 N. H. 592. Here it was said if the guaranty is denied, the benefit must be restored. The plaintiff cannot recover upon the guaranty; if he desires, he may amend his declaration by adding an appropriate count for the recovery of the land or its value if sold.

3. *In re Phoenix, etc., L. Assur. Co.*, 2 J. & H. 441. See also *Natusch v. Irving*, 2 Coop. C. C. 358.

4. *Miller v. American Mut. Accident Ins. Co.*, 92 Tenn. 167. Here the court said that the remedy was a suit in disaffirmance of the contract and for an accounting.

5. *Andrews v. Union Mut. F. Ins. Co.*, 37 Me. 257.

6. In addition to the cases below, see those cited to the proposition in the text that an action is not maintainable directly on the contract. *Hull v. Swansea*, 5 Q. B. 526; 48 E. C. L. 526; *Athenæum L. Assur. Co. v. Tooley*, 3 De G. & J. 294; *Ex p. Key*, 16 W. R.

1103; *In re Phoenix L. Assur. Co.*, 2 J. & H. 441; *In re Sea F. & L. Assur. Co.*, 5 De G. M. & G. 465; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67; *North Western Union Packet Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Southern L. Ins., etc., Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448; *Ossipee Hosiery, etc., Mfg. Co. v. Cunney*, 54 N. H. 295; *Hall v. Paris*, 59 N. H. 71; *Whitney v. Peay*, 24 Ark. 22; *Roberts v. Deming Woodworking Co.*, 111 N. Car. 432; *Curtis v. Piedmont Lumber, etc., Co.*, 109 N. Car. 401; *Maher v. Chicago*, 38 Ill. 266; *Thomas v. Port Huron*, 27 Mich. 323; *Paul v. Kenosha*, 22 Wis. 256; 94 Am. Dec. 598; *Carey v. East Saginaw*, 79 Mich. 73; *Farmers' L. & T. Co. v. St. Joseph, etc., R. Co.*, 1 McCrary (U. S.) 247.

"To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing; to say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained

them, is something very different and savors very much of an inducement to fraud." Green's Brice's Ultra Vires (2d Am. ed.) 721.

In *Salt Lake City v. Hollister*, 118 U. S. 263, it was said that in cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by the recovery of the property or the money specifically, or as money had and received to the plaintiff's use."

In *Hitchcock v. Galveston*, 96 U. S. 341, where a city was sued for damages for putting an end to a contract with plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds which it was beyond its power to issue, it was decided that the invalidity of the promise was no reason why the city should not pay for the benefits which it had received from the plaintiffs' performance of the contract; Mr. Justice Story, in behalf of the court, saying: "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

So, in *Louisiana v. Wood*, 102 U. S. 204, a city, which had received money for bonds issued by it without authority and at an illegal rate of interest, and purchased by the plaintiff, was held liable, not on any contract of purchase, nor on any express contract whatever, but on a contract implied from its receipt of the money; Wait, C. J., observing: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently, no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to-wit, that the city would, on demand, return the money paid to it by mistake, and as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again, in *Parkersburg v. Brown*,

106 U. S. 487, where certain parties, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust deed in the nature of a mortgage, to secure the payment of the bonds and interest, it was held that the bonds could not be enforced against the city, but that the mortgagors had a right to reclaim the property and to demand an account of the city. Mr. Justice Blatchford, in delivering judgment, said: "The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Briens (the mortgagors) in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received." *Chapman v. Douglas County*, 107 U. S. 348, is to the same effect.

In *Slater Woolen Co. v. Lamb*, 143 Mass. 420, it was held that a corporation created "for the purpose of manufacturing fabrics of wool and worsted, or of a mixture thereof with other textile material," may maintain an action for groceries, dry goods, and other similar articles, sold and delivered by, and in the name of, a person who is keeping a store as the undisclosed agent of the corporation, to a person not in the employment of the corporation, who retains and uses the goods, notwithstanding the contracts of sale are not within the charter powers of the corporation. See also *Chester Glass Co. v. Dewey*, 16 Mass. 94; 8 Am. Dec. 128.

In *Allen v. Freedman's Sav., etc., Co.*, 14 Fla. 418, the plaintiff advanced money upon certain commercial drafts which were afterwards dishonored. The plaintiff's charter did not authorize such use of moneys deposited with it, but required them to be invested in certain other securities. It was held that the plaintiff was entitled to

is broken, an action may be maintained against the corporation on an implied promise to return the money, and a demand for its return may be submitted to arbitration.<sup>1</sup>

So where one receives money in advance on an *ultra vires* contract, and subsequently refuses to perform, the other party may recover the money in an action for money had and received.<sup>2</sup>

A railroad corporation which, under a contract, has used the roadbed, rolling stock and equipments of another, may not set up the defense of *ultra vires* to a bill in equity by the latter for an accounting and return of the property.<sup>3</sup>

So, a court of equity will always refuse relief to one seeking to rescind an *ultra vires* contract, unless he first offers to return, or make compensation for, the property he has received under it.<sup>4</sup>

recover the moneys in an action for money had and received, irrespective of the drafts.

In *Moore v. Swanton Tanning Co.*, 60 Vt. 459, the orators and two of the defendants were members of a corporation conducting a tannery business. The stockholders voted to consolidate its business with the tannery owned by the orators in another state. The vote was carried out to the extent of transferring the personalty of the foreign tannery to the defendant corporation, but not the realty. It was held that whether or not the purchase of real property in another state was within the corporate powers of the defendant, it must account for the actual value of what it had received. See also *Manville v. Belden Min. Co.*, 17 Fed. Rep. 425.

In *Central Trust Co., etc., v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306, it is held that where a "pooling contract," entered into between two railroad corporations, has been fully executed, and the profits arising therefrom are collected and held by a receiver of one of them, he may not retain the fund thus acquired, but will be decreed to pay it over to the other company, without regard to the validity of the original agreement.

But in *Grand Lodge v. Waddill*, 36 Ala. 313, it was held that when a corporation lends money without authority under its charter, and takes a promissory note to secure its repayment, it cannot recover under the common money counts. The court said: "It is true that money loaned may be recovered under a common money count. But then, a recovery under a common count in this case, would be an enforcement of a void contract, as

effectually as if it had been under a special count setting forth the contract."

1. *Morrill v. American Tract Soc.*, 123 Mass. 129; 25 Am. Rep. 40. Here the court said: "The plaintiff is not seeking to enforce that contract (the *ultra vires* contract), but only to recover his money and prevent the defendant from unjustly retaining the benefits of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act. The right to recover the money upon the implied promise, under like circumstances, has been heretofore recognized by the court."

2. *Dill v. Wareham*, 7 Met. (Mass.) 438. See also *White v. Franklin Bank*, 22 Pick. (Mass.) 81.

3. *Manchester, etc., R. Co. v. Concord, etc., R. Co.* (N. H. 1890), 20 Atl. Rep. 383; the court, in this case, saying: "The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to a transaction *ultra vires* simply, will be heard to allege its invalidity while retaining its fruits. However the contractual power of the defendant may be limited under its charter, there is no limitation of its power to make restitution to the other party, whose money or property it has obtained through an unauthorized contract; nor, as a corporation, is it exempted from the common obligation to do justice, which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."

4. *Memphis, etc., R. Co. v. Dow*, 19 Fed. Rep. 388; *Brown v. Atchison*, 39 Kan. 37; *Manville v. Belden Min. Co.*,



While a corporation is not chargeable with a loan of money made by the directors in excess of their authority, yet if any portion of the money has been devoted to the legitimate purposes of the corporation, it is liable to that extent.<sup>1</sup> And if the money

17 Fed. Rep. 425; United Lines Tel. Co. v. Boston Safe Deposit, etc., Co., 147 U. S. 431; Buford v. Keokuk Northern Line Packet Co., 69 Mo. 611. See also Madison Ave., etc., Church v. Oliver St., etc., Church, 73 N. Y. 82.

A railroad company which has leased certain telegraph lines without authority cannot repudiate the lease, unless it offers to make compensation for the improvements and additions which the lessees have made to the property. Western Union Tel. Co. v. Union Pac. R. Co., 1 McCrary (U. S.) 562; American Union Tel. Co. v. Union Pac. R. Co., 1 McCrary (U. S.) 188; Atlantic Union Tel. Co. v. Union Pac. R. Co., 1 McCrary (U. S.) 541; Western Union Tel. Co. v. Burlington, etc., R. Co., 3 McCrary (U. S.) 130.

In New Castle Northern R. Co. v. Simpson, 23 Feb. Rep. 214, equity having, at the instance of a railroad company, set aside a construction contract as *ultra vires*, decreed that the corporation should account for benefits received from partial performance, and that the contractor was not to be put off with the mere reimbursement of his actual outlay, but was entitled to receive for what he had done such compensation as any other railroad contractor could recover under such circumstances, in the absence of an express agreement. The corporation was, also, held chargeable with interest on the amount found to be due the contractor when the work was stopped.

In Wilson's Case, L. R., 12 Eq. 521, where a person made a loan to a building society, which it was *ultra vires* in the latter to accept, and which was secured by a deposit of deeds of the society, it was held that on the society being wound up the official liquidator could not deprive the lender of his securities without repaying the money advanced.

1. Bank of Australasia v. Breillat, 6 Moo. P. C. 152; Hawtayne v. Bourne, 7 M. & W. 595; Hawken v. Bourne, 8 M. & W. 703; *In re* Exmouth Docks Co., L. R., 17 Eq. 181; Ulster R. Co. v. Banbridge, etc., R. Co., 2 Ir. Eq. 190; *In re* National Bldg. Soc., L. R., 5 Ch. 309; Allen v. LaFayette, 89 Ala. 650; Union Gold Min. Co. v. Rocky

Mt. Nat. Bank, 96 U. S. 640; Parsons v. Monmouth, 70 Me. 262. Compare Hackettstown v. Swackhamer, 37 N. J. L. 191.

In 2 Morawetz on Priv. Corp. (2d ed.), § 715, it is said that money or other property transferred to the corporation under a contract which is void, because beyond the authority of the agent assuming to represent the corporation, the latter is liable to account for the money or other property so received. If any portion of the property has been preserved, it must be restored to the owner, and if it has been converted into a distinct fund, this must be given up.

And in Taylor on Priv. Corp., ch. 7, § 311, it is said: "The corporation may repudiate the contract without rendering up the benefits which through the contract have accrued to the corporate property, when such benefits have become amalgamated with the corporate property, and cannot be rendered up without infringing the rights of persons who have never assented to the contract, nor in any way acquiesced in it." See Hill's Case, L. R., 9 Eq. 605.

In Allis v. Jones, 45 Fed. Rep. 148, it was said: "The mortgages were given to secure an indebtedness in excess of the amount of debts the companies, by their charters, were authorized to contract, and it is said this renders the evidence of the indebtedness, and the mortgages given to secure it, *ultra vires* and void. But on the facts of this case this position cannot be maintained. The money was received by the companies, and used in conducting and carrying on their legitimate corporate business, with the knowledge and consent of all the officers and stockholders. On these facts the banks are entitled to be repaid their money, and the companies could execute a valid security for its payment."

A mining company, being in financial difficulties and owing money to employes for wages, the directors borrowed sums for the purpose of paying these debts. They afterwards personally repaid these advances. It was held that they might prove these advances upon the winding up of the

borrowed has been expended in discharging valid debts of the corporation, the lender is entitled to be subrogated to the rights of the creditors so paid.<sup>1</sup> If, however, the money has been used for unauthorized purposes, the corporation is not chargeable, though it may have received benefits therefrom.<sup>2</sup>

Transactions in violation of some positive law, or involving

company, upon the ground that the money had been expended in the payment of debts which might have been enforced against the company. *In re German Min. Co.*, 4 De G. M. & G. 19.

Where a corporation borrowed money without authority, for the purpose of completing its works, and sold the works for the full cost, it was held that the lender could prove insolvency in proceedings for the full amount of his claim against the company. *Troupe's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225; *In re Magdalena Steam Nav. Co.*, Johns. 690.

In *Ex p. Bignold*, 22 Beav. 143, a trading company borrowed money for the purpose of carrying on its business. It had no power to make this loan, but it was held that the members were liable to an additional subscription in order to pay the money advanced.

In *Lowdnes v. Garnett*, etc., Gold Min. Co., 33 L. J. Ch. 418, a director who had made advances to a company in excess of its borrowing powers, to meet the necessary expenses of the business, was allowed to prove his claim as a postponed creditor against the company. See also *Ulster R. Co. v. Banbridge*, etc., R. Co., 2 Ir. Eq. 190.

A building society that loaned money on the security of its own shares, in violation of its charter, was allowed to prove against the estate of the borrower to the amount of the loan. *In re Coltman*, 19 Ch. Div. 64. See *Hardy v. Metropolitan Land*, etc., Co., L. R., 7 Ch. 427.

1. The case of *In re Cork*, etc., R. Co., L. R., 4 Ch. 748, is a leading one upon this subject. A railroad company had exhausted its borrowing powers, and was in debt for property bought on credit. In these circumstances, an issue of bonds was negotiated, and the money received from the sale thereof was expended for the payment of these debts, and the purchase of necessary material. The Lord Chancellor said: "It is shown, I think, as regards some of the moneys that have been received through the medium of Mr. Lewis, some small proportions

were paid directly to persons who were actual creditors of the company, and so far there could be little or no dispute as to the right of Mr. Lewis or of the person claiming through him, to stand in the place of the original creditor, whose debt being valid, has been so paid." And it was held that, to that extent, the lender could recover.

See also the English cases cited in note just preceding. In *Re National Bldg. Soc.*, L. R., 5 Ch. 309, Gifford, L. J., referring to these cases, said: "They were decided upon a principle recognized in the old cases beginning with *Marlow v. Pitfield*, 1 P. Wms. 558, where there was a loan to an infant and the money was spent in paying for necessities; and in another case of a more modern date, where there was money actually loaned to a lunatic, and it went in paying expenses which were actually necessary for the lunatic. In such cases it has been held that although the party loaning the money, could maintain no action, yet inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. That is the principle of these cases. It is a very clear and definite principle which ought not to be departed from." See generally SUBROGATION, vol. 24, p. 187.

2. *Re Worcester Corn Exchange Co.*, 3 De G. M. & G. 180; *Zulueta's Claim*, L. R., 5 Ch. 444; *Wenlock v. River Dee Co.*, 36 Ch. Div. 674; *Ex p. Cropper*, 1 De G. M. & G. 147; *Hill's Case*, L. R., 9 Eq. 605; *In re Doncaster Bldg. Soc.*, L. R., 3 Eq. 158.

A building society which had no powers of borrowing, obtained advances which were used partly in payment of the running expenses of the society, and partly in payment of debts to withdrawing members. It was held that the lender could not recover so far as the money was expended in payment of withdrawing members. *Cunliffe v. Blackburn*, etc., Bldg. Soc., 9 App. Cas. 857.

moral turpitude, and not *ultra vires* merely, are not embraced in the discussion in this section, and the principles here stated do not apply to them. They are subject to the rules governing the actions of courts with reference to illegal contracts generally.<sup>1</sup>

The distinction made in some of the cases, that a suit may be brought for an accounting, or upon the common counts, but not directly upon the contract, seems to be based upon a technicality and refinement, and in some cases is calculated to work injustice; in some instances, the measure of relief would exceed or fall far short of that fixed by the parties; in others, there would be no remedy at all, for in certain cases an action upon the contract would be the only action that could be maintained. There is really no sound reason why the contract should not be recognized and enforced whenever justice requires it.<sup>2</sup>

The directors of a benefit building society, the rules of which gave no power to borrow money, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money subsequently presented a petition for an order to wind up the company. It was held, reversing the decision of the master of the rolls, that the transaction was *ultra vires*, and the petitioner had no legal or equitable debt against the company, and the petition was accordingly dismissed. Gifford, L. J., said: "There is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company." *In re Nat. Bldg. Soc.*, L. R., 5 Ch. 309.

See the following cases, where the corporation, having received no benefits from the *ultra vires* contract, was held not liable, although the other party had incurred expenses in reliance upon the contract. *Jemison v. Citizens Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482; *St. Louis Mfg. Co. v. Hilbert*, 24 Mo. App. 338; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Davis v. Old Colony R. Co.*, 131 Mass. 268; 41 Am. Rep. 221. See also *Greeley v. Nashua Sav. Bank*, 63 N. H. 145, where it was held that an institution for savings is not estopped to plead want of authority under its charter to receive for safe keeping *United States* bonds delivered to a clerk of its treasurer, when neither the bonds nor their avails have come to its possession.

1. *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393; *James v. Eve*, L. R., 6 H. L. 335; *Buckeye*

*Marble, etc., Co. v. Harvey*, 92 Tenn. 115; *Manchester, etc., R. Co. v. Concord R. Co.* (N. H. 1890), 20 Atl. Rep. 383; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Nellis v. Clark*, 4 Hill (N. Y.) 424; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *Salina Bank v. Alvord*, 31 N. Y. 474; *Crocker v. Whitney*, 71 N. Y. 161; *Tracy v. Talmadge*, 14 N. Y. 189; 67 Am. Dec. 132; *Agawan Nat. Bank v. South Hadley*, 128 Mass. 503; *McDonald v. New York*, 68 N. Y. 23; 23 Am. Rep. 144; *Parr v. Greenbush*, 72 N. Y. 463; *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530; *Thomas v. West Jersey R. Co.*, 101 U. S. 71. Such transactions are subject to the maxim, *In pari delicto est conditio defendentis*. See *infra*, this title, *Contracts Expressly Forbidden, or Contrary to Public Policy*.

In *New York State L. & T. Co. v. Helmer*, 77 N. Y. 64, a trust company which had discounted a note in violation of the law against unauthorized banking was held not entitled to recover against the maker. The court said: "The facts, as presented by the answers, do not bring the case within that class of decisions where the party having received the benefit of the contract, is not allowed to repudiate it because the other party had no power to make it. Such cases rest upon the principle that the contract was an innocent or legal one, and in this respect differ from the case where the act was illegal or expressly prohibited by law."

2. This is substantially the language of Mr. Morawetz. See 2 Morawetz Corp. (2d ed.), § 703.

In *Bissell v. Michigan Southern, etc.,*

(2) *On Both Sides.*—*Ultra vires* contracts are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been fully performed on both sides.<sup>1</sup>

A transfer of property to or by a corporation, may not be set aside simply on the ground that it was unauthorized on the part

R. Co., 22 N. Y. 276, Comstock, C. J., in speaking for the majority of the court, said: "It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money or value under and according to it, thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is claimed to rest; for surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer, further, that while in many cases the remedy by a suit in disaffirmance of the agreement and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the services of carrying him in their cars perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation is \$2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance because the agreement was *ultra vires*, must be quite apparent."

See also *Chicago Bldg. Soc. v.*

*Crowell*, 65 Ill. 453, where Mr. Justice Scott, for the court, said that, "when corporations have received the benefit of a contract, if there is nothing in it that is contrary to public policy, there can be no just reason why they should not be required to perform it."

1. *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 409; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 316; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 468; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 56; *Buckeye Marble Co. v. Harvey*, 92 Tenn. 115; *James v. Eve, L. R.*, 6 H. L. 335; *Taylor v. South & North Alabama R. Co.*, 4 Woods (U. S.) 575.

"The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require." *Parish v. Wheeler*, 22 N. Y. 509, *per* Comstock, C. J.

"In many instances, where an invalid contract, which the parties to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred." *Miller, J.*, in *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

In *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448, it was held that where a corporation has power, with the consent of all its stockholders, to sell its plant to another corporation and to retire from business, taking payment in the stock of the latter—if the fact that the stock so taken was issued to, and is held by, an officer of the vendor, as trustee, renders the transaction *ultra vires*—after it has been completed, and the title to the stock taken in payment vested in the vendor, it may sell and dispose of the same, and a purchaser from it may not, in an action to recover the purchase price, avail himself of the defense of *ultra vires*.

of the corporation; in such cases, the state alone may object to the unauthorized corporate action.<sup>1</sup>

**2. Contracts Expressly Forbidden or Contrary to Public Policy.**—The effect to be given contracts in violation of express statutory provision depends upon the intention of the legislature, to be found by the application of the ordinary rules of statutory construction. It may be stated as a general rule, that if a statute expressly prohibits a corporation from making a certain contract, such contract is void, although not declared in terms to be so; and that it is void may be pleaded in a suit brought directly and exclusively upon the contract.<sup>2</sup>

For instance, a statute prohibiting a corporation from issuing

1. *Shewalter v. Pirner*, 55 Mo. 218; *Coleman v. San Rafael Turnpike R. Co.*, 49 Cal. 517; *Natoma Water, etc., Co. v. Clarkin*, 14 Cal. 544; *Natchez v. Gallery*, 54 Miss. 499; *Utley v. Clark Gardner Lode Min. Co.*, 4 Colo. 369; *Whitman Gold, etc., Min. Co. v. Baker*, 3 Nev. 386; *Barnes v. Suddard*, 117 Ill. 237; *Alexander v. Tolleston Club*, 110 Ill. 65; *Leazure v. Hillegas*, 7 S. & R. (Pa.) 313; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1; *Smith v. Sheeley*, 12 Wall. (U. S.) 358; *Lehman v. Warner*, 61 Ala. 455; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Chambers v. St. Louis*, 29 Mo. 543; *Worcester v. Eaton*, 13 Mass. 371; 7 Am. Dec. 155; *Com. v. Wilder*, 127 Mass. 1; *Holton v. Lake County*, 55 Ind. 194; *Land v. Coffman*, 50 Mo. 243; *Davidson College v. Chambers*, 3 Jones Eq. (N. Car.) 253; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Myers v. Croft*, 13 Wall. (U. S.) 291; *Com. v. New York, etc., R. Co.*, 114 Pa. St. 346; *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 562; *Fritts v. Palmer*, 132 U. S. 282; *Farmers, etc., Bank v. Detroit, etc., R. Co.*, 17 Wis. 372; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Mapes v. Scott*, 94 Ill. 379; *Warner v. De Witt County Nat. Bank*, 4 Ill. App. 305; *Runyan v. Coster*, 14 Pet. (U. S.) 122; *Banks v. Poitvaux*, 3 Rand. (Va.) 136; 15 Am. Dec. 706; *McIndoe v. St. Louis*, 10 Mo. 577; *Kelley v. Peoples Transp. Co.*, 3 Oregon 189; *Chicago, etc., R. Co. v. Lewis*, 53 Iowa 101; *Barrow v. Nashville, etc., Turnpike Co.*, 9 Humph. (Tenn.) 304; *Mallett v. Simpson*, 94 N. Car. 37; 55 Am. Dec. 595; *Ayers v. South Australia Banking Co.*, L. R., 3 C. P. 548; *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43; *Heiskell v. Chickasaw Lodge*, 87 Tenn.

686; *Sistare v. Best*, 88 N. Y. 527; *Beecher v. Marquette, etc., Rolling Mill Co.*, 45 Mich. 103.

In *Union Nat. Bank v. Matthews*, 98 U. S. 263, *Swayne, J.*, speaking for the court, said: "Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding for that purpose."

In *Hough v. Cook County Land Co.*, 73 Ill. 23; 24 Am. Rep. 230, it was held that where a corporation, created by the laws of that state, is empowered by its charter to purchase, and receive conveyances for, and hold titles to, lands, but is prohibited from so purchasing and holding for other than a prescribed purpose, a deed executed to it, by one having capacity to convey, will vest the title in the corporation, and the question as to whether it has exceeded its powers in making the purchase, is one between the corporation and the commonwealth, with which the grantor has no concern.

2. *New York State L. & T. Co. v. Helmer*, 77 N. Y. 64; *In re Jaycox*, 12 Blatchf. (U. S.) 209. In this latter case the People's Safe Deposit and Savings Institution, incorporated by special act (*New York Laws* 1868, ch. 816), opened an office for banking, at which it carried on a regular banking business, not being authorized by its charter to do so, but being forbidden by the constitution and laws of the state under heavy penalties. In the course of its business, it discounted for certain parties, afterwards bankrupt, certain notes, which were not paid, and which it proved in the district court as claims against them. It was held that the notes were void; and further that a

notes, "unless the same be made payable on demand and without interest," renders void notes issued in contravention of it, even in the hands of a *bona fide* holder.<sup>1</sup>

So, notes discounted by a corporation forbidden by a general statute to do a banking business, are void.<sup>2</sup>

But to the general rule above stated, there are several well recognized exceptions: First, where the inhibition is intended for the benefit and protection of a particular class of persons interested in the corporation, as, for instance, the shareholders, the

claim for the money loaned was not a valid one, because the transaction was illegal, and the corporation had no power to loan money on personal security, and its charter prescribed how its funds should be invested.

**General Statutory Prohibitions.**—Statutes prohibiting corporations from transacting business for other purposes than those named in their charters are merely declaratory of the common law, and there is no reason for supposing that the legislature intended them to have greater force and effect than the common-law rule. 2 Morawetz Corp. (2d ed.), § 658; Farmers Nat. Bank v. Sutton Mfg. Co., 52 Fed. Rep. 191.

1. Root v. Godard, 3 McLean (U. S.) 102; Hayden v. Davis, 3 McLean (U. S.) 276; Weed v. Snow, 3 McLean (U. S.) 265; Root v. Wallace, 4 McLean (U. S.) 8; Davis v. Bank of River Raisin, 4 McLean (U. S.) 387.

2. *In re* Jaycox, 12 Blatchf. (U. S.) 209; Philadelphia Loan Co. v. Townner, 13 Conn. 249.

In Talmage v. Pell, 7 N. Y. 328, a trust company, in violation of general laws, bought stock of the plaintiff, giving notes secured by an assignment of a mortgage in payment. It was held that both note and assignment were void.

**Utica Insurance Cases—New York Restraining Act.**—The effect of the *New York Restraining Act* upon contracts made in violation of its provisions, was considered in a series of cases known as the Utica Insurance Cases, beginning with the case of Utica Ins. Co. v. Scott, 19 Johns. (N. Y.) 1. In these cases the company had, in violation of the act carried on the business of discounting paper, exercising in respect thereto ordinary banking powers. And it was held that the securities taken on such discounts were void, but that the money loaned was recoverable. The court in the case just mentioned observed that: "The lending money is

not declared to be void, and, therefore, whenever money has been lent, it may be recovered, although the security itself is void," citing among other authorities the case of Robinson v. Bland, 2 Burr. 1077. This distinction was adopted and followed in subsequent cases. Utica Ins. Co. v. Kip, 8 Cow. (N. Y.) 20; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 369; Utica Ins. Co. v. Bloodgood, 4 Wend. (N. Y.) 652; Pratt v. Short, 79 N. Y. 437; 35 Am. Rep. 531; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; New York State L. & T. Co. v. Helmer, 77 N. Y. 68. While these cases have been criticised, they have never been overruled. See Curtis v. Leavitt, 15 N. Y. 97.

In New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. (N. Y.) 650, the court, by Nelson, C. J., said: "Whether the doctrine of these cases is well founded, and may be upheld upon established principles or not, or whether the result was not materially influenced by the peculiar phraseology and powers of the charter of the Utica Insurance Company in respect to which they arose, it is not necessary at present to examine. I am free to say, in either respect, I should have great difficulty in assenting to them." And in Tracy v. Talmage, 14 N. Y. 166; 67 Am. Dec. 132, Selden, J., said: "These cases have never been overruled, and yet, I think I may say they have generally been regarded with some suspicion as to their soundness. . . . There is undoubtedly great difficulty in reconciling these cases with the settled rules in regard to illegal contracts." And the court, in *In re* Jaycox, 12 Blatchf. (U. S.) 209, says: "These cases are distinguished from the present, and in a particular which has been referred to as constituting the possible ground upon which the decisions there made could be upheld, or, as I should better say, in the feature which

depositors (of a bank or savings institution), the creditors, the subscribers (of a building society), the policy holders (of an insurance company), such effect will be given the contract as will best promote the interests of the favored class.<sup>1</sup>

A statute prohibiting savings banks from lending their funds "on the security of names alone," being for the protection of depositors, will not prevent the bank from enforcing payment of a promissory note, whether the purchase was or was not in conformity with its provisions.<sup>2</sup>

So debtors to a bank may not avoid payment on the ground that less than the required number of its directory discounted their notes.<sup>3</sup> Again, it is no defense to a note made and indorsed only by one and the same party, that the plaintiff purchased it of a bank forbidden by statute to discount paper without at least two names to it—the provision being obviously intended for the protection and security of the stockholders and

was deemed to furnish the ground on which those cases proceeded; namely, that that company had a general power to lend money, and, therefore, though it received therefor a void security, it could reclaim the loan. Without assenting to the reasoning by which this result was reached, it is sufficient to say that the premises are wanting in the present case."

In *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 578, decided contemporaneously with some of the Utica insurance decisions, Savage, C. J., states the ground of those decisions as indicated in the case just preceding. He says: "If those cases are critically examined, it will be seen that the right of the plaintiffs in those cases to recover is placed upon the power given them by their charter to loan money." And he declares that "the Hudson Insurance Company has no such power, and therefore the contract of loan is void, as well as the security, and for the same reason, namely, the want of capacity to make such contract either by parol or by taking a note."

1. *Mott v. U. S. Trust Co.*, 19 Barb. (N. Y.) 568; *Little v. O'Brien*, 9 Mass. 423; *Prescott Nat. Bank v. Butler*, 157 Mass. 548; *National Pemberton Bank v. Porter*, 125 Mass. 333; 28 Am. Rep. 235; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Merchants Nat. Bank v. Hanson*, 33 Minn. 40; 53 Am. Rep. 5, *overruling First Nat. Bank v. Pierson*, 24 Minn. 140; 31 Am. Rep. 341; *Holden v. Upton*, 134 Mass. 177; *National Bank v. Continental L. Ins. Co.*, 41 Ohio St. 1; *Germantown Farmer's*

*Mut. Ins. Co. v. Dheim*, 43 Wis. 420; 28 Am. Rep. 549.

In *Bowditch v. New England L. Ins. Co.*, 141 Mass. 292; 55 Am. Rep. 474, the court, in referring to the statute which in that case prohibited loans by an insurance company to its officers, said: "It is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy holders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers, who borrow money in violation of its provisions, void, would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction."

2. *Farmington Sav. Bank v. Fall*, 71 Me. 49.

3. *Smith v. State Bank*, 18 Ind. 327. Here it was said that the provisions in the charter as to what shall constitute a quorum to do business are for the security and protection of the stockholders and bill holders; but the bank may endanger its franchises by disregarding them. To the same effect are *Bradley v. State Bank*, 20 Ind. 528;

depositors of the bank, it should not be so construed as to operate adversely to their interests.<sup>1</sup>

Upon this reasoning a national bank which has loaned money upon the security of real estate in violation of the National Bank Act, may enforce both the loan and the security taken therefor.<sup>2</sup>

And the provision in the same act prohibiting a bank organized thereunder from lending to any person a greater amount than ten per cent. of its capital stock, being obviously intended for the protection of its depositors, does not prevent the bank from recovering the money loaned and enforcing any security taken therefor.<sup>3</sup>

In all of these cases, the right of the government to forfeit the charter of the corporation is deemed a sufficient check and safeguard against the violation of the provisions; to declare the contracts void would be to defeat the aim and spirit of the enactments and work a hardship upon those for whose benefit and protection they were intended.<sup>4</sup>

Second, when the statute contains a specification of the conse-

*Planters' Bank v. Sharp*, 4 Smed. & M. (Miss.) 75; 4 Am. Dec. 470.

1. *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242.

2. See NATIONAL BANKS, vol. 16, p. 164 *et seq.*; *Union Nat. Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Swope v. Leffingwell*, 105 U. S. 3; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405; *Columbia Nat. Bank's Appeal*, 16 W. N. Cas. (Pa.) 357; *Graham v. National Bank*, 32 N. J. Eq. 804; *Thornton v. National Exch. Bank*, 71 Mo. 221; *Winton v. Little*, 94 Pa. St. 64; *Oldham v. First Nat. Bank*, 85 N. Car. 240; *Scofield v. State Nat. Bank*, 9 Neb. 316; 31 Am. Rep. 412; *Warner v. DeWitt County Nat. Bank*, 4 Ill. App. 305; *Wroten v. Armat*, 31 Gratt. (Va.) 228; *Simons v. First Nat. Bank*, 93 N. Y. 269; *Wherry v. Hale*, 77 Mo. 20; *Mapes v. Scott*, 88 Ill. 352.

**Purchase of Note by Bank Under Power to "Discount and Negotiate."**—In *Prescott Nat. Bank v. Butler*, 157 Mass. 548, it was held, that conceding that under *United States Stat.* (1864), ch. 106, § 8, empowering national banks to "discount and negotiate" notes, the purchase of a note by such a bank is *ultra vires*, the maker or indorser cannot defend on the ground that the bank has obtained no title.

3. *Gold Min. Co. v. National Bank*, 96 U. S. 640; *Wyman v. Citizens' Nat. Bank*, 29 Fed. Rep. 734; *O'Hare v.*

*Second Nat. Bank*, 77 Pa. St. 96; *Shoemaker v. National Mechanics Bank*, 2 Abb. (U. S.) 416; *Pangborn v. West Lake*, 36 Iowa 546; *Stewart v. Maryland's Nat. Union Bank*, 2 Abb. (U. S.) 424; *Vining v. Bricker*, 14 Ohio St. 331; *Mills County Nat. Bank v. Perry*, 72 Iowa 15; 2 Am. St. Rep. 228.

In *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 96 U. S. 642, the court said: "We do not think that public policy requires, or that Congress intended, that an excess of loans beyond the proportions specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interest of creditors, stockholders, and all who have an interest in the safety and security of the bank."

4. *Union Nat. Bank v. Matthews*, 98 U. S. 629. Here it was said: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of an ouster and dissolution was, we think, the check, and none other contemplated by Congress."

In *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 373, the bank was a *Pennsylvania* corporation, and had taken a mortgage upon real estate in *New York*. A bill of foreclosure was filed in the latter state. The answer set up as a defense, "that by the act of



quences which shall follow a violation of its provisions, and they are other than that the contract shall be void, the contract is valid and enforceable.<sup>1</sup>

A provision in the charter of a bank prohibiting any officer, under penalty of fine or imprisonment, from borrowing money from the bank, belongs to this class. In such case, the officer is not exempt from liability for money loaned to him in violation of the provision.<sup>2</sup>

So also is the provision of the National Bank Act prohibiting banks organized thereunder from charging more than a specified rate of interest on loans or discounts, under penalty of forfeiting the whole interest. Here the penalty named in the statute is the only one intended, and the loans are recoverable.<sup>3</sup>

And a prohibition in the charter of a bank against demanding more than a certain rate of interest has no more effect upon a note or other security given for a loan made contrary thereto, than the ordinary laws of the state against usury have upon contracts made by individuals.<sup>4</sup>

incorporation the plaintiffs were not authorized to take a mortgage, except to secure a debt previously contracted in the course of its dealings; and here the money was loaned after the bond and mortgage were executed." Chancellor Kent, in delivering judgment, said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of *Pennsylvania* to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of misuser by setting aside a just and *bona fide* contract."

1. *Harris v. Runnels*, 12 How. (U. S.) 80; *Ossipee Hosiery Mfg. Co. v. Canney*, 54 N. H. 295; *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray (Mass.) 534; *Taylor v. Empire State Sav. Bank* (Supreme Ct.) 21 N. Y. Supp. 643; *Pratt v. Short*, 79 N. Y. 449; 35 Am. Rep. 531. In this last case it was said by the court: "In view of the special language of the Restraining Act and the specification of the consequences which should follow the unlawful discount of commercial paper, there is great force in the suggestion that the legislature regarded the particular penalty imposed, and the remedy of *quo warranto*, or by an action in equity to restrain the exercise by a corpora-

tion of unauthorized powers as a sufficient protection against corporations or individuals unlawfully engaged in the business of discounting paper, and that it was not intended that they should also forfeit all claim to money loaned or advanced upon the prohibited security."

2. *Lester v. Howard Bank*, 33 Md. 558; 3 Am. Rep. 211. See also *Bowditch v. New England L. Ins. Co.*, 141 Mass. 292; 55 Am. Rep. 474.

3. *Oates v. First Nat. Bank*, 100 U. S. 250; *Bank of U. S. v. Waggener*, 9 Pet. (U. S.) 399; *Smith v. Exchange Bank*, 26 Ohio St. 141; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 192; *Lucas v. Government Nat. Bank*, 78 Pa. St. 228; 21 Am. Rep. 17; *First Nat. Bank v. Childs*, 133 Mass. 248; *Stephens v. Monongahela Bank*, 88 Pa. St. 157; *Lazear v. National Union Bank*, 52 Md. 78; 36 Am. Rep. 355. See also *Bandel v. Isaac*, 13 Md. 224.

In *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 355, Story, J., in delivering the opinion of the court, said: "The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery."

4. *Farmers' Bank v. Burchard*, 33 Vt. 344; *Bank of Middlebury v. Bling-*

Corporate contracts which contravene public policy are, like similar contracts between individuals, not enforceable; such contracts are more than *ultra vires*; they are illegal. Such are agreements for compensation for procuring a contract from the government to furnish its supplies,<sup>1</sup> or for lobby services,<sup>2</sup> or to influence directors of a corporation to act for the benefit of others and to the prejudice of the corporation,<sup>3</sup> or to grant to individuals certain privileges in consideration of the withdrawal by them of their opposition to the passage of an act affecting the interests of the corporation,<sup>4</sup> or whereby a corporation, collecting the lawful fees due to public officers, is to retain a portion thereof in consideration of forbearance of efforts to procure the repeal of the law by which the offices were created,<sup>5</sup> or which tend to prevent fair and healthy competition.<sup>6</sup>

ham, 33 Vt. 621; Rock River Bank v. Sherwood, 10 Wis. 230; 78 Am. Dec. 666; Grand Gulf Bank v. Archer, 8 Smed. & M. (Miss.) 151; Planters' Bank v. Sharp, 4 Smed. & M. (Miss.) 75; 43 Am. Dec. 470; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Manchester Com. Bank v. Nolan, 7 How. (Miss.) 508.

1. Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45.

2. Marshall v. Baltimore, etc., R. Co., 16 How. (U. S.) 314.

3. Bliss v. Matteson, 52 Barb. (N. Y.) 335. In this case, the agreement between the plaintiff and defendants contained an engagement on the part of the latter to control the action of directors and trustees of a railroad company, and to cause them to agree by vote to pay a claim of the plaintiff on account of past due coupons on bonds of the company, without reference to the legality of the same, or to the interest of their *cestuis que trustent*, in consideration that the plaintiff should use his influence to induce the bondholders to fund their coupons. The agreement was adjudged void as being against public policy. The court used this language: "The question is, whether this agreement is among that class which is deemed contrary to public policy, and, therefore, illegal and void. The law upon this subject inculcates a high morality, and the courts, in administering the rule, from time to time, so far from relaxing it, have constantly shown a disposition to apply it with increasing vigor. The rule is, that an agreement which is designed, or which, in its nature and effect, tends to lead persons who are charged with the performance of a trust or duties for the

benefit of others, to violate or betray them, is contrary to public policy and void. There is no difference in principle, whether the trust which it is meant to pervert is public or private, nor is it material that nothing actually fraudulent or illegal was done under the contract. It is enough that such is the tendency of it." The following cases are cited and relied upon: Fuller v. Dame, 18 Pick. (Mass.) 472; Davidson v. Seymour, 1 Bosw. (N. Y.) 88; Satterlee v. Jones, 3 Duer (N. Y.) 102; Devlin v. Brady, 32 Barb. (N. Y.) 518; Spinks v. Davis, 32 Miss. 152; Marshall v. Baltimore, etc., R. Co., 16 How. (U. S.) 314.

4. Pingry v. Washburn, 1 Aik. (Vt.) 264; 15 Am. Dec. 676. But it is otherwise where the opposition is of a private character, and merely for the protection of purely private interests, and is withdrawn for a consideration, and there is no design to conceal the arrangement from the law-makers. Low v. Connecticut, etc., Rivers R. Co., 46 N. H. 284.

5. Reed v. Paper Tobacco Warehouse Co., 2 Mo. App. 82.

6. State v. Hartford, etc., R. Co., 29 Conn. 538. Here the H. & N. H. railroad company was chartered to construct and operate a road from Hartford to the navigable waters of New Haven harbor. Subsequently a steamboat company was chartered to run in connection with the road to New York—the two constituting a route of great convenience to the public. After the road was built and used in connection with the line of steamers for several years, the railroad company constructed a track diverging from the original track at a point a mile and a

3. **Contracts Unfitting Corporations for Performance of Public Duties.**—Corporations established for objects *quasi* public, such as railroad, canal, telegraph, turnpike and gas companies, to which the right of eminent domain and other extraordinary privileges are granted in order to enable them to accommodate the public, may not, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, without which its function to be a corporation can have little more than a nominal existence. They cannot thus devolve upon others duties, privileges, and powers which were conferred upon them for the public advantage; and all contracts and transactions by which this is attempted, are *ultra vires* and void. Nor can such corporations assume the ownership and management of similar enterprises, without express legislative authority. The corporate charter not only grants rights, it also imposes duties; an acceptance of those rights is an assumption of those duties. As it is a contract which binds the state not to interfere with those rights, so likewise, it is one which binds the corporation not to abandon the discharge of those duties. It is unlike a deed or patent which vests in the grantee or patentee not only title, but full power of alienation; but it is more—it is a contract, the obligations of which neither party, state or corporation, can, without the consent of the other, abandon.<sup>1</sup>

half from its terminus at tide water, and running to the depot of the N. Y. and N. H. railroad company in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide-water. This was done under a contract with the last named railroad company by which it was to prevent the extension of a certain railroad chartered by the legislature which would interfere with the H. & N. H. road, and the N. Y. & N. H. road was to secure an advantage over the line of steamboats in competing for public travel. The contract was declared void as against public policy.

1. *Beman v. Rufford*, 1 Sim. N. S. 550; 6 Eng. L. & Eq. 106; *Great Northern, etc., R. Co. v. Eastern Counties R. Co.*, 9 Hare 313; *Winch v. Birkenhead, etc., R. Co.*, 13 Eng. L. & Eq. 506; *Shrewsbury, etc., R. Co. v. Shrewsbury, etc., R. Co.*, 1 Sim. N. S. 110; *MacGregor v. Dover R. Co.*, 16 Eng. L. & Eq. 180; *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; 73 E. C. L. 775; *Johnson v. Shrewsbury, etc., R. Co.*, 3 De G. M. & G. 914; *Staffordshire, etc., Canal Co. v. Birmingham Canal*, 1 H. L. 254;

*Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; 83 E. C. L. 287; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64; *State v. Consolidated Coal Co.*, 46 Md. 1; *Tippicanoe County, etc., v. LaFayette, etc., R. Co.*, 50 Ind. 85; *Troy, etc., R. Co. v. Boston, etc., R. Co.*, 86 N. Y. 107; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Abbott v. Johnstown, etc., R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 541; *Hamilton v. Savannah, etc., R. Co.*, 49 Fed. Rep. 412; *Stockton v. Central R. Co.*, 50 N. J. Eq. 54; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692; *Archer v. Terre Haute, etc., R. Co.*, 102 Ill. 493; *Roper v. McWhorter*, 77 Va. 214; *Pittsburgh, etc., R. Co. v. Bedford, etc., R. Co.*, 81\* Pa. St. 104; *Ohio, etc., R. Co. v. Indianapolis, etc., R. Co.*, 5 Am. L. Reg. N. S. 733; *Sapp v. Northern Central R. Co.*, 51 Md. 126; *Rogers Locomotive, etc., Wks v. Erie R. Co.*, 20 N. J. Eq. 386; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683;

Shepard v. Milwaukee Gas Light Co., 6 Wis. 539; 70 Am. Dec. 479; Chicago Gas Light, etc., Co. v. Peoples' Gas Light, etc., Co., 121 Ill. 530; 2 Am. St. Rep. 124; St. Louis v. St. Louis Gas Light Co., 70 Mo. 69; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; 46 Am. Rep. 527; Western Union Tel. Co. v. American, etc., Tel. Co., 65 Ga. 160; 38 Am. Rep. 781.

In *Thomas v. West Jersey R. Co.*, 101 U. S. 71, the court, by Mr. Justice Miller, in declaring *ultra vires* and void a lease by a railroad company, of all its road, rolling stock and franchises, for which there was no authority in the charter, said, "that where a corporation, like a railroad company, has granted to it by charter, a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions—which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes—is a violation of the contract with the state and is void as against public policy."

The doctrine is asserted with remarkable clearness in the opinion of the court delivered by Mr. Justice Campbell in *New York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30. In this case, the corporation was chartered to build and maintain a railroad in *Pennsylvania* by the legislature of that state. The stock in it was taken by a *Maryland* corporation, and the entire management of the road was committed to the latter, which appointed all the officers and agents and furnished the rolling stock. In reference to this state of things, and its effect upon the liability of the *Pennsylvania* corporation for infringing a patent of the defendant in error, Winans, the court said: "This conclusion (argument) implies that the duties imposed upon the plaintiff (in error) by the charter are fulfilled by the construction of the road, and that, by alienating its right to use and its power of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the legislature and the com-

munity. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature."

And in *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 390, Zabriske, Ch., says: "It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its functions and duties to the state, without legislative authority." Here a *New Jersey* railroad corporation, without express authority, undertook to lease to another company for twenty years its railroad, with all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls. The contract of lease was confirmed by a vote of the stockholders. The lessor was authorized to cancel the lease upon giving three months' notice, but in that event was to be liable to pay the damages incurred by the other party by reason of such action. Under this provision the railroad company ended the contract and resumed possession of the leased road. The suit was by the lessee for the damages provided for, and it was held that no recovery could be had because the contract was *ultra vires*.

In *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, it was held that a general law of *Oregon* authorizing companies to organize themselves by written articles of association, filed with the secretary of state, for "any lawful enterprise, business, pursuit, or occupation" specified in the articles, including "making or constructing any railroad" and "to purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," did not authorize a railroad company to be incorporated, either for leasing its road to another corporation, or for taking leases from other corporations of their roads, although these objects were included in its articles of association; and therefore, that, without further and express authority from the legislature, a lease

for ninety-six years by one railroad company of its whole road and franchises to another such corporation, was *ultra vires* and void, and would not sustain an action by the lessor against the lessee for the rent stipulated in the lease.

In *State v. Atchison, etc., R. Co.*, 24 Neb. 161; 8 Am. St. Rep. 164, Maxwell, J., for the court, said: "To justify the defendant in leasing its line to the B. & M. R. R. Company, it must be able to point to the exact statute granting such authority, which it has failed to do. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 294. In the opinion of the majority of the court in that case, it is said: 'We think it may be stated as the just result of these cases, and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.' This, in our view, is a correct statement of the law."

"It is too well settled to admit of doubt that a corporation cannot disab其身 by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests." *Per Fuller, C. J.*, in *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396.

A contract by which a horse-railway corporation transfers the entire control of its road, with all its franchises, receiving in return only a fixed rent, paid in the form of a dividend to its stockholders, is *ultra vires* and void. *Middlesex R. Co. v. Boston, etc., R. Co.*, 115 Mass. 347.

In *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441, it was held that where two separate corporations were created to make railroads, they had no right to unite and conduct their business under one management; nor had they a right to establish a steamboat line to run in connection with the

road, and notes given for the purchase of a steamboat could not be recovered upon.

A street-railway company has no power to mortgage its franchise, road, or property, without legislative authority, and under *Massachusetts Statutes* (1864), ch. 229, a mortgage by such a corporation of practically all of its property, without such authority, is void. *Richardson v. Sibley*, 11 Allen (Mass.) 65; 87 Am. Dec. 700. See also *Com. v. Smith*, 10 Allen (Mass.) 455; 87 Am. Dec. 672.

In *American Union Tel. Co. v. Union Pac. R. Co.*, 1 McCreary (U. S.) 188, certain contracts entered into by a railroad company assigning a large part of its franchise and alienating property which was necessary to the performance of its obligations and duties to the government and the public, were adjudged *ultra vires*.

A contract whereby a railroad company undertakes to grant to a single company the sole right to construct and maintain lines of telegraph along its road is *ultra vires* and void. *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. Rep. 493.

In *Stewart's Appeal*, 56 Pa. St. 413, a company was authorized to build a railroad, but failing to obtain the means necessary, contracted with an individual to build a railroad solely for his own use on a portion of their route. It was held that the company had no power to make such a contract, and the individual could not build the road.

A contract to pay certain sums for the use of a railway bridge across the Mississippi river between *Illinois* and *Iowa*, is not *ultra vires* of a railroad corporation of *Illinois* or *Pennsylvania*, whose road connects by means of intervening roads with the bridge as part of a continuous line of transportation. *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371.

And a railroad company having the right to construct a particular line of railroad, with the general power to buy all lines of property, of whatever nature or kind, may purchase from another company a road built upon that line, provided the latter company has power to sell and dispose of the same. *Branch v. Jesup*, 106 U. S. 468.

A contract whereby a railroad company lets another company into joint possession of a portion of its lines for the period of nine hundred and ninety-nine years at an agreed rental, is not

These principles have no application to corporations of a strictly private character, such as those established for ordinary manufacturing and trading purposes; they, like a partnership or an individual, may sell or lease their property to another corporation.<sup>1</sup>

**4. Contracts Ultra Vires Because of Facts Peculiarly Within Knowledge and Intention of Corporation.**—When a corporation is not authorized to issue negotiable paper under any circumstances, such paper is void, not only in the hands of the original payee, but in those of any subsequent holder as well; this, for the reason that all persons dealing with a corporation are bound to take notice of the extent of its charter powers.<sup>2</sup>

But if the corporation is authorized to give notes for any purpose, the defense of *ultra vires* will not be available to it, in a suit by a *bona fide* indorsee of its negotiable instruments, although the particular contract might have been really unauthorized; the reason being that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. This doctrine is applied to commercial paper made by a corpora-

*ultra vires*, where such joint possession does not interfere with the present use of such lines by the company that owns them. *Chicago, etc., R. Co. v. Union Pac. R. Co.*, 47 Fed. Rep. 15.

A corporation authorized to sell its franchises is authorized to mortgage them. *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191.

1. *Holmes, etc., Mfg. Co. v. Holmes, etc., Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448; *Evans v. Boston Heating Co.*, 157 Mass. 37; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393; *Andesco Oil Co. v. North American, etc., Co.*, 66 Pa. St. 375; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42. See also *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 50.

It is competent for an irrigating company, incorporated under the laws of *Kansas*, to construct and operate a canal for irrigation, water works, and manufacturing purposes, with the assent of its stockholders, to sell and convey to a similar company its right of way, canal, personal and real property, provided this is done in good faith, and not for the purposes of delaying or defrauding creditors. *State v. Western Irrigating Canal Co.*, 40 Kan. 96; 10 Am. St. Rep. 166.

But a contract by a corporation created under the laws of the State of *Ohio*, while solvent and flourishing, to sell its business, the greater part of

the consideration being stock and bonds of another corporation to be organized to carry on the business, no emergency rendering the sale necessary for the protection of stockholders, is *ultra vires*, and not enforceable, as, under the laws of that state, one corporation may not, without express legislative authority, become the owner of stock in another. *Eason v. Buckeye Brewing Co.*, 51 Fed. Rep. 156.

2. *Monument Nat. Bank v. Globe Works*, 101 Mass. 58; 3 Am. Rep. 322; *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 289; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 579; 99 Am. Dec. 30; *Smead v. Indianapolis, etc., R. Co.*, 11 Ind. 104.

Where a bank is prohibited by law from issuing any bill or note not payable on demand and without interest, under a penalty, any instrument issued in violation of the act is void. *Hayden v. Davis*, 3 McLean (U. S.) 276; *Weed v. Snow*, 3 McLean (U. S.) 265; *Root v. Godard*, 3 McLean (U. S.) 102.

In *Dodge v. Memphis*, 51 Fed. Rep. 165, where a town, in pursuance of statutory authority, subscribed for stock in a railroad, but without such authority issued negotiable bonds in payment therefor, the bonds were adjudged absolutely void, and suit was not allowed to be maintained on them upon the theory that they were valid as non-negotiable instruments.

tion for the accommodation of a third person when in the hands of a *bona fide* holder, who has taken it before maturity, on the faith of its being business paper.<sup>1</sup>

And upon the same principle the defense of *ultra vires* has been disallowed to a corporation when sued for debts incurred in excess of the limit imposed by its charter.<sup>2</sup>

A corporation having power to contract for the purchase of

Shares of capital stock issued beyond the limit fixed by charter are void. *Scoville v. Thayer*, 105 U. S. 148; *McCord v. Ohio, etc., R. Co.*, 13 Ind. 221; *Oler v. Baltimore, etc., R. Co.*, 41 Md. 583; *Mt. Holly, etc., Co.'s Appeal*, 99 Pa. St. 513; *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *Wright's Appeal*, 99 Pa. St. 425. See generally *Stock*, vol. 23, p. 582; *STOCKHOLDERS*, vol. 23, p. 776.

1. *Mechanics' Banking Assoc. v. New York, etc.*, Lead Co., 35 N. Y. 505, *affirming* 23 How. Pr. (N. Y.) 74; *Lehigh Valley Coal Co. v. Welt Depere Agricultural Works*, 63 Wis. 45; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 387; 1 Am. St. Rep. 123; *Farmers', etc., Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Bird v. Daggett*, 97 Mass. 489; *National Bank v. Young*, 41 N. J. Eq. 531; *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 290, *per Selden, J.*; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 579; 99 Am. Dec. 30; *Bailey v. M. E. Church*, 71 Me. 475; *Smead v. Indianapolis, etc., R. Co.*, 11 Ind. 104.

In *Auerbach v. LeSueur Mill Co.*, 28 Minn. 291; 41 Am. Rep. 285, it was held that the defendant corporation having authority to incur debts to a limited extent, and to issue negotiable notes therefor, the plaintiff, as a *bona fide* holder of the note in suit, might recover upon the same, although in this particular case the corporate indebtedness at the time the note was given exceeded the limits prescribed by the articles of association.

And in *Wood v. Corry Water Works Co.*, 44 Fed. Rep. 146, the corporation having received and enjoyed the avails of its mortgage bonds, it was held that the plaintiffs could not assail their validity in the hands of *bona fide* purchasers, on the ground that, in contravention of statute, the amount of bonds issued exceeded one-half of the capital stock paid in.

In *Balfour v. Ernest*, 5 C. B. N. S. 601; 94 E. C. L. 599, where the holder

knew of the circumstances under which the bill was accepted, he was held to notice that the acceptance was beyond the powers of the corporation and recovery was denied him.

In *National Bank v. Young*, 41 N. J. Eq. 535, the court said: "The general doctrine of the law is that where a corporation has power under any circumstances to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances giving such requisite authority, and such paper is no more liable to be impeached for infirmity in the hands of such a holder than any other commercial paper. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 203; *Marshall County v. Schenck*, 5 Wall. (U. S.) 784; *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548." See *MUNICIPAL CORPORATIONS*, vol. 15, p. 949; *MUNICIPAL SECURITIES*, vol. 15, p. 1204; and *CORPORATIONS (PRIVATE)*, vol. 4, p. 223, where the subject of the power and liability of corporations, public and private, respectively, in relation to commercial paper, is fully treated.

As railroad companies have general power to issue bonds, persons dealing therein, in the absence of notice, have the right to assume that all restrictions upon this power have been complied with. *Ellsworth v. St. Louis, etc., R. Co.*, 98 N. Y. 553.

2. *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 296; *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Humphrey v. Patrons Merc. Assoc.*, 50 Iowa 607; *Auerbach v. LeSueur Mill Co.*, 28 Minn. 291; 41 Am. Rep. 285. But see *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 735.

"If a private corporation, under its governing statute, is limited in respect of the amount of indebtedness which it may incur, although a person to whom it proposes a contract by which it is to become indebted, will be bound to take notice of the statute creating the limit, yet he will not be bound to know whether the corporation has already incurred debts to the extent of

goods, is bound by such a contract, although the goods may not be intended to be used for the purposes of the corporation, and this fact is known to the other party.<sup>1</sup>

And a corporation having power to borrow money, may not evade payment of the same, even though the lender knew that the corporation would expend the money in prosecuting a business unauthorized by its charter, provided the business itself was free from any intrinsic immorality or illegality.<sup>2</sup>

If, however, it was a part of the agreement that the money loaned, or the goods purchased, should be used for an *ultra vires* purpose, or the lender or vendor has done anything in aid or furtherance of such purpose, he will be precluded from recovering.<sup>3</sup>

the limit, so as to exhaust its power; but, on the contrary, the proposal made to him for a contract creating an indebtedness is in itself a warranty that the power has not been exhausted; and it would be sanctioning the grossest fraud to allow the corporation to get the benefit of such a contract, and then repudiate the obligation of it, on the ground that its power had been exhausted when the contract was made." Judge Seymour D. Thompson, in *Am. L. Rev.*, May-June, 1894, p. 386.

1. Effect of Knowledge of Unauthorized Application of Subject of Contract.—*In re* Contract Corporation, L. R., 8 Eq. 14; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132. In this latter case stocks were sold to a banking corporation, which were intended by the latter for resale upon speculation. This was beyond the scope of the bank's charter powers. In reference to the contention that the vendor knew the object of the vendee in purchasing the stock, the court said: "It is contended by the counsel for the claimant that there is no evidence that the vendor, Morris Canal and Banking Company, had any knowledge of the object of the vendee in making the purchase. I shall, however, assume that they had such knowledge, because in the view I take of the subject it cannot affect the result."

2. *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412; *Thompson v. Lambert*, 44 Iowa 239.

In *Parish v. Wheeler*, 22 N. Y. 502, the plaintiff, at the request of the corporation, advanced money to take up a draft accepted by the corporation for a part of the original purchase-money of a steamboat. It was held that the corporation could not escape liability on

the ground that the purchase of the steamboat was *ultra vires*, although the plaintiff, knowing all the facts, advanced the money in pursuance and consummation of the purchase.

In *Ex p. Credit Foncier, etc.*, L. R., 7 Ch. 161, two directors of company A were also directors of company B, and both companies employed the same solicitor. Company A was indebted to their contractor, but the debt was not payable immediately. The contractor had bought shares in the company and was pressed by the stockbrokers for the money. Company A agreed to advance him a certain sum, which sum it borrowed from company B, on the security of a mortgage. The loan was negotiated by one of the persons who was a director in both companies, and the mortgage was prepared by the solicitor who acted for both companies. Company A had authority to borrow money, but not to buy up their own shares. Both companies subsequently were wound up. It was held that company B was not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that it was consequently entitled to prove against the estate of company A under the winding up.

3. *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412; *Thompson v. Lambert*, 44 Iowa 239. See also *Soudheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; *Lightfoot v. Tenant*, 1 B. & P. 551; *Cannan v. Bryce*, 3 B. & Ald. 179; *McKinnell v. Robinson*, 3 M. & W. 434.

The propositions of the text find support in a line of English cases regarding contracts for the sale of goods



to be smuggled into that country, and other contracts of a similar nature. Thus, in *Faikney v. Reynous*, 4 Burr. 2069, the plaintiff and one of the defendants had been jointly concerned in stock jobbing, and the plaintiff, in contravention of an express statute, had advanced a certain sum of money in compounding certain differences, for one half of which defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the plaintiff was held entitled to recover. Although this case differs from the others above cited in this section, yet the principle upon which it was decided is equally applicable; namely, that a party to a contract innocent in itself is not responsible for, nor affected by, the use which the other party may make of the subject of the contract.

The first of the cases in reference to smuggling is that of *Holman v. Johnson*, Cowp. 341, where the plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into *England*, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in the case just mentioned: namely, that mere knowledge by the vendor of the unlawful intent did not make him a participant in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in the case, says "The seller, indeed, knows what the buyer is going to do with the goods, but the interest of the vendor is totally at an end and his contract completed by the delivery of the goods." Where, however, the seller does any act which is calculated to facilitate the smuggling, he is regarded as *particeps criminis*, and cannot recover; as is shown by the subsequent cases of *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Reed*, 5 T. R. 599. These were all cases where the plaintiff had sold goods to the defendant knowing that they were to be smuggled into *England*, and in each of them the plaintiff was non-suited, but they all differ from the case of *Holman v. Johnson*, Cowp. 341, just referred to, in this, that the plaintiff had in each of these three cases done some act in addition to the sale in aid and furtherance of the defendant's design to vio-

late the revenue law, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in *Waymell v. Reed*, 5 T. R. 599, is very explicit. He observes: "In *Holman v. Johnson*, Cowp. 341, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely upon the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendant in the act of smuggling by packing the goods up in a manner most convenient for that purpose. In each of the three cases just cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman v. Johnson*, Cowp. 341. Indeed, that decision seems to have been uniformly followed by the courts in *England* from that day to the present. In 1835, the question again arose in *Pellecat v. Angell*, 2 C. M. & R. 317, where the court held that the plaintiff could recover the price of the goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into the country. Lord Abinger says: 'The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise, there he must take the consequences of his own act.' And again he observes: 'The plaintiff sold the goods; the defendant might smuggle them if he wished, or he might change his mind the next day. It does not at all import a contract of which the smuggling was an essential part.'"

In *Hodgson v. Temple*, 5 Taunt. 181, the plaintiffs, who were distillers, had sold spirituous liquors to the defendants, with full knowledge that the latter intended to retail them in express violation of the revenue law. It was insisted, in defense to an action brought for the purchase price of the liquors, that the plaintiffs were *particeps criminis* and could not recover. Mansfield, C. J., said: "This would be carrying the law much further than it has ever been carried. The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction."

**5. Contracts Executed in Unauthorized Manner.**—As stated elsewhere in this article,<sup>1</sup> the term *ultra vires* has, in some instances, been used to designate corporate acts which, although within the powers granted, are performed in a manner different from that prescribed by the charter or by general law. Clearly, this is a misuse of the term; where the infirmity of the act does not consist in a want of corporate power to do it, but in the disregard of formalities prescribed, the material question is whether the prescription is mandatory or directory, and must be solved by the application of the ordinary rules of statutory construction. It may be here repeated that it is this indiscriminate use of the expression, with respect to cases different in their nature and principles, that has occasioned so much confusion, if not misapprehension, on this subject. Corporate contracts and transactions of the character here indicated have received full treatment elsewhere in this work, to which reference is now made.<sup>2</sup>

**6. Contracts in Anticipation of Legislative Authority.**—Contracts of corporations to do something, at the time not authorized, but conditioned upon obtaining legislative authority therefor, are valid, and their stipulations become enforceable after the passage of the act.<sup>3</sup>

**V. PERSONAL LIABILITY OF DIRECTORS AND OFFICERS FOR ULTRA VIRES TRANSACTIONS.**—When the directors and officers of a corporation engage in *ultra vires* transactions, they are personally liable to it for the resulting damages. This is true whether the act is expressly prohibited by the corporation's charter or by-laws, or is simply beyond the officers' authority, although within the corporation's charter powers. The directors and officers are agents of the corporation for which they act, and for their

1. See *supra*, this title, *Definition and General Principles*.

2. See CORPORATIONS, vol. 4, p. 184; STATUTES, vol. 23, p. 140.

3. **Contracts in Anticipation of Legislative Authority.**—New Haven, etc., Co. v. Hayden, 107 Mass. 525; Portage County v. Wisconsin Cent. R. Co., 121 Mass. 460.

In *Scottish North Eastern R. Co. v. Stewart*, 3 Macq. H. L. Cas. 382, a railroad company had bound itself to purchase land, provided authority should be given to it by Parliament. Lord Wensleydale, in rendering judgment, observed: "No objection can, I think, be made, on the *ultra vires* doctrine, to a contract by a company who wish to alter one of the branches of their railroad, and are about to apply to Parliament for authority to do so, engaging to purchase land from a neighboring proprietor, if they should obtain their act."

In *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 410; 82 E. C. L. 396, Mr. Justice Erle says: "Although the works contracted for would have been unlawful without an act of Parliament, still, if the parties intended to obtain the act before the works were done, they would not intend to violate the law when the contract was made, nor violate it by doing the works according to the act."

So, in *Taylor v. Chichester, etc., R. Co.*, L. R., 4 H. L. 628, it was held that an "agreement to arise and take effect on the passing of a bill then pending in Parliament, is to be regarded, by virtue of that stipulation as if it had been *de facto* made after the passing of the bill." And in *Sussex R. Co. v. Morris, etc., R. Co.*, 19 N. J. Eq. 13, where a railroad company had made a contract relating to business "upon any future extension or branches," it was held that branches

unauthorized transactions they are responsible to their principal, just as an agent of an individual is for the damage caused to his principal by his unauthorized acts.<sup>1</sup>

Thus, the managers of a building and loan association are liable for losses from loans made on the personal security of the members in violation of a by-law limiting the amount of such loans.<sup>2</sup>

So the directors and trustees of a savings bank may be held liable for losses incurred by the violation of a law or provision of the charter regulating the investment of deposits.<sup>3</sup>

But where the *ultra vires* business is pursued for the benefit of the corporation, and it has the actual benefit thereof, and is so acquiesced in by the stockholders that it actually, though illegally, becomes the business of the corporation, it may not maintain an action against the officers for damages suffered therein. In other words, a corporation engaged in *ultra vires* dealings, may not sue, for damages suffered therein, the agents it employs to carry on the business. In such a case, the corporate agent would be protected, just as the agent of a copartnership who does business with the express or implied consent of the copartners, which is not authorized by the articles of copartnership.<sup>4</sup>

When the authority of the directors to do a particular act depends upon complicated questions of law, and they act in good faith, and use due care and skill to ascertain the precise extent of their powers, they will not be held liable if it turns out that the act is *ultra vires*.<sup>5</sup>

not then authorized, but subsequently allowed by the legislature, were included.

1. *Holmes v. Willard*, 125 N. Y. 75; *North Hudson Mutual Bldg., etc., Assoc. v. Childs*, 82 Wis. 460; *Austin v. Daniels*, 4 Den. (N. Y.) 299; *Joint Stock Discount Co. v. Brown*, L. R., 8 Eq. 381; *In re Faure Electric Accumulator Co.*, L. R., 40 Ch. Div. 141; *distinguishing Studdert v. Grosvenor*, 33 Ch. Div. 528; *Pickering v. Stephenson*, L. R., 14 Eq. 322. See also OFFICERS (PRIVATE CORPORATIONS), vol. 17, pp. 112, 118; BANKS AND BANKING, vol. 2, p. 114 *et seq.*

**Ultra Vires Issue of Stock—Watered Stock.**—As to the liability of corporate officers for an overissue or *ultra vires* issue of stock, and the issue of watered stock, see STOCK, vol. 23, pp. 619, 622.

2. *Citizens Bldg. Assoc. v. Coriell*, 34 N. J. Eq. 383. See generally, BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 604.

3. *Dodd v. Wilkinson*, 42 N. J. Eq. 647; *Wilkinson v. Dodd*, 42 N. J. Eq. 234; *Williams v. McDonald*, 42 N. J.

Eq. 392; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546. See also SAVINGS BANKS, vol. 21, p. 722 *et seq.*

4. *Holmes v. Willard*, 125 N. Y. 75; *McNab v. McNab, etc., Mfg. Co.* (Supreme Ct.), 16 N. Y. Supp. 448; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 536. See *supra*, this title, *Ratification and Acquiescence*. See generally PARTNERSHIP, vol. 17, p. 824; AGENCY, vol. 1, p. 331; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39.

In *International, etc., R. Co. v. Bremond*, 53 Tex. 96, it was held that a shareholder in a railroad company which, against his protest, has been consolidated without authority of law with another company, by the action of other stockholders, and whose equitable interests have been wrongfully appropriated by the consolidated company, may not hold the directors, as such, liable for the damage; nor are the directors liable to the corporation for a consolidation effected by act of the stockholders.

5. *Sperling's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684. Here *Sharswood*,

**VI. LIABILITY OF CORPORATION FOR ULTRA VIRES TORTS.**—It was at one time supposed that private corporations aggregate could not commit torts, and particularly those which involve the element of malicious intent; that, as the sovereign in granting rights and powers for lawful purposes had conferred no power to commit unlawful acts, such acts committed by the corporation's agents must, of necessity, be *ultra vires* the corporation, and the individual wrongs of the agents themselves. It is true that every tort committed by a corporation involves an unauthorized exercise of corporate power, but this is no reason why the corporation should not be held responsible for the consequences. However this may be, the doctrine stated above is entirely obsolete, and to-day corporations are held liable to the same extent, and under the same circumstances, for the consequences of their wrongful acts, as natural persons. They are held liable for assault and battery, fraud and deceit, false imprisonment, malicious prosecution, libel and slander, and other torts needless to mention. In certain cases, they may be indicted for misfeasance and nonfeasance touching duties imposed upon them in which the public are interested. Their offenses may be such as will forfeit their existence.<sup>1</sup>

J., for the court, said: "In regard to the question last adverted to, whether the defendants should be held responsible for any of their acts and investments as *ultra vires*, it might be sufficient to notice the fact that the charter of this corporation was a very complicated one, made up by comparing together no less than sixteen different acts of incorporation or supplements. . . . To have mistaken the extent of their powers under such circumstances would not have been matter of surprise even in the most timid and cautious. We may adopt upon this point the language of C. J. Greene, in *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624: 'In considering the question of the personal responsibility of the directors, we shall assume that they violated the charter of the screw company. The question then will be, was such violation the result of mistake as to their powers, and if so did they fall into the mistake from want of proper care, such care as a man of ordinary prudence practices in his own affairs? For, if the mistake be such as with proper care might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the screw company, they ought not to be liable.' We

may say in this case, conceding that the directors did violate the charter, it was a question upon which, with all due care, they might have made an honest mistake; and moreover, it appears by the evidence, and is so reported, that they acted throughout by the advice of their counsel. It is well settled that trustees will be protected from responsibility under such circumstances. *Lewin on Trusts* 595; *Vez v. Emery*, 5 Ves. 141; *Calhoun's Estate*, 6 Watts (Pa.) 180."

1. See CORPORATIONS (PRIVATE), vol. 4, p. 250 *et seq.*, where the question is thoroughly discussed. See also TORTS, vol. 26, p. 72; and *supra*, this title, *History and Development of the Doctrine*.

The former doctrine as to the power of corporations to commit torts, and their liability therefor, is thus aptly answered by Mr. Binney in his argument in *Chestnut Hill, etc., Turnpike Co. v. Rutter*, 4 S. & R. (Pa.) 12; 8 Am. Dec. 675. He says: "According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and, therefore, it is no act of the corporation at all. This doctrine leads to

It is no defense to an action of tort against a corporation that the tort was committed while transacting a business without and beyond the purview of the corporate authority and purposes, if the corporation in any clear and explicit manner recognized the business as its own, as by employing agents to superintend it, or receiving the profits arising therefrom.<sup>1</sup>

Thus, it can be no defense to a railroad company which undertakes to receive and transport passengers by steamer, that it had

absolute impunity for every species of wrong, and can never be sanctioned by any court of justice." These observations were quoted approvingly by the court in *State v. Morris, etc.*, R. Co., 23 N. J. L. 369.

While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technically *ultra vires*, it is well established that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case, the doctrine of *ultra vires* has no application. *Central R., etc., Co. v. Smith*, 76 Ala. 582; 52 Am. Rep. 353.

1. *First Nat. Bank v. Graham*, 100 U. S. 699; *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 258; *Salt Lake City v. Hollister*, 118 U. S. 256; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 202; *Alexander v. Relfe*, 74 Mo. 495; *South, etc., R. Co. v. Chappell*, 61 Ala. 527. In this last case it was said: "It is not necessary, to fix the liability, that the wrongful act, or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of the powers conferred by its charter. It may have been committed while the corporation, or its servants or agents, acting under its authority, were exceeding corporate power or engaged in business or transactions wholly foreign to its nature."

Corporations are liable for every wrong of which they are guilty, and in such cases, the doctrine of *ultra vires* has no application. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604.

In *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30, it is said that a corporation is liable to the same extent, and under the same circumstances, as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious or

negligent tort, or wrong, which it commits, however foreign to its nature or beyond its general powers the wrongful transaction or act may be.

But see *Hood v. New York, etc., R. Co.*, 22 Conn. 1; 22 Conn. 502; 23 Conn. 609, and *Bathe v. Decatur County Agricultural Soc.*, 73 Iowa 11; 5 Am. St. Rep. 651. In this latter case it was held that the agricultural society, not being authorized to employ persons to convey people in their vehicles to a fair held under its auspices, was not liable for an injury to a horse occasioned by such persons negligently running against it while so engaged.

*Mill v. Hawker, L. R.*, 9 Exch. 309, was an action for trespass against the surveyor and members, in their private capacity, of a highway board, committed by the surveyor in carrying out a resolution of the board, admitted to be *ultra vires*. It was held that the action would lie at least against the surveyor, but no decision was arrived at as to the liability of the board as a corporation, though the point arose on the argument. *Kelly, C. B.*, dissented, expressing it as his opinion that the board was liable, and no one else. He says: "It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*. If the board, by resolution or otherwise, had accepted a bill of exchange, directed their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individual who had written or authorized the acceptance would have been liable to any, and if any, to what action at the suit

no legal right so to do, when charged with responsibility for wrongs coming to those who commit their personal safety to the agents of the company, and who suffer from their negligence and misconduct.<sup>1</sup>

And when a corporation is sued in trover, as bailee, it may not

of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act is to be deemed *ultra vires*, and, therefore, no action would lie against the corporate body if it had been authorized, it is clear that a corporation would not be liable for any tort committed or authorized by them, and the decisions above cited would be contrary to law."

In *Central R., etc., Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353, Clopton, J., for the court, said: "Generally it may be said that corporations are liable for the consequences of tortious acts done by their authority, though not within the scope of their powers, express, implied, or incidental. The distinction between the liability of a corporation, on an unauthorized contract, and for a negligent or wrongful act in the performance of such contract, is clearly and properly drawn by Seldon, J., in *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 258; which was an action by a passenger on a train of cars, which by contract the two companies were unitedly running, for a breach of duty to convey him safely, the passenger having been injured by the negligence of their servants. The defense of the companies was that, in making the contract, they transcended their powers, and, consequently, in judgment of law, they were not operating the road, and did not undertake to carry the plaintiff over it. After holding that the contract to operate the consolidated roads and to transport the plaintiff was illegal and void, he says: 'It is said that if the contract was *ultra vires* and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grows out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through

the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or has been run over by a train of cars when crossing the railroad track. The duty to observe care in these cases arises not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct themselves as not through their negligence to inflict injury upon others.' An exemption from liability in such cases, because the act is *ultra vires*, would be a license to corporations to do wrongs to others. From these principles, it follows that if the defendant undertook the business of transporting persons by a mode of conveyance other than that authorized and provided by the charter, its duties and responsibilities to a passenger are the same as if the business was authorized and legal."

1. *Gruber v. Washington, etc., R. Co.*, 92 N. Car. 1; *Central R., etc., Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353; *Hutchinson v. Western, etc., R. Co.*, 6 Heisk. (Tenn.) 634. In the first of these cases, it is said that, "Conceding that running a line of steamers was not within the contemplation of the charter and was unwarranted by it, it by no means follows that upon the wrongful assumption of the business of common carriers, it can be conducted without incurring the obligations for safe transportation which belong to the exercise of those functions." In the second case the court said: "To render a corporation liable in an action *ex delicto* for damages occasioned by the negligence of its agents and servants in the performance of an *ultra vires* contract, it must be established that the contract was its corporate act, and not the unauthorized act of its officers or agents, and this may be shown by proof of authority conferred by a prior corporate act, or by a subsequent ratification by a corporate act under circumstances which required an election to ratify or repudiate it." In the last case, the court by Tenney, J., said: "If a corporation, chartered

interpose the defense that the contract of bailment was *ultra vires*.<sup>1</sup>

On the other hand, a party causing by his negligence, injury to lands, the title to which is held by a corporation, may not escape liability by showing that the corporation was not permitted by its charter to acquire title to the property, or that it was acquired for unauthorized purposes.<sup>2</sup>

**VII. RESTRAINING ULTRA VIRES ACTS—STOCKHOLDERS AND CREDITORS.**—A single shareholder may maintain suit to restrain the corporation from a contemplated transaction which is manifestly beyond its powers. This is true, notwithstanding all the other shareholders are willing to assent to and confirm the proposed act; no majority, however large, can authorize such an act. This right of the stockholder is placed upon the ground that, from the fact that the corporation was created for certain purposes, there is an implied contract that it shall not divert its powers, funds, or credit to other purposes, and that such diversion would be a species of breach of trust, as well as a violation of law which might endanger the existence of its charter.<sup>3</sup> It is not necessary for a complaining stockholder to show that any pecuniary injury

for one purpose, engage in a business different from that authorized by charter, or if its employes engage in such different business in the name of the principal, and the principal, with a knowledge of such departure, receive the profits arising therefrom, employ agents to superintend it, or in any other distinct mode recognize it as their business, and in its prosecution by its agents an injury results therefrom to another's person or property, the party so injured is entitled to maintain his action for the damages resulting from the wrongful act. The fact that the act from which the injury resulted was unauthorized by the charter of incorporation is no defense for the wrongdoer. With corporations, as with individuals, if it be engaged in a lawful business, and to promote that lawful business, resort to unauthorized acts, it must be held responsible for the consequences of such unauthorized acts, else the maxim that no 'man shall take advantage of his own wrong' is violated."

1. *First Nat. Bank v. Strang*, 138 Ill. 347.

2. *Farmers' L. & T. Co. v. Green Bay*, etc., R. Co., 11 Biss. (U. S.) 334; *Cole Silver Min. Co. v. Virginia*, etc., Water Co., 1 Sawy. (U. S.) 470; *Farmers' and Millers' Bank v. Detroit*, etc., R. Co., 17 Wis. 383.

3. *Gray v. Lewis*, 8 Eq. Cas. 526;

*Atwool v. Merryweather*, L. R., 5 Eq. 464, note; *Bird v. Bird's Patent Deodorizing Co.*, L. R., 9 Ch. 358; *Salomons v. Laing*, 12 Beav. 352; *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 13; *Clinch v. Financial Corp.*, 5 Eq. 479; *Menier v. Hooper's Tel. Works*, 9 Ch. 350; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712; *Russell v. Wakefield Water-Works Co.*, L. R., 20 Eq. 474; *Great Western R. Co. v. Rushout*, 5 De G. & S. 290; *Cunliff v. Manchester*, etc., Canal Co., 2 Russ. & M. 480 n; *Ware v. Grand Junction Water-Works Co.*, 2 Russ. & Mylne 470; *Bagshaw v. Eastern Counties Union R. Co.*, 7 Hare 114; *Auckland v. Westminster Board*, L. R., 7 Ch. 597; *Mills v. Northern R. Co.*, 5 Ch. Div. 621; *Pickering v. Stephenson*, L. R., 14 Eq. 322; *Kernaghan v. Williams*, L. R., 6 Eq. 228; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; *Rogers v. Oxford*, etc., R. Co., 2 De G. & J. 662; *Hodgson v. Powis*, 1 De G. M. & G. 6; *Cohen v. Wilkinson*, 1 Macn. & G. 481; *Zabriskie v. Cleveland*, etc., R. Co., 23 How. (U. S.) 381; *Memphis v. Dean*, 8 Wall. (U. S.) 64; *Bronson v. Lacrosse R. Co.*, 2 Wall. (U. S.) 302; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Heath v. Erie R. Co.*, 8 Blatchf. (U. S.) 347; *Zabriskie v. Hackensack*, etc., R. Co., 18 N. J. Eq. 178; 90 Am. Dec. 617; *Lanman v. Lebanon Valley R. Co.*, 30 Pa. St. 46; *Cass v. Manchester*, etc., R. Co., 9 Fed.

will result from the contemplated act; he has an interest in the continued existence of the corporation, and any act which would warrant a court in decreeing forfeiture of its charter is such an injury to his interest as will give him standing in a court of

Rep. 640; *Bergman v. St. Paul Mut. Bldg. Assoc.*, 29 Minn. 275; *Bliss v. Anderson*, 31 Ala. 612; 70 Am. Dec. 511; *Davis v. Old Colony R. Co.*, 131 Mass. 258; 41 Am. Rep. 221; *Pratt v. Pratt*, 33 Conn. 446; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130; *Tippicanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85; *Chicago v. Cameron*, 120 Ill. 447; *Teachout v. Des Moines, etc., R. Co.*, 75 Iowa 722; *Smith v. Bangs*, 15 Ill. 400; *Willoughby v. Chicago Junction R., etc., Co.* (N. J.), 39 Am. & Eng. Corp. Cas. 153.

In such a case, the question is not one of discretion or expediency. The right of the stockholder to maintain the action and enjoin the transaction is personal to himself, and independent of any right or interest of the corporation, and must be recognized, although all the other members are arrayed against him. *Da Ponte v. Northern Pac. R. Co.*, 21 Blatchf. (U. S.) 534.

"It is now no longer doubted, either in *England* or the *United States*, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law." *Wayne, J.*, in *Dodge v. Woolsey*, 18 How. (U. S.) 341.

**Instances of Ultra Vires Acts Restrained at the Suit of One, or of a Minority, of the Stockholders.**—The following

may be given as examples of *ultra vires* acts restrained at the instance of stockholders as just stated: The unauthorized purchase by a railroad company of shares in another company. *Central R. Co. v. Collins*, 40 Ga. 582; *Maunsell v. Midland, etc., R. Co.*, 1 H. & M. 130; *Salomons v. Laing*, 12 Beav. 339; *Kean v. Johnson*, 9 N. J. Eq. 401; unauthorized consolidations and leases. *Nathan v. Tompkins*, 82 Ala. 437; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455; *International, etc., R. Co. v. Bremond*, 53 Tex. 96; *Clearwater v. Meredith*, 1 Wall. (U. S.) 40; *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264; *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 178; 90 Am. Dec. 617; *Charlton v. New Castle, etc., R. Co.*, 5 Jur. N. S. 1096; *Imperial Bank v. Bank of Hindustan, L. R.*, 6 Eq. 91; *Blatchford v. Ross*, 54 Barb. (N. Y.) 42; *Young v. Rundout, etc., Gas Light Co.* (Supreme Ct.), 15 N. Y. Supp. 443; *Botts v. Simpsonville, etc., Turnpike Road Co.*, 88 Ky. 54; *Shaw v. Campbell Turnpike R. Co.* (Ky. 1891), 15 S. W. Rep. 245; *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 75; a corporation created for the purpose of constructing a railroad between certain termini, from using the funds obtained for that purpose, or from pledging its credit, for the purpose of an extension beyond those termini. *Stevens v. Rutland, etc., R. Co.*, 29 Vt. 546; a corporation organized for the purpose of granting fire and life assurance, from embarking in the business of marine insurance. *Natusch v. Irving*, Appendix to *Gow on Partnership*, 576; 2 *Cooper's Ch. Cases*, pt. 2, p. 358; a canal company from changing part of its line into a railway. *Cunliff v. Manchester, etc., Canal Co.*, 2 Russ. & M. 480, note; a water company from taking its supply from a source different from that designated in its charter. *Ware v. Grand Junction Water-Works Co.*, 2 Russ. & M. 470; a plank-road company from undertaking to establish a stage line upon the road and to procure a contract for carrying the *United States* mail. *Wiswall v. Greenville, etc., Plank Road Co.*, 3 Jones Eq. (N. Car.) 183; a bank from discounting or purchasing paper at a



equity.<sup>1</sup> But the complainant must have the interest of a share-

greater rate of discount than that allowed by the fundamental law of the corporation. *Manderson v. Commercial Bank*, 28 Pa. St. 379; from proceeding to try a complaining stockholder for the violation of certain by-laws which are beyond the scope of the purposes of the corporation. *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215; a company incorporated for the manufacture of pig-iron, from engaging in the milling business as an independent enterprise. *Yarborough v. Lumpkin*, 52 Ga. 276; the unauthorized use of notes by a bank intended to circulate as currency. *Bliss v. Anderson*, 31 Ala. 612; 70 Am. Dec. 511.

In *Mackintosh v. Flint*, etc., R. Co., 34 Fed. Rep. 582, it was held that where the holders of the common stock of a railroad corporation are entitled to, but are denied, a voice in the management and control of the corporate affairs, equity will, pending a suit for the enforcement of this right, interfere to prevent the consummation of a transaction which is injurious to their rights, and perhaps *ultra vires* the corporation, until they can have an opportunity to express their assent or dissent thereto.

**Creditors.**—"And this right may be exercised also by a creditor, either when the corporation is about to do such an act, or when the directors or other officers or agents, propose to assume powers not conferred upon the corporation. . . . The creditors have a right to restrain general speculations and acts *ultra vires*, as they have become creditors with the knowledge and understanding that they are constituted a corporation for certain purposes and with certain powers; and it is to be presumed that the credit was given with a full knowledge of these matters and a judgment of the ability to meet the obligation, based upon such purposes and powers, of the debtor." *G. W. Field in American Law Review*, vol. 13, p. 659.

**Unsecured Creditor.**—Where the amount of indebtedness that a corporation is authorized to incur is limited by its charter, the objection that a mortgage for a sum exceeding that amount is *ultra vires*, will not avail an unsecured creditor, who became such after the execution of the mortgage, and whose claim is open to the

same objection. *Allis v. Jones*, 45 Fed. Rep. 148.

**Interference of Equity with the Internal Policy of Corporations.**—Equity will not interfere with the internal policy and management of a corporation, unless it is manifest that the act complained of is *ultra vires*. *Becher v. Wells Flouring Mill Co.*, 1 Fed. Rep. 276; *Thompson v. Erie R. Co.*, 11 Abb. Pr. N. S. (N. Y. Supreme Ct.) 188; *Joslyn v. Pac. Mail Steamship Co.*, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 329; *Bach v. Pacific Mail Steamship Co.*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 373. In this last case it was held that equity will not interfere by injunction at the instance of a shareholder in a business corporation, with the general management of the corporate property, such as the manner of investing its surplus funds, unless there is a clear violation of express law or a wide departure from charter powers.

For the principles governing equitable interference to prevent mismanagement of corporate affairs, breaches of trust, fraud, etc., see *CORPORATIONS*, vol. 4, p. 184; *OFFICERS (PRIVATE CORPORATIONS)*, vol. 17, p. 39.

**Where the Act is Intra Vires, but Hurtful to the Stockholder in Another Capacity.**—The corporation will not be enjoined at the instance of a stockholder from doing what is in direct furtherance of the object of its creation, and to the advantage of all the stockholders as such, though it may be injurious to the complaining stockholder in another character, or to some other person, or to the public. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40.

**Demand Upon Corporation to Sue.**—As to whether it is necessary, in order to enable a stockholder to sustain suit in his own name, that he should aver in his bill that he has applied to the corporation, or its board of directors, to sue, and that they have refused, see *CORPORATIONS*, vol. 4, p. 280 *et seq.*, where the question is fully treated.

**1. Not Necessary to Show that Pecuniary Injury Will Result from the Act.**—*Noole v. Great Western R. Co.*, L. R., 3 Ch. 262; *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 348; *Bliss v. Anderson*, 31 Ala. 613; 70 Am. Dec. 511; *Manderson v. Commercial Bank*, 28 Pa. St.

holder;<sup>1</sup> though the *quantum* of that interest is immaterial.<sup>2</sup> A person not a stockholder, and whose rights are not infringed by a violation of its charter by the corporation, has no just cause of complaint.<sup>3</sup> It seems that a transferee of stock, who has not

379; *Wiswall v. Greenville, etc., Plank Road Co.*, 3 Jones Eq. (N. Car.) 183.

Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is not a sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the company. *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775.

"It seems to me that if such a transaction is contemplated, the charter is placed in a degree of peril that entitles any shareholder to call in the assistance of this court to prevent the company from taking such a step. The defendant's objection that the plaintiff does not state a cause of action in the complaint, because no facts are alleged going to show that he will suffer any pecuniary damage in consequence of the contract complained of, is not well taken; not only because the plaintiff alleges that the effect of the contract, if carried out, will be to render the plaintiff's stock worthless, but because if the contract is illegal, as alleged, it may lead to a total forfeiture of the charter of the company, in which the plaintiff is a stockholder." *Rendall v. Crystal Palace Co.*, 4 K. & J. 326, *per Page-Wood*, V. C.

In *Yarborough v. Lumpkin*, 52 Ga. 276, the court, in restraining a corporation created for the purpose of manufacturing pig-iron from engaging in the milling business, said: "Whether the corn and flour mill is not the best investment is not the question. The complainant has a right to insist on it that the funds of the company shall go to the uses designated by the charter, and all the parties together do not, as a corporation, have the legal right to engage in the milling business, except as a mere incident to the purposes of their incorporation."

In *Tomkinson v. South Eastern R. Co.*, 35 Ch. Div. 677, Kay, J., said: "The question . . . is whether the act proposed to be done is within the powers of the railway company, or outside its powers. If it is outside its powers, it is now perfectly settled that

any one shareholder may come to the court and say: 'This company is going to do an act beyond its powers; stop it;' and the court thereupon has no discretion in the matter."

1. *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20; *Roebeling v. First Nat. Bank*, 30 Fed. Rep. 744; *Mayer v. Denver, etc., R. Co.*, 38 Fed. Rep. 197; *Bussey v. Hooper*, 35 Md. 15; *Landes v. Globe, etc., Mfg. Co.*, 73 Ga. 176.

2. *Kean v. Johnson*, 9 N. J. Eq. 401; *Seaton v. Grant*, L. R., 2 Ch. 459; *Samuel v. Holladay*, 1 Woolw. (U.S.) 400; *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. 578; *Natusch v. Irving*, Appendix to Gow on Part. 576. In this last case the complainant had only paid one hundred and fifty pounds to the funds of the company, the whole capital being five hundred thousand pounds divided amongst about six hundred stockholders.

3. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192; *Sparhawk v. Union, etc., R. Co.*, 54 Pa. St. 401; *Camblos v. Philadelphia, etc., R. Co.*, 4 Brew. (Pa.) 563; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 432; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166. In this last case, the city of New Orleans was authorized to erect and maintain wharves within its limits, and to collect wharfage. The legislature of the state granted to a railroad company the authority to inclose and occupy for its purposes and uses a specifically described portion of the levee and batture, maintain the wharves theretofore erected on the property within those limits, and exempted it from the supervision and control which the municipal authorities exercised in the matter of public wharves. The court, by Mr. Justice Mathews, in holding that the enactment referred to infringed no rights of the city, and that the question as to whether the company in constructing, pursuant to the authority conferred, the wharf on its property and collecting wharfage, acted *ultra vires*, could not be raised by a claimant under the city, who was not a stockholder in the company, and

registered his stock, nor obtained recognition by the corporation as a stockholder, is not qualified to bring suit.<sup>1</sup> It would be otherwise in case of a wrongful refusal on the part of the corporate officers to make the transfer on the books.<sup>2</sup> It seems to be the better opinion that the fact that the complainant purchased the stock with the avowed design of preventing the consummation of the unauthorized transaction, or that he is interested in a rival corporation to whose advantage the suit will inure, or that his motives and feelings are adverse to the defendant corporation, will not disentitle him to relief.<sup>3</sup> But, it should be ob-

whose rights had not been infringed, said: "The legal interest which qualifies a complainant, other than the state itself, to sue in such a case, is a pecuniary interest in preventing the defendant from doing an act, where the injury flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The state has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly, which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed. This was the principle on which this court proceeded in the case of *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91. It is applied in *Liverpool v. Chorley Water-Works Co.*, 2 De G. M. & G. 852; *Stockport Dist. Water-Works Co. v. Manchester*, 9 Jur. N. S. 266; *Pudsey Coal Gas Co. v. Bedford, L. R.*, 15 Eq. 167."

1. *Brown v. Duluth, etc.*, R. Co., 53 Fed. Rep. 889. Here the court said: "A membership in this corporation consists in the ownership of shares thereof recognized by the corporation.

The complainant claims membership by acquiring corporate stock by transfer, but not having registered his stock and obtained recognition by the corporation as a stockholder, he can claim no other rights than those which the assignment vests in him. Undoubtedly, as between himself and his assignors, the purchase of the certificate gives him all the rights of ownership, and entitles him to demand that he shall be registered by the corporation; but until he has caused a transfer to be made upon the books of the corporation, his title, as between the corporation and himself, is not perfected, and he neither has the rights, nor is subject to the liabilities, of membership. He may bring suit, under some circumstances, to protect his individual interests in the corporate property, but he cannot participate in the management of the corporation and enforce corporate rights to restrain threatened wrongs on the corporate interest. He brings this suit in behalf of himself and his associate stockholders. Not being a stockholder himself recognized by the corporation, he is personally precluded from doing this."

Whether persons having an equitable interest in shares, but not being registered shareholders, have a standing in a court of equity to restrain *ultra vires* acts, *quære*. *Mills v. Northern R. Co.*, 5 Ch. Div. 621.

In *Stewart v. Erie, etc.*, Transp. Co., 17 Minn. 372, it was objected that the plaintiff was not entitled to sue, because he was not a stockholder, upon a *bona fide* cash subscription. The court, in negating this objection, said: "If he is a legal stockholder, his right to protect his interest as such cannot depend upon the manner in which he acquired it."

2. *Carson v. Iowa City Gas Light Co.*, 80 Iowa 638.

3. *Elkins v. Camden, etc.*, R. Co., 36

served, the plaintiff on the record must be the person urging the suit. If it appears that he is a mere nominee or puppet in the hands of another, the bill will be dismissed.<sup>1</sup>

In one instance the court refused to interfere by injunction, it

N. J. Eq. 5; *Colman v. Eastern Counties R. Co.*, 10. Beav. 1; *Seaton v. Grant*, L. R., 2 Ch. 459; *Salisbury v. Metropolitan R. Co.*, 39 L. J. Ch. 429; *Sanford v. Catawissa, etc., R. Co.*, 24 Pa. St. 378.

In *Bloxam v. Metropolitan R. Co.*, L. R., 3 Ch. 337, the plaintiff bought his shares a short time before the bill was filed, and to enable him to file the bill, Lord Chelmsford, L. C., said: "However questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit. In this respect he differs from the plaintiff in the case of *Forrest v. Manchester, etc., R. Co.*, 7 Jur. N. S. 887, who stated in his examination that the directors of a rival company directed the institution of the suit and indemnified him against costs; and Lord Westbury dismissed the bill on the ground that the plaintiff, coming in the character of a shareholder in the company, and stating that it was not his own act but an act that he had been directed to do by the other company, the suit was an imposition on the court. The plaintiff may be properly described in the words of Lord Justice Knight Bruce in *Rogers v. Oxford, etc., R. Co.*, 2 De G. & J. 662, as a person who was made 'a shareholder in the company for the mere purpose of instituting this litigation.' But if the question put by Vice Chancellor Wood in *Filder v. London, etc., R. Co.*, 1 H. & M. 493, is repeated in this case: 'Is the suit *bona fide* plaintiff's own suit, or is he merely the hand by which some one else acts?' the correct answer must be, that he consented to become the instrument of others, but for that purpose he has acquired an interest which gives him a common cause with them. I cannot say that, having chosen to place himself in this invidious position, with a real interest, though of no great amount, at stake, he is not to have the ordinary rights of a plaintiff on account of the motives which led him to acquire the means of appearing in that character."

Wallace, J., in *Da Ponte v. Northern Pac. R. Co.*, 21 Blatchf. (U. S.) 534, said: "A court of equity will not be

swift to grant the stringent relief of a preliminary injunction to an officious plaintiff who seems to have acquired his interest as a stockholder with a view of assailing transactions in the corporate affairs, of which the existing stockholders do not seem to have complained."

By Equity Rule 94 of the *United States* Supreme Court, it is provided that, "every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved upon him since by operation of law." See *Dimpfel v. Ohio, etc., R. Co.*, 110 U. S. 209; *Hawes v. Contra Costa Water Co.*, 104 U. S. 450; *Leo v. Union Pac. R. Co.*, 19 Fed. Rep. 283; *Dannmeyer v. Coleman*, 8 Sawy. (U. S.) 51; *Whittemore v. Amoskeag Nat. Bank*, 26 Fed. Rep. 819.

In reference to this rule, the court, in *Parsons v. Joseph*, 92 Ala. 405, said: "Upon an examination of these authorities it will be seen that the principle asserted rests solely upon Equity Rule No. 94, adopted by the *United States* Supreme Court, and which may be found in the preface to volume 104 of the *United States* Reports. Morawetz on Private Corporations, speaking of this rule, says: 'It was evidently designed as a rule of practice merely and was deemed necessary to guard courts from being imposed upon by the collusion of parties.' Morawetz on Priv. Corp., §§ 269, 270. The rule is not a general principle of law applicable to pleadings in all the courts, and has never been applied to the courts of this state." Compare *Alexander v. Searcy*, 81 Ga. 536; 12 Am. St. Rep. 337.

1. *Forrest v. Manchester, etc., R. Co.*, 7 Jur. N. S. 887. An injunction will not be granted at the instance of a plaintiff who purchased his stock to enable him to file a bill in aid of a private bill of other plaintiffs. *Sparhawk v. Union, etc., R. Co.*, 54 Pa. St. 401.

appearing that the corporation repudiated, and refused to be bound by, the *ultra vires* contract.<sup>1</sup>

Legislative authorization of an *ultra vires* sale of corporate franchises and property has merely the effect of waiving the rights of the public—the right of dissenting stockholders to object to the unauthorized corporate act remains unimpaired. It is not competent for the legislature to thus divest or impair the rights of shareholders *inter se* as guaranteed by the charter, without their consent.<sup>2</sup>

When the proceedings are not against particular members or officers of the corporation, on account of their misdeeds, but against the corporation, on account of corporate acts in excess of charter powers, the relief sought primarily affects the corporation itself, and it must be made a party defendant.<sup>3</sup>

Here, Woodward, C. J., said: "A chancellor will always look to the genuineness of the character in which a plaintiff comes before him. A stockholder is bound to come with clean hands, with a sincere complaint, free from all false pretenses, as much as every other party who comes into a court of equity. Injunction is not of right, but of grace, and to move an upright chancellor to enforce this strongest arm of the law, he must have, not a sham case, but a well-grounded complaint, the *bona fides* of which is unquestioned, or capable of vindication, if questioned."

In *Robson v. Dodds*, L. R., 8 Eq. 30, it was held that a suit instituted by a plaintiff having only a nominal interest, on behalf of a body of shareholders, not for the benefit of the plaintiff, but for improper purposes, at the instigation of another person, who indemnifies the plaintiff against the costs of the suit, will be treated as an imposition on the court, and the bill will be ordered to be taken off the file. In this case a bill filed by a member of a building society on behalf of himself and other members against the directors of the society to restrain certain proceedings alleged to be *ultra vires*, was ordered to be taken off the file, upon evidence that the plaintiff was a person of small means, and had purchased one share in the society for the purpose of instituting the suit, and that the suit was really instituted by his solicitor, who was not a shareholder, for the purpose of annoying two of the directors.

Whether if the act had been *ultra vires* the court would have declined to interfere, on the ground that the bill was filed by the nominee of another company with a view solely to the in-

terest of that company, *quære*. *Rogers v. Oxford, etc., R. Co.*, 2 De G. & J. 662. See also *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 662; *Ffooks v. Southwestern R. Co.*, 1 S. & G. 166.

1. *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 372.

In *Nathan v. Tompkins*, 82 Ala. 438, it was held that where the bill seeks to enjoin the consummation of an attempted consolidation with another corporation, as shown by resolutions passed by the majority at a stockholders' meeting, which declared that the consolidation "do now take place, and be fully carried into effect," followed by an election of officers of the consolidated company, the abandonment of the attempt by the defendants, on discovering the irregularity of their proceedings, not shown by an official declaration, or by the rescission of the resolutions, does not destroy the equity of the bill.

2. *Knoxville v. Knoxville, etc., R. Co.*, 22 Fed. Rep. 758.

3. **Parties Defendant—The Corporation.**—See CORPORATIONS (PRIVATE), vol. 4, p. 283; Green's *Brice's Ultra Vires* (2d Am. ed.), p. 654. At this point Mr. Brice says further: "There are, however, two decisions by Lord Romilly, M. R., where the absence of the corporation was excused. The former of these is *Daugars v. Rivaz*, 28 Beav. 233. . . . In the case of *Gregory v. Patchet*, 33 Beav. 595, the action was against the directors only in respect of proceedings *ultra vires* in the second sense, and amounting to a fraud on a minority of the shareholders."

Mr. Green, in his *American notes* (note a, p. 654), commenting on the

As a general rule it is not necessary to make the directors or governing body defendants, and particularly, when no relief is prayed against them.<sup>1</sup>

If third parties are immediately concerned in the transaction objected to by the complainant, they should be brought, or allowed to come, before the court to protect their interests; but ordinarily the stockholder's complaint is against the corporation directly, and he will be satisfied in having an end put to the objectionable transaction, without more.<sup>2</sup>

A shareholder seeking to restrain the corporation from doing an *ultra vires* act must show by distinct and definite averments that the act is *ultra vires*.<sup>3</sup>

The right of the state to restrain *ultra vires* acts is discussed in a subsequent part of this article.<sup>4</sup>

**VIII. RATIFICATION AND ACQUIESCENCE.**—It is necessary, in this connection, to distinguish between such acts as are beyond the legitimate scope and province of the corporation under any circumstances, and such as are within the scope of the franchise granted, but beyond the authority of a mere majority of the shareholders, or of the officers or agents assuming to perform them.<sup>5</sup> According to some authorities, when a corporation does an act not *per se* illegal or *malum prohibitum*, though there is want of power under the charter to do it, and which affects the interests of the stockholders only, the latter may be barred from objecting to, or repudiating, the act, either by their express assent, or intelligent, though tacit, consent, thereto.<sup>6</sup> By other authorities this

first case above, says: "This is an exceptional case and cannot be considered as militating against the rule now well settled in *America* that the corporation must be a party to the suit."

1. **The Directors.**—Green's *Brice's Ultra Vires* (2d Am. ed.) 656; Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347; Hatch v. Chicago, etc., R. Co., 6 Blatchf. (U. S.) 105; Winch v. Birkenhead, etc., R. Co., 5 De G. & S. 562. In an action to procure the cancellation of stock unlawfully issued, the directors are not necessary parties. Wood v. Union, etc., Bldg. Assoc., 63 Wis. 9. See also Dousman v. Wisconsin, etc., Min. etc., Co., 40 Wis. 418.

2. **Third Parties.**—Green's *Brice's Ultra Vires* (2d Am. ed.), p. 655. See Hare v. London, etc., R. Co., 1 J. & H. 252, where a corporation had acted upon an agreement made with several other corporations, which was alleged to be *ultra vires*, and it was held that the latter were necessary parties to a suit by a stockholder in the former to have the agreement adjudged void,

and his corporation enjoined from further acting upon it. See also Brogden v. Bank of Upper Canada, 13 Grant's Ch. (Ont.) 544.

3. *Mills v. Northern R., etc., Co.*, 5 Ch. Div. 621. See also *Oliver v. Gilmore*, 52 Fed. Rep. 562.

4. See *infra*, this title, *Rights of the State*.

5. For the different senses in which the expression *ultra vires* is used, see *supra*, this title, *Definition and General Principles*.

6. In *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, at a meeting of the shareholders, a resolution was passed by a majority, authorizing any shareholder to convert his shares into preferred shares, upon paying a certain bonus to the corporation. Many of the members took advantage of this privilege, and a large number of shares were reissued as preferred shares. After the expiration of four years, during which the preferred shares were quoted in the newspapers, and referred to in the annual reports of the board of directors, a member who had

retained his original shares, instituted suit to enjoin the corporation from giving preference to the holders of the preferred shares. The court, by Folger, J., in holding that the shareholders must be deemed to have had notice of the resolution, and to have ratified it by their acquiescence, said: "In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two phases: one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third parties dealing with it, and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent of the stockholders to the use of unauthorized power by the corporate body, will be of no avail. When it is a question of the right of a stockholder to restrain the corporation within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent, or his intelligent, though tacit, consent, to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust, to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*; then no assent of the stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts. The instance put in *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 269, is illustrative. A bank has no authority from the state to engage in benevolent enterprises, and a subscription, though formally made, for a charitable object, will be out of its powers, but it would not be otherwise an illegal act; yet if every stockholder did expressly assent to such an application of the corporate funds, though it would still be in one sense *ultra vires*, no wrong would be done, no public interest harmed; and no stockholder could object, or claim that there was an infringement of his

rights, and have redress or protection. Such an act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders, could not be avoided by any of them to the harm of third persons. This arises from the principle that the trust for stockholders is not of a public nature. . . . It was not expressly prohibited by the charter, or by any statute, to this corporation, to classify the shares of its capital stock so that one class should have greater right and value than another. It was not *malum in se* so to do, unless it was that a vested right was thereby affected, but that was not a public evil; it was a wrong that affected private persons only, and one which they might assent to. This case is thus without the principle of *Ashbury R., etc., Co. v. Riche, L. R.*, 7 H. L. 653, where the act was expressly prohibited."

This principle was reaffirmed in *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.*, 90 N. Y. 607. Here the trustees of a manufacturing corporation in good faith, assigned and transferred all of its property in the settlement of a judgment against the corporation. All of the stockholders had knowledge of the transfer at or about the time it was made, and for four years took no steps to impeach or question the same. It was held that, even conceding that the trustees had no power to make the assignment and transfer, an action was not maintainable to set it aside, either by the corporation or its stockholders; Tracy, J., saying: "If all the stockholders of this corporation had, with full knowledge, subsequently ratified the transfer and affirmed the settlement, the act, though beyond the power given the trustees by the charter, could not be subsequently avoided by the stockholders or by the corporation. This case falls within the rule established by this court in the case of *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159."

The general rule laid down in *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, was also approved in *Hollins v. St. Paul, etc., R. Co.* (Supreme Ct.), 9 N. Y. Supp. 909.

In *Phosphate of Lime Co. v. Green, L. R.*, 7 C. P. 43, the company was expressly prohibited from purchasing its own shares. The directors entered into an agreement with a stockholder amounting to a purchase of his shares. It was held that this arrangement,

doctrine is denied.<sup>1</sup> It seems to be universally agreed that a stockholder may be estopped from complaining of acts falling in the second class, as stated above, by reason of his acquiescence or ratification. Such acts are generally governed by the rules applica-

which had been carried out, could not be set aside, as it had been ratified by the shareholders.

In regard to this case Mr. Brice says: "The marginal note says 'the directors' (were prohibited, etc.), but this is wrong; it was 'the company,' though the decision apparently proceeded upon the other supposition. If not, it is decided that the company, notwithstanding, could ratify a purchase of its own shares, although it had no power to do this; then the case is directly contrary to numerous other decisions. See *ante*, p. 95. Indeed, in any view, the decision seems to be bad, unless the proceedings were *ultra vires* in the narrow sense only." Green's Brice's *Ultra Vires* (2d Am. ed.), p. 548, note.

The shareholders having acknowledged the liability of the corporation for a particular debt, may not repudiate it on the ground that it was in excess of the limit of indebtedness which the corporation was authorized by law to incur. *Poole v. West Point Butter, etc., Assoc.*, 30 Fed. Rep. 513.

"It does not follow that, because a railroad has no power to purchase or own stock in another railroad company, a stockholder who has acquiesced therein for fifteen years should have a right to object. It may be true, and doubtless is, that no assent or acquiescence of the stockholders can validate such an act; but it is a different question whether, after such a long acquiescence, the stockholder may take advantage of the invalidity of such acts. The act of purchasing and owning and voting stock in one railroad company by another railroad company may be *ultra vires*, so far as the public are concerned; but we do not think that a stockholder, who has acquiesced for fifteen years, and who has received money from the corporation by reason of the illegal act, should be allowed to make that question. His acquiescence does not render valid the illegal act of the corporation, but will prevent him from taking advantage of its invalidity." *Simmons, J.*, in *Alexander v. Searcy*, 81 Ga. 546; 12 Am. St. Rep. 337.

In *Taylor v. South & North Ala-*

*bama R. Co.*, 4 Woods (U. S.) 575, it was held that an executed contract constructively fraudulent, for the issue of preferred stock by a corporation, in excess of its charter powers, but not prohibited by law or contrary to public policy, will not, after acquiescence for the period of ten years by the shareholders, be disturbed at their instance, on the ground that it was *ultra vires*.

1. In *Ashbury R., etc., Co. v. Riche*, L. R., 7 H. L. 653, the contract was expressly prohibited by statute. It was held that the contract, "being in its inception void, as beyond the provisions of the statute, it cannot be ratified even by the assent of the whole body of shareholders." The Lord Chancellor (Lord Cairns) said: "If the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made? . . . It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized." In this case, Lord Chelmsford, concurring, observed: "If there had been an active ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association."

In *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13. *McCay, J.*, for the court, said: "Every charter is a contract between the public and the corporators, and between the corporators themselves. An act of the officers (and a corporation can act in no other way) may violate the contract with the public. According to the authorities, such an act is an illegal contract, contrary



ble to principal and agent, or by an analogous principle adopted in reference to contracts under the Statute of Frauds, where, though the contract may not be binding *ab initio*, it may still become so by the subsequent action of the parties.<sup>1</sup>

As just stated, ratification by a shareholder of acts *ultra vires* the directors or agents of a corporation, may be express<sup>2</sup> or im-

to public policy and void. But if the act only violated the contract between the corporators, it may or may not be void, accordingly as the corporators may have directed, assented to, or acquiesced in it. The former class of facts includes those which relate to enterprises or franchises not granted. The latter class includes such acts as violate those provisions of the charter which regulate the rights of the corporators with each other. It is apparent that there is a wide difference in the nature of things between these two classes of acts. The officers of a corporation may do an act which is, under the charter, beyond the legitimate scope and province of the grant, as if a railroad company should undertake to build a cotton manufactory, or a bank to build a railroad. Such an act would be an attempt to exercise a franchise not granted to the corporation. There is strength in the argument that such an act is illegal, contrary to public policy, and, however parties may have consented, they may ask the court to refuse to enforce contracts based upon or in furtherance of it. If by consent the stockholders could give validity to contracts based upon such acts, they could, in effect, grasp new franchises from the public at their pleasure. But acts of the officers of a corporation are often said to be *ultra vires* when they are wholly within the scope of the franchises granted in the charter, but they are beyond the authority conferred upon the officers. Such acts, though directly contrary to the provisions of the charter, if they be authorized by the stockholders, or be acquiesced in, or confirmed, cannot be avoided after third persons have acted upon them. They are regulated by the rules which govern the relation of principal and agent to third persons."

Similar observations were made in *Cozart v. Georgia R., etc., Co.*, 54 Ga. 384.

"An act which is in excess of the charter of a corporation, involves an unauthorized exercise of corporate

power on the part of the company, and this objection cannot be obviated by any subsequent ratification, either by the agents or by the shareholders of the corporation; so it is clear that if an act performed by an agent on behalf of a corporation is prohibited by statute or by the charter of the company, or by some general rule of the common law, no ratification by other agents or shareholders of the company can cure the illegality of the act. The ratification of an act has no greater effect than a previous grant of authority to do the act; it merely obviates the objection that the principal did not authorize the act to be done." 2 Morawetz on Private Corp. (2d ed.), § 619.

See also *Lucas v. White Line Transfer Co.*, 70 Iowa 550; 59 Am. Rep. 449; *Martin v. Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365; *Faymouth v. Koehler*, 35 Mich. 22. Neither the directors nor shareholders can waive the provisions of a statute forbidding the directors from being concerned in certain contracts with the corporation. *Barton v. Port Jackson, etc., Plank Road Co.*, 17 Barb. (N. Y.) 397.

1. *Dimpfel v. Ohio, etc., R. Co.*, 110 U. S. 209; *Watts' Appeal*, 78 Pa. St. 370; *Ashhurst's Appeal*, 60 Pa. St. 290; *McNab v. McNab Mfg. Co.* (Supreme Ct.), 16 N. Y. Supp. 448; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; *Emerson v. New York, etc., R. Co.*, 14 R. I. 555, *affirming* *Boston, etc., R. Co. v. New York, etc., R. Co.*, 13 R. I. 260; *Cozart v. Georgia, etc., Co.*, 54 Ga. 384; *Thompson v. Lambert*, 44 Iowa 239; *Scott v. Methodist Church, etc.*, 50 Mich. 528; *Perry v. Simpson, etc., Mfg. Co.*, 37 Conn. 520. See generally AGENCY, vol. 1, p. 331.

2. In *Sewell's Case*, L. R., 3 Ch. 131, the directors of a company, whose capital was three hundred thousand pounds, divided into three thousand shares of one hundred pounds each, made an unauthorized issue of one thousand additional shares beyond their capital. They subsequently called general meetings, at which resolutions

plied. Implied ratification is another term for acquiescence or laches.<sup>1</sup>

The general rule is that delay in instituting suit will not in itself constitute laches. In addition to the element of delay, there must be the element of knowledge, actual or constructive, of the material facts and circumstances of the transaction.<sup>2</sup>

After knowledge of the transaction may be imputed to the

were passed extending, as it was competent for the company to do, in that manner, under its articles of association, its capital to six hundred thousand pounds. It was held (reversing the decision of the master of the rolls), that the issue of the one thousand shares, although originally *ultra vires*, was confirmed by these resolutions.

1. See *Brotherhood's Case*, 31 Beav. 365; 8 Jur. N. S. 926; *Spackman v. Evans*, L. R., 3 H. L. 171; *Evans v. Smallcombe*, L. R., 3 H. L. 249; *Allen v. Wilson*, 28 Fed. Rep. 677; *Scott v. Methodist Church*, etc., 50 Mich. 528.

When the stockholders neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the commitment of it, this will be deemed an acquiescence in it, and if innocent third parties have been led thereby to put themselves in a position from which they cannot be taken without loss if the act were held invalid, the stockholders will be estopped from questioning it. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Sheldon Hat Blocking Mach. Co. v. Eickemeyer Hat Blocking Co.*, 90 N. Y. 607.

"If by 'acquiescence' is meant a course of conduct which amounts to active and intelligent consent, I think it very likely that many of these shareholders could not be held to have actively or intelligently consented to what was going on, but what I think is the real question to be looked at in any case of this kind is this: Had the shareholders notice of the way in which the affairs of the company were being conducted and its property was being managed, and of the rights and interests which were created with regard to the stock of the company? If they had that notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been cre-

ated and given, although it might well be that any remedy to which they would originally have been entitled against the executive of the company for any breach of duty on their part might be unaffected even by lapse of time." The Lord Chancellor (*Lord Cairns*) in *Evans v. Smallcombe*, L. R., 3 H. of L. 256.

In *Kolff v. St. Paul Fuel Exchange*, 48 Minn. 215, it was held that mere failure of a shareholder to object to certain by-laws, which were *ultra vires* the corporation, until an attempt was made to enforce them against him, did not preclude him from objecting to them.

2. See generally, *LACHES*, vol. 12, p. 533; *AGENCY*, vol. 1, p. 432; *Kelley v. Newburyport*, etc., R. Co., 141 Mass. 496; *Gilman*, etc., R. Co. v. *Kelly*, 77 Ill. 426; *Bi-Spool*, etc., Co. v. *Acme Mfg. Co.*, 152 Mass. 404; *Stokes v. Detrick*, 75 Md. 256.

In *Evans v. Smallcombe*, L. R., 3 H. L. 249, Lord Chelmsford said: "Length of time may, in many cases, materially assist in establishing the presumption of acquiescence in an act which requires confirmation to give it validity; but then it is not time, but acquiescence, which changes what would otherwise be a void act into a valid one."

"A shareholder must be considered to be fully informed of the powers given to directors by the deed of association to which he is either actually or constructively a party; but he is not bound to know, and practically he rarely does know, whether the directors are acting within, or exceeding the scope of the authority intrusted to them. Therefore, as your lordships lately held in the case of *Spackman v. Evans*, L. R., 3 H. L. 171, where the directors had exceeded their powers in allowing certain shareholders to forfeit their shares and retire from the company, the acquiescence of the remaining shareholders was not to be presumed, in the absence of proof of actual knowledge, or means of knowledge of which they had neglected to

shareholder, the length of delay on his part that will constitute a bar must depend largely, if not entirely, upon the circumstances of each case. He certainly will not be permitted to wait until events have shown whether ratification or repudiation is the more profitable, but he must act with diligence, and before the act of which he complains has become the foundation of rights or

avail themselves." Lord Chelmsford in *Downes v. Ship*, L. R., 3 H. L. 343.

"It is a most essential proposition, to be rigidly enforced, that in these joint-stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, unless in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do. If, with knowledge of that fact, the shareholders remain a long time and take no steps whatever, still more if they so remain while great alterations are going on in the company, they must be taken to have retrospectively sanctioned what has been done." Lord Cranworth in *Houldsworth v. Evans*, L. R., 3 H. L. 263.

In *Stanhope's Case*, L. R., 1 Ch. 169, Lord Cranworth, L. C., said: "That such a proceeding could not have been supported if questioned at the time it originally took place was hardly contested. But if so, lapse of time makes no difference, for there is nothing to show that any of the other shareholders, still less that all of them, were aware of what had been done. It is said that by examining books and accounts open to their inspection, and consulting the letters of shareholders, as published from time to time, any shareholder might have discovered the truth. This is not to my apprehension very clear, but even supposing it to be so, that is not sufficient. It is no part of the duty of a shareholder to look into the management of the business. He has the right, acting on the terms of the deed, to leave the management in the hands of those to whom he has confided it, and to assume that they are doing their duty. It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so."

In *Mallory v. Mallory-Wheeler Co.* (Conn.), 38 Am. & Eng. Corp. Cas. 120, Andrews, C. J., said: "Ratifica-

tion ordinarily requires some positive assertive act. *Howell v. McCrie*, 36 Kan. 636; 59 Am. Rep. 584. In order that acquiescence alone should become ratification, the delay must be so long continued that it can be accounted for only on the theory that there has been some affirmative act. *Derby v. Alling*, 40 Conn. 410; *Evans v. Smallcombe*, L. R., 3 H. L. 249. The distinction is perhaps of no consequence in this case. The real claim is that the defendant by long delay has lost all right to avail itself of the original invalidity in the plaintiff's contract; whether it was called 'ratification,' or 'waiver,' or 'acquiescence,' or 'estoppel,' it makes no very great difference. But before such right can be lost in either of the ways mentioned, certain conditions must exist. The delay must have been unreasonable. *Lewin on Trusts* (Am. ed.) \*495, 496; *Sherman v. Fitch*, 98 Mass. 64; *Indianapolis Rolling Mill v. St. Louis, etc., R. Co.*, 120 U. S. 256. The stockholder must have had an opportunity to act, and to act with perfect freedom, *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456; *Hoxie v. Home Ins. Co.*, 32 Conn. 40; 85 Am. Dec. 240; *Allore v. Jewell*, 94 U. S. 512; *DeBussche v. Alt*, 8 Ch. Div. 286; *Kempson v. Ashbee*, L. R., 10 Ch. 15; *Sayers v. Collyer*, 28 Ch. Div. 103; and have been fully advised of all the material facts in the case. *Gould v. Blodgett*, 61 N. H. 115; *Kelly v. Newburyport, etc., R. Co.*, 141 Mass. 496; *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43; *Lewin on Trusts* (Am. ed.) \*597; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R., 6 Ch. 558; *Albion Steel, etc., Co. v. Martin*, 1 Ch. Div. 580; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587."

In many cases it has been said that "the means of knowledge are the same thing in effect as knowledge itself." See *Wood v. Carpenter*, 101 U. S. 143; *Taylor v. South & North Alabama R. Co.*, 4 Woods (U. S.) 584; *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43.

equities which must be overthrown in order to extend relief to him.<sup>1</sup>

Participation by a shareholder in the transaction complained of,<sup>2</sup>

1. Watts' Appeal, 78 Pa. St. 370; *Rabe v. Dunlap* (N. J. 1893), 25 Atl. Rep. 959; *Moore v. Silver Valley Min. Co.*, 104 N. Car. 534; *Leo v. Union Pac. R. Co.*, 19 Fed. Rep. 283; *Seymour v. Spring Forest Cemetery Assoc.* (Supreme Ct.), 19 N. Y. Supp. 94. In *Ffooks v. South Western R. Co.*, 1 Sm. & G. 142, a delay of one year was held to be fatal; in *In re Pinto Silver Min. Co.*, 8 Ch. Div. 273, and *Peabody v. Flint*, 6 Allen (Mass.) 52, three years; in *Boston R. Co. v. Boston, etc.*, R. Co., 65 N. H. 393; *Burt v. British Nat. L. Assur. Assoc.*, 4 De G. & J. 158; *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *International, etc.*, R. Co. v. *Bremond*, 53 Tex. 96, two years; in *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, four years; in *Kitchen v. St. Louis, etc.*, R. Co., 69 Mo. 224, five years; in *Graham v. Birkenhead, etc.*, R. Co., 2 Mac. & G. 146, eighteen months; in *Gray v. Chaplin*, 2 Russ. 126, forty-seven years; in *Alexander v. Searcy*, 81 Ga. 546; 12 Am. St. Rep. 337, fifteen years; in *Descombes v. Wood*, 91 Mo. 196; 60 Am. Rep. 239, four years; in *Dimpfel v. Ohio, etc.*, R. Co., 110 U. S. 209, three years and eight months.

In *Chicago v. Cameron*, 120 Ill. 448, it was held that where no attempt is made to enforce the payment of bonds of a railroad company wrongfully delivered for other than a corporate purpose, a delay of eleven and a half years in the bringing of a suit by the stockholders to cancel and set aside the bonds and the deed of trust given to secure their payment, is not a bar to the relief sought.

In *Mills v. Central R. Co.*, 41 N. J. Eq. 12, it was said: "If a stockholder, in order to save his rights in such a case as this, is bound to bring suit, a delay of fifty-four days in bringing it is not, under such circumstances as this case presents, laches. Sixty days is the time given by the statute for filing an answer to a bill, and surely he may, without forfeiting his rights, take as much time to prepare his bill as the defendants would have by law to put in their answer. If a stockholder whose rights are disregarded and trampled under foot makes reasonable haste to bring suit, it is enough."

"But it is to a dissentient stockholder that the relief is granted, and to a stockholder who comes with diligence to assert his rights. If a stockholder assents to acts *ultra vires*, or, although not originally or expressly assenting, has for an unreasonable time acquiesced, and has permitted them to go unquestioned, so that other parties, who have acted upon the faith of them (as, for instance, by making large expenditures of money), would suffer great injury from their repudiation, a court of equity would not easily be induced to grant relief at the instance of such a stockholder." *Berry, J.*, in *Stewart v. Erie, etc.*, Transp. Co., 17 Minn. 372.

2. *Parsons v. Joseph*, 92 Ala. 406; *Bartelle v. North Western Cement, etc.*, Co., 37 Minn. 89; *Venner v. Atchison, etc.*, R. Co., 28 Fed. Rep. 581; *Barr v. Pittsburgh Plate Glass Co.*, 51 Fed. Rep. 33; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50. See also the cases cited in the preceding notes to this section.

In *Terry v. Eagle Lock Co.*, 47 Conn. 161, the court, by *Carpenter, J.*, said: "In many instances a court of equity will refuse to interfere with the corporation, at the instance of a stockholder, in respect to an unauthorized contract which has been fully executed, when, if the same stockholder had applied in season for an order to restrain the execution of the contract, it might have felt bound to grant the relief prayed for, and especially is this so where, as in this case, the petitioner has stood by and allowed the alleged illegal transaction to be consummated, and has allowed and even induced others to become interested in the corporation, upon the supposition that the existing state of things is legal and proper. If it be conceded, therefore, that the transaction was originally *ultra vires*, a point we do not discuss, we should not have felt justified in interfering with it at this time except for very strong reasons. Such reasons do not exist in this case. On the contrary, there are pretty cogent reasons why we should not interfere."

In *Mills v. Central R. Co.*, 41 N. J. Eq. 1, it was held that, where one of two trustees, who held stock of the

or acceptance by him of the benefits and fruits thereof, with full knowledge,<sup>1</sup> will constitute a bar to his relief.

The ratification of a particular act of the directors in excess of their authority will not authorize the performance of similar acts in the future.<sup>2</sup>

A transferee of shares with notice that the prior holder was precluded from objecting by reason of laches, is bound by the same disqualification; but a transferee in good faith and without notice is not thus barred.<sup>3</sup>

**IX. RIGHTS OF THE STATE—1. To Restrain Ultra Vires Acts.**—The right of stockholders, creditors and other parties, to invoke the interposition of equity against the commission by the corporation of *ultra vires* acts, has been treated in a former part of this article.<sup>4</sup> The question here has reference solely to the rights of the state to restrain such acts. The better opinion seems to be that equity may not, in the absence of an express grant of jurisdiction, restrain by injunction, at the suit of the state, the bare usurpation, excess, or abuse of corporate powers; that the appropriate remedy of the state in such case is at law by information in the

defendant as part of their trust funds, merely expressed an opinion favorable to the lease of the defendant's road to another, but refused to vote for a resolution by the stockholders directing the officers to make the lease, and subsequently voted against ratifying it, he was not estopped by acquiescence from assailing its validity.

In *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78, it was held that if a member of the board of directors is present at the adoption of a resolution, and aware of what is being done, and does not object, he must be presumed to have assented to it; but if such proceeding is simply preliminary to a decision by a subsequent vote of the shareholders on the consolidation of the company with another company, which can only be ultimately decided by the vote of all the shareholders, and not of the board of directors, such consent so given by a director, who is also a shareholder, will not preclude him from subsequently objecting to the consolidation.

1. *Alexander v. Searcy*, 81 Ga. 546; 12 Am. St. Rep. 337; *Tyrell v. Cairo, etc., R. Co.*, 7 Mo. App. 294; *Branch v. Jesup*, 106 U. S. 469; *Parsons v. Joseph*, 92 Ala. 406; *Venner v. Atchison, etc., R. Co.*, 28 Fed. Rep. 581; *Dexter v. Long*, 2 Wash. 435; *West Salem Land Co. v. Montgomery Land Co.*, 89 Va. 192. But the receipt of money as a part of the earnings of a corporation

is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the money came from such business. *Central City Sav. Bank v. Walker*, 66 N. Y. 429. See also *Baldwin v. Burrows*, 47 N. Y. 199.

2. *Irvine v. Union Bank, L. R.*, 2 App. Cas. 366. See also *Bloxham v. Metropolitan R. Co., L. R.*, 3 Ch. 354; *Ashbury v. Watson, L. R.*, 28 Ch. Div. 56. But in *Wood v. Boney* (N. J. 1891), 21 Atl. Rep. 574, it was held that a shareholder may not object to a meeting of the directory on the ground that it was held beyond the state of the company's incorporation, it appearing that he attended the previous meetings, nearly all of which were held at the same place, and made no objection.

3. *Ffooks v. South Western R. Co.*, 1 Sm. & G. 142; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Matter of Syracuse, etc., R. Co.*, 91 N. Y. 1; *Hollins v. St. Paul, etc., R. Co.* (Supreme Ct.), 9 N. Y. Supp. 909; *Parsons v. Joseph*, 92 Ala. 403; *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889; *Venner v. Atchison, etc., R. Co.*, 28 Fed. Rep. 581; *Ashbury v. Watson*, 28 Ch. Div. 56; 1 *Morawetz on Corporations*, § 267. See generally LACHES, vol. 12, p. 533; STOCK, vol. 23, p. 582; STOCKHOLDERS, vol. 23, p. 776.

4. See *supra*, this title, *Restraining*

nature of a *quo warranto*. In order to sustain the proceeding in equity, it must be made to appear that some injury to the public either has ensued, or is likely to ensue, from the *ultra vires* act.<sup>1</sup>

Now, by statute in some of the states, courts of chancery have

*Ultra Vires Acts—Stockholders and Creditors.*

1. The leading case upon this question in this country is *Atty. Gen'l v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371, where Chancellor Kent, in a very able and elaborate opinion, after a thorough discussion of the question upon principle, and an extensive examination of the earlier authorities, held that such a proceeding could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of *New York*, but that the proper remedy was at law by information in the nature of a *quo warranto*. The Chancellor said: "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. . . . If the defendants are carrying on banking operations contrary to law, they ought, undoubtedly, to be restrained, but I cannot be of opinion that the operation is such a mischief or public nuisance as to require the immediate and extraordinary process of this court to abate it." No appeal appears to have been taken from this decree, and an information in the nature of a *quo warranto* was thereupon filed and sustained by the supreme court of *New York*, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; 8 Am. Dec. 243. Followed in *Atty. Gen'l v. Bank of Niagara*, Hopk. Ch. (N. Y.) 354. See also *Pixley v. Roanoke Nov. Co.*, 75 Va. 325; *U. S. v. Union Pac. R. Co.*, 98 U. S. 569.

In *Atty. Gen'l v. Chicago, etc., R. Co.*, 35 Wis. 432, an injunction was granted in favor of the state, acting through its attorney general, to restrain certain railroad companies from charging tolls for the transportation of passengers and freight in excess of the rates allowed by law. Chief Justice Ryan, who delivered the opinion in this case,

assails the decision of Chancellor Kent just referred to.

In *Atty. Gen'l v. Tudor Ice Co.*, 104 Mass. 239; 6 Am. Rep. 227, it was held that, "this court has no jurisdiction in equity of an information by the attorney general against a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely on the ground that they are not authorized by the act of incorporation, and are, therefore, against public policy." Gray, J., in delivering the opinion of the court, said: "The single case in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers is *Atty. Gen'l v. Great Northern R. Co.*, 1 D. & S. 154, in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice Chancellor Wood, two years later, in *Hare v. London, etc., R. Co.*, 2 J. & H. 111."

That Vice Chancellor Kindersley did proceed upon the ground that the question involved was a matter of grave damage and injury to the public is obvious from the following observation. He said: "Wherever the interests of the public are damaged by a company established for any particular purpose by act of Parliament acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and the duty of the attorney general to protect the interests of the public by an information."

In *Atty. Gen'l v. Great Eastern R. Co.*, 11 Ch. Div. 449, James, L. J., said: "In my judgment, where the matter is a mere matter of *ultra vires*—that is, whether the managing partners of a concern are or are not doing something outside of their charter, act of Parliament, or deed of settlement—there ought to be some plain and sufficient

public mischief shown to warrant a suit on behalf of the sovereign or the people. It is not, in my opinion, sufficient to say the thing complained of is *ultra vires* and that it interests the public; that whatever may be the nature or extent of the excess complained of, the excess should be at once stopped, so that bodies incorporated and established by an act of Parliament should be taught to keep within their strict lines. I cannot accede to any such view of the duty of the attorney general or of this court. . . . It is only where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or nonfeasance, that the attorney general ought to interfere. If a particular landowner has cause of complaint, it is for him to appeal to the tribunals. If, as between the company and its shareholders, there is a wrongful application of the capital or a wrongful incurring of liabilities, it is for the shareholders to complain. If, as between the company and any persons outside the company, it is entering into contracts *ultra vires*, it is for such persons to take proper advice and guard themselves from risks which they are perfectly free to avoid. I cannot myself see any principle on which the attorney general is to interfere with a railway company's contracts merely because they are *ultra vires*, any more than he would on the like ground interfere with the contracts of any other incorporated joint-stock company carrying on other industrial enterprises."

In *Stockton v. Central R. Co.*, 50 N. J. Eq. 54, a *New Jersey* railway company leased its franchises and roads to a similar corporation of another state. The lease was not only unauthorized, but was expressly forbidden by law. Its effect was to combine coal producers and carriers, and to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the state. This was held to be a corporate excess of power tending to monopoly and the public injury, and might well be restrained by equity at the suit of the attorney general. See also *Pennsylvania R. Co. v. Com.* (Pa. 1886), 7 Atl. Rep. 363; *Gulf, etc., R. Co. v. State*, 72 Tex. 404.

In *Atty. Gen'l v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, it was held that an information in equity in behalf of the state, through its attorney

general, will lie against a *quasi* public corporation doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are not merely to impair the rights of the public in the use of one of the great ponds of the commonwealth for the purposes of boating and fishing, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation hurtful to the public health. Here the court said: "The information in this case alleges not only that the defendant is doing acts which are *ultra vires*, and an abuse of the power granted it by the legislature, but also that the necessary effect of such acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one, an information by the attorney general is the appropriate remedy."

That such proceedings may be sustained where the unauthorized act amounts to a public nuisance, requiring immediate judicial interference, such as the obstruction of highways and navigable waters, see *Atty. Gen'l v. Shrewsbury Bridge Co.*, 21 Ch. Div. 752; *Atty. Gen'l v. Cockermouth Local Board*, L. R., 18 Eq. 172; *Atty. Gen'l v. Leeds*, L. R., 5 Ch. 583; *Atty. Gen'l v. Southampton*, 2 Giff. 363; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 98; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *District Atty. v. Lynn, etc., R. Co.*, 16 Gray (Mass.) 242; *Atty. Gen'l v. Boston Wharf Co.*, 12 Gray (Mass.) 553; *Atty. Gen'l v. Tudor Ice Co.*, 104 Mass. 244; 6 Am. Rep. 227; *Atty. Gen'l v. Cohoes Co.*, 6 Paige (N. Y.) 133; 29 Am. Dec. 755; *Thompson v. Patterson, etc., R. Co.*, 9 N. J. Eq. 526; *Com. v. Pittsburg, etc., R. Co.*, 24 Pa. St. 159.

So, too, the attorney general may sue to restrain public corporations from acting *ultra vires* where public interests are involved. *Atty. Gen'l v. West Hartlepool Imp. Com'rs*, L. R., 10 Eq. 152; *People v. New York*, 32 Barb. (N. Y.) 35; *aff'd* 32 Barb. (N. Y.) 102; *State v. New York*, 3 Duer (N. Y.) 159; *Ewing v. Board of Education*, 72 Mo. 440; *State v. Saline County Ct.*, 51 Mo. 350. See also *MUNICIPAL CORPORATIONS*, vol. 15, p. 949; *INJUNCTIONS*, vol. 10, p. 777.

power to restrain by injunction any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business not allowed by its charter, and in the same manner, to restrain any individuals from exercising any corporate rights, privileges, or franchises not granted to them by the law of the state.<sup>1</sup>

**2. To Forfeit Charter—*a*.** WHEN ENFORCED.—The right of the state to revoke corporate franchises for misuser or nonuser has been said to be "the common law of the land and a tacit condition annexed to the creation of every corporation."<sup>2</sup>

The subject of forfeiture of corporate charters on the ground of mere nonuser does not find a proper place in this article.

**Obstruction of Road—Balance of Public Convenience.**—It has been held that where a railway company has diverted its road *ultra vires*, but with a *bona fide* view to public convenience, equity will not compel it to replace the road so as to make its work *intra vires*, if the result be to occasion greater inconvenience to the public, or to the complaining section of the public. *Atty. Gen'l v. Ely, etc., R. Co., L. R., 6 Eq. 106.* Here Lord Romilly, M. R., said: "I decline to interfere by injunction, either ordinary or mandatory; but as I think that the attorney general ought not to be prevented from proceeding to abate any obstruction or nuisance which he may consider to exist on the highway or on the parish road in question, I shall dismiss the information without costs, and without prejudice to the attorney general taking such steps at law, by way of indictment or otherwise, as he may think proper."

1. *People v. Ballard*, 134 N. Y. 269 (reviewing the legislation of the state upon the subject of the jurisdiction of chancery over corporations); *Atty. Gen'l v. Bank of Chenango, Hopk. Ch. (N. Y.) 598*; *Verplanck v. New York Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 88*; *Bank Com'rs v. Bank of Buffalo, 6 Paige (N. Y.) 497*; *Atty. Gen'l v. Bank of Niagara, Hopk. Ch. (N. Y.) 354*; *Chicago L. Ins. Co. v. Needles, 113 U. S. 574* (involving *Illinois* statute); *State v. Merchants' Ins., etc., Co., 8 Humph. (Tenn.) 235*.

*Texas* Constitution, art. 4, § 22, providing that the attorney general shall especially inquire into the charter rights of all private corporations, and in the name of the state take such action in the courts as may be proper to prevent any private corporation from exercising any power, etc., unauthorized

by law, is held to authorize that officer to maintain such a suit only when the public interest will be subserved thereby, and does not extend to restraining the unlawful action on the part of the corporation which will affect only private interests. *State v. Farmers' L. & T. Co., 81 Tex. 530*; *State v. Kennedy, 81 Tex. 553*.

2. *Terrett v. Taylor, 9 Cranch (U. S.) 43, per Story, J.* And the same high authority in another case, said that, "a corporation by the very terms and nature of its political existence is subject to dissolution by forfeiture of its franchises for willful misuser or non-user." *Mumma v. Potomac Co., 8 Pet. (U. S.) 287*.

And in *Com. v. Commercial Bank, 28 Pa. St. 389*, the court said: "It is now well settled by numerous authorities that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter, as for condition broken, or for a breach of trust. *Angell & Ames on Corp., p. 660*."

In *People v. Dashaway Assoc., 84 Cal. 814*, it was said that the cases of forfeiture may be divided into two classes: First, cases of perversion, as where a corporation does an act inconsistent with the nature, and destructive of the end and purposes, of the grant. In these cases, unless the perversion is such as to amount to an injury to the public, who are interested in the franchise, it will not work a forfeiture. Second, cases of usurpation, as where a corporation exercises powers and privileges which it has no right to exercise. In this class of cases the question of forfeiture is not dependent, as



Moreover, the principles governing the subject have been fully treated in other parts of this work.<sup>1</sup> This discussion will be confined, as far as practicable, to forfeitures for the exercise of powers, privileges, and liberties not granted to the corporation.

No mere intention or purpose on the part of a corporation to violate its duty can constitute ground for forfeiture of its charter. Its officers and managers have, like individuals, a *locus pœnitentiæ*.<sup>2</sup>

Where a corporation has been guilty of acts which are made by statute a cause of forfeiture, and the state by its proper representative demands a judgment of dissolution on account thereof, the court has no discretion to refuse such judgment upon the ground that public or private interest would be better subserved by preserving the existence of the corporation.<sup>3</sup> But in other cases, it seems that the court is invested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted merely of the particular power illegally assumed, and ordinarily the latter course will be adopted if the public good is sufficiently protected thereby and does not demand the former.<sup>4</sup>

It has been held that if a corporation, formed under a general

in the former, upon any interest of, or injury to, the public. See also *Harris v. Mississippi, etc., R. Co.*, 51 Miss. 605; *Commercial Bank v. State*, 6 Smed. & M. (Miss.) 617; 45 Am. Dec. 280; *People v. Hillsdale, etc., Turnpike Co.*, 2 Johns. (N. Y.) 190; *State v. Kill Buck Turnpike Co.*, 38 Ind. 71.

1. See CORPORATIONS (PRIVATE), vol. 4, p. 184; FORFEITURE, vol. 8, p. 443; FRANCHISES, vol. 8, p. 584; INFORMATION (CRIMINAL), vol. 10, p. 702; QUO WARRANTO, vol. 19, p. 660.

2. *Com. v. Pittsburgh, etc., R. Co.*, 58 Pa. St. 26. Here it was said, by Sharswood, J., that, "it would be unjust, before the act was consummated, to visit the corporate body itself with the extreme penalty of civil death and confiscation." See also *State v. Kingan*, 51 Ind. 142; *State v. Beck*, 81 Ind. 500.

3. *State v. Pennsylvania, etc., Canal Co.*, 23 Ohio St. 121; *State v. Oberlin Bldg., etc., Assoc.*, 35 Ohio St. 258. See also *State v. Minnesota Cent. R. Co.*, 36 Minn. 246; *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98; *People v. Fishkill, etc., Plank Road Co.*, 27 Barb. (N. Y.) 445.

4. *State v. Ironton Gas Co.*, 37 Ohio St. 45; *State v. Southwestern Transp. Co.*, 23 Ohio St. 166; *State v. Cincinnati, etc., R. Co.*, 47 Ohio St. 130; *State v. Greenville Bldg., etc., Assoc.*, 29 Ohio St. 92; *State v. Farmers' College*, 32 Ohio St. 487; *State v. Standard*

*Ins. Assoc.*, 38 Ohio St. 281; *State v. Middleburgh Mut. Aid, etc., Assoc.*, 38 Ohio St. 300; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 113; *Central, etc., Road Co. v. People*, 5 Colo. 39.

In *State v. Oberlin Bldg., etc., Assoc.*, 35 Ohio St. 258, the court said: "With some hesitation, a majority of the court have reached the conclusion that it will be for the interest of the stockholders, as well as the public, that we should render the latter (ouster of the particular power) instead of the former (ouster of the franchise to be a corporation) judgment. The evidence satisfies us that if the corporation is permitted to wind up its affairs, the work will be accomplished in a few months. But if the association should be ousted from its franchise to be a corporation, we would be required to appoint trustees under the act of 1878, 75 Ohio Laws 817, § 22; Rev. Sta., § 6781, and this would occasion delay and involve increased expense. Accordingly, the corporation will be ousted from the exercise of the powers referred to in the first paragraph of the syllabus, and from the power of permitting any member to hold in his own right more than twenty shares of stock, but not from its franchise to be a corporation, nor from the exercise of the power referred to in the second paragraph of the syllabus."

statute authorizing incorporation for any legal purpose except, among others mentioned, that of insurance, attempts to transact the business of life insurance, it may be proceeded against for usurping powers not conferred by law.<sup>1</sup>

Where a bank had willfully and repeatedly violated a prohibition in its charter against dealing in promissory notes, and making loans at a greater rate of discount than that specified therein, the charter was declared forfeited.<sup>2</sup>

And judgment of ouster was rendered against an insurance company for doing a banking business without authority and in violation of a general statute restraining unauthorized banking.<sup>3</sup> So if a bank makes loans to its directors,<sup>4</sup> or keeps its principal place of business and its books and records out of the state, in violation of statute,<sup>5</sup> it is subject to forfeiture.

And in *State v. People's Mut. Ben. Assoc.*, 42 Ohio St. 579, the court said: "The present membership of the defendant numbers about thirty-five hundred, chiefly worthy and deserving people, utterly innocent, if not wholly ignorant, of any misuse or abuse of its franchises. Purged of the unfortunate features of its management which this trial has developed, this association is capable of much usefulness. To visit perversion of its objects by a few upon the heads of the entire membership must result in irremediable hardship. Without stating more fully the grounds of our action or the considerations which move us, it must serve our present purpose to say that the relator's prayer that the defendant be ousted of its franchise to be a corporation is refused. Judgment will be entered, however, ousting it of the use of its franchise for the profit of its trustees and for the issuing of certificates of membership in the form complained of by the relator."

In *State v. Essex Bank*, 8 Vt. 489, it was held, that while the withdrawing of bank stock under the form of loans upon private security, if permitted with intent to reduce the effective capital below the amount required by charter, was a violation of the charter, yet on proceedings had upon information for the purpose of vacating the charter, it is not a matter of course that for this cause it will be declared vacated. The power of the court is to be exercised in discretion, and if no existing danger to the community requires it to be exercised, the court will decline to exercise it.

In *Com. v. Commercial Bank*, 28 Pa.

St. 383, where the bank had repeatedly and willfully violated a prohibition in its charter against dealing in promissory notes, and making loans at more than a specified rate of discount, the court said: "We have no doubt that a violation of the charter in either of these particulars defeats the chief object of the grant and is good ground for demanding judgment of forfeiture. These abuses are of such magnitude and affect the public so injuriously that when willfully persisted in it becomes a duty of high obligation on the part of those in authority rigidly to enforce the forfeiture."

1. *The Golden Rule v. People*, 118 Ill. 492.

An Ohio statute (66 Ohio Laws 125, 126), authorized incorporation for the purpose of building and repairing steamboats. A corporation formed under this statute undertook to build and maintain wharves. It was held that the statute did not authorize incorporation for such a purpose and judgment of ouster from doing such business was rendered. *State v. Southwestern Transp., etc., Co.*, 23 Ohio St. 166. Subsequently the company persisted in conducting this forbidden business, and in a second suit, judgment of forfeiture was rendered against it. *State v. McCoy*, unreported, cited in 33 Ohio St. 453.

2. *Com. v. Commercial Bank*, 28 Pa. St. 383.

3. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 355; 8 Am. Dec. 243.

4. *Banking Com'rs v. Buffalo Bank*, 6 Paige (N. Y.) 497.

5. *State v. Milwaukee, etc., R. Co.*, 45 Wis. 579.

It has been held that if a bank's corporate existence is fixed by its charter in a specified city or town, any attempt to exercise elsewhere those powers which are essential corporate franchises, will be illegal and subject it to forfeiture.<sup>1</sup>

But it seems that a mere negligent or mistaken excess of power, will not of itself warrant a judgment of forfeiture.<sup>2</sup>

When a corporation has given instructions to its agents, in accordance with its charter, for their guidance in the conduct of its business as prescribed by that instrument, violation of the instructions by the mere agents, without the knowledge, connivance, acquiescence or approbation of the corporation, affords no ground for forfeiture.<sup>3</sup>

Corporations of a *quasi* public character, such as railway, turnpike, telegraph, and gas companies, may not, in the absence of special authority, dispose of their property or franchises in any way calculated to disable them from discharging their duties to the public, and for such acts their charters are subject to forfeiture.<sup>4</sup>

In several very recent cases, where a corporation had entered into a trust combination, the object of which was to destroy competition in an article of commerce and create a monopoly therein, its charter was decreed forfeited. Such an act, besides being *ultra vires*, is against public policy, as being in restraint of trade.<sup>5</sup>

The courts of one state may not revoke or annul a corporate

1. *People v. Oakland County Bank*, 1 Dougl. (Mich.) 282. See also *Thompson v. Waters*, 25 Mich. 242; 12 Am. Rep. 243; *Underwood v. Waldron*, 12 Mich. 91; *Detroit F. & M. Ins. Co. v. Judge*, 23 Mich. 494.

2. For example, in *State v. Merchants', etc., Ins. Co.*, 8 Humph. (Tenn.) 235, it was held that the action of the respondent in loaning money at a higher rate than was allowable through a mistaken idea of its powers, was not a fatal abuse of its charter. See also *State v. Consolidated Coal Co.*, 46 Md. 1; *People v. Kingston, etc., Turnpike Road Co.*, 23 Wend. (N. Y.) 193; 35 Am. Dec. 551.

3. *Tuscaloosa Scientific, etc., Assoc. v. State*, 58 Ala. 54.

4. See *CORPORATIONS*, vol. 4, p. 272 *et seq.*; *Com. v. Tenth Mass. Turnpike Co.*, 5 Cush. (Mass.) 509; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521; 94 Am. Dec. 123.

In *East Line, etc., R. Co. v. State*, 75 Tex. 434, the respondent, a railroad chartered under the laws of *Texas* and doing business in that state, was sold to the *Mo., Kan. & Texas Ry.*, a competing road; forfeiture of the respondent's charter was decreed, and its

property put into the hands of a receiver.

Under similar facts, in *State v. Atchison, etc.*, R. Co., 24 Neb. 143; 8 Am. St. Rep. 164, the court declared that such consolidation was ground for forfeiture, but confined the judgment to ouster from that particular transaction. See *supra*, this title, *Contracts Unfitting Corporations for Performance of Public Duties*.

5. See *TRADE COMBINATIONS AND CORPORATE TRUSTS*, vol. 26, p. 229. In *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843, the defendant was one of the companies forming the sugar trust. All the shareholders of the defendant (in pursuance of a former agreement) joined in selling the entire stock to one Searles, one of the trustees of the sugar trust, who proceeded to operate the company in the interests of the trust. The decision contained two points: first, that the act of the shareholders in selling out their shares to the trust, was the act of the corporation; secondly, that the object of the trust was in restraint of trade and illegal, and that the act of the corporation in joining this "trust" was so

charter granted by the laws of another state, but they may withdraw franchises granted to such a corporation by their own state, when justified by the facts, and, by injunction or otherwise, prevent the corporation carrying on business therein in violation of its laws.<sup>1</sup>

*b. HOW ENFORCED.*—The subject of the modes of proceeding

much against public policy as to justify a forfeiture. Finch, J., in an extremely able opinion, said: "And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act, had sinned, yet the impalpable entity had not acted at all and must go free. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution." In same case at page 625, the same judge observes: "As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the state, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension

of those consequences by creating artificial persons to aid in producing such aggregations."

The next case was that of the whisky trust. The Nebraska Distilling Co., by vote of all the shareholders, sold all its property to trustees in trust for the Distillers' and Cattle-Feeders' Trust, the official name of the whisky trust. It was held that inasmuch as the object of the whisky trust was to destroy competition and create a monopoly, the action of the defendant corporation was a breach of its duty to the state that demanded its dissolution. *State v. Nebraska Distilling Co.*, 29 Neb. 700.

The third case was decided by the supreme court of *Ohio* in March, 1892. The shareholders of the Standard Oil Co., an *Ohio* corporation, entered into an agreement with certain other companies and certain parties as trustees, for the formation of the Standard Oil Trust. By this agreement it covenanted that corporations should be formed in each of several states as soon as possible, and that, upon the formation of such companies, the parties to this agreement (among whom were the shareholders of the defendant), would transfer their property to such new companies. It was held that the action of the shareholders was the corporate act of the defendant, and as such was properly punishable by forfeiture. But the judgment was the annulment of this particular agreement and not forfeiture, because the attorney general had failed to comply with the provision of the *Ohio* statutes requiring suit to be instituted within five years from the date of the agreement. *State v. Standard Oil Co.*, 49 Ohio St. 137.

1. *State v. Fidelity, etc., Ins. Co.* (*Ohio*, 1892), 37 Am. & Eng. Corp. Cas. 583; *State v. Fidelity, etc., Ins. Co.*, 39 Minn. 538; *State v. Western Union L. Ins. Co.*, 47 Ohio St. 167; *Talbott v. Fidelity, etc., Ins. Co.*, 74 Md. 536; 35 Am. & Eng. Corp. Cas. 262; *State v. Fidelity & Cas. Ins. Co.*, 77 Iowa 648; 26 Am. & Eng. Corp. Cas. 22; *State v.*

against a corporation to forfeit its franchises has been thoroughly treated in other parts of this work.<sup>1</sup>

c. WAIVER.—The state may exact the forfeiture of corporate rights, or waive it, as may seem best to it for the public interests. The waiver may be implied or express, as by subsequent legislative acts recognizing the continued existence of the corporation.<sup>2</sup>

Boston, etc., R. Co., 25 Vt. 433; Merrick v. Van Santvoord, 34 N. Y. 208; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 373; East Line, etc., R. Co. v. State, 75 Tex. 451; Society, etc., v. New Haven, 8 Wheat. (U. S.) 464; Importing, etc., Co. v. Locke, 50 Ala. 335. See generally, FOREIGN CORPORATIONS, vol. 8, p. 329.

1. See CORPORATIONS (PRIVATE), vol. 4, pp. 291, 302; FORFEITURE, vol. 8, p. 445; INFORMATION (CRIMINAL), vol. 10, p. 709 *et seq.*; QUO WARRANTO, vol. 19, p. 660; SCIRE FACIAS, vol. 21, p. 879 *et seq.*

2. Com. v. Union F. Ins., etc., Co., 5 Mass. 230; 4 Am. Dec. 50; People v. Los Angeles Electric R. Co., 91 Cal. 338; People v. Ulster, etc., R. Co., 128 N. Y. 240; Atty. Gen'l v. Petersburg, etc., R. Co., 6 Ired. (N. Car.) 456; Snell v. Chicago, 133 Ill. 413; State v. Minnesota Cent. R. Co., 36 Minn. 262; State v. Mississippi, etc., R. Co., 20 Ark. 495; People v. Manhattan Co., 9 Wend. (N. Y.) 351; Farnsworth v. Lime Rock R. Co., 83 Me. 440; Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 127; Com. v. Allegheny Bridge Co., 20 Pa. St. 185; People v. Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193; 35 Am. Dec. 551; People v. Bristol, etc., Turnpike Road Co., 23 Wend. (N. Y.) 222.

"The alleged forfeiture by . . . the railroad company of all or any part of its corporate rights, powers or privileges, is, therefore, impertinent to the present controversy. If it were material, the successive legislative enactments in recognition of its existence, and in confirmation and extension of its powers to which reference has already been made, . . . would operate as a remission and waiver in respect of any cause of forfeiture previously existing." *Per* Sandford, J., in *Central Crosstown R. Co. v. Twenty-third St. R. Co.*, 54 How. Pr. (N. Y. Super. Ct.) 168.

In *State v. Real Estate Bank*, 5 Ark. 506; 41 Am. Dec. 109, it was held that if, after an act has been done by a bank, which is ground for forfeiture, the legis-

lature directs the governor to borrow money from the bank, knowing the ground of forfeiture to exist, this constitutes a waiver of the forfeiture.

In *Thomas v. West Jersey R. Co.*, 101 U. S. 71, a railroad company incorporated and doing business under the laws of *New Jersey* leased its road and franchises. The lease was held to be *ultra vires* and void. While the lease was in operation, an act was passed by the *New Jersey* legislature making it unlawful for "directors, lessees, or agents" of that road to charge more than specified rates. It was argued that the use of the word "lessees" operated a ratification of the lease, but this was negated by the court in the following language: "It is not by such an incidental use of the word 'lessees' in an effort to make sure that all who collected fares should be bound by the law, that a contract, unauthorized by the charter and forbidden by public policy, is to be made valid and ratified by the state."

In *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431; 35 Am. Dec. 634, it is held, that where by the act incorporating a bank, the legislature reserves the power of annually appointing one of the directors of the institution, and an information in the nature of a *quo warranto* is filed against it for a misuser of its franchises, an appointment of a director by the governor and the senate subsequently to the filing of the information is not a waiver of the forfeiture. The legislature alone may waive such forfeiture.

And where, in *quo warranto* proceedings to oust a foreign insurance company from the right to do business prohibited by the laws of *Ohio*, the defense was set up that the offense had been condoned by the issue of a certificate to the offending corporation by the *Ohio* superintendent of insurance, Minshall, J., said: "We are of the opinion that the issuing of a license to a foreign insurance company to do business in this state is a ministerial and not a judicial act, and is not a bar to a proceeding against it in *quo warranto*,

The waiver of the right to claim forfeiture confers no new rights upon the corporation. It is merely the surrender by the sovereign of a right reserved to itself upon the original grant.<sup>1</sup>

The state may not be estopped from instituting *quo warranto* proceedings against a private corporation for the usurpation of rights and franchises, upon the ground that it has been recognized as a corporation by a municipality of the state.<sup>2</sup>

**UMPIRE**—(See also **ARBITRATION**, vol. 1, p. 689).—An umpire is a person whom two arbitrators, appointed and duly authorized by parties, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His province is to determine the issue submitted to the arbitrators on which they have failed to agree, and to make an award thereon which is his sole award. Neither of the original arbitrators is required to join in the award, in order to make it valid and binding on the parties. In the absence of any agreement or assent by the parties to the controversy, dispensing with all civil hearing by the umpire, it is his duty to hear the whole case, and to make a distinct and independent award thereon, as the result of his judgment. He stands, in fact, in the same situation as a sole arbitrator, and he is bound to hear and determine the case in like manner as if it had been originally submitted to his determination.<sup>3</sup>

**UNAVOIDABLE**—(See also **INEVITABLE ACCIDENT**, vol. 10, p. 601; **ACT OF GOD**, vol. 1, p. 173; **ACCIDENT**, vol. 18, p. 82).—See note 4.

when it is found to be exercising any of the franchises of the state without authority of law." *State v. Fidelity, etc., Ins. Co. (Ohio)*, 37 Am. & Eng. Corp. Cas. 583. See also *State v. Fidelity, etc., Ins. Co.*, 39 Minn. 538.

1. *Matter of New York El. R. Co.*, 70 N. Y. 338. Here it was held that a legislative act waiving the right to claim the forfeiture of the railroad's charter was not in violation of a constitutional prohibition against laws conferring exclusive franchises, etc.

But where a corporation engages in another and entirely different business from that contemplated by its charter, so that there is ground for forfeiture, if the legislature, during the existence of such ground of forfeiture, passes a law amending the act under which it was organized, in which its corporate existence is clearly recognized, its acquisitions confirmed, its powers enlarged and new ones conferred, so as to embrace its business as then conducted, such amendatory act will, in effect, constitute a new charter and operate as a waiver of any cause of forfeiture, and the corporation may subsequently en-

gage in any business authorized by such later and amendatory act. *People v. Ottawa Hydraulic Co.*, 115 Ill. 281.

2. *Atty. Gen'l v. Hanchett*, 42 Mich. 436.

3. *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 384; 87 Am. Dec. 723; *Ingraham v. Whitmore*, 75 Ill. 30; *Watson on Arbitration* (3d ed.) 100; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; 13 Johns. (N. Y.) 27; *Bates v. Cooke*, 9 B. & C. 407; 17 E. C. L. 407; *In re Salkeld*, 12 Ad. & El. 767; 40 E. C. L. 189; *Passmore v. Pettit*, 4 Dall. (U. S.) 271. So a testator may appoint his executor as umpire to decide disputed questions as to his intentions. *American Board, etc., of Foreign Missions v. Terry*, 15 Fed. Rep. 700.

4. **Unavoidable casualty**, as the term is used in a lease to limit the lessee's liability to pay rent, has been held to comprehend only damage or destruction arising from supervening and uncontrollable force or accidents; that is, events or accidents which human prudence and foresight could not prevent; and not to extend to a mere want of repair arising from lapse of

**UNBECOMING.**—See note 1.

**UNBORN CHILDREN.**—(See also INFANTS, vol. 10, p. 624.)

In regard to the right of a person to sue for injury or loss sustained while *en ventre sa mere*, the few adjudged cases indicate that such a right exists.<sup>2</sup>

time. *Welles v. Castles*, 3 Gray (Mass.) 323. See also *Crystal Spring Distillery Co. v. Cox*, 49 Fed. Rep. 555. A boiler explosion has been held to be such an "unavoidable casualty." *Phillips v. Sun, etc., Co.*, 10 R. I. 458. See also *LANDLORD AND TENANT*, vol. 12, p. 741; *CASUALTY*, vol. 3, p. 37.

**Unavoidable Accident—Bill of Lading.**—To constitute an unavoidable accident, within a stipulation in a bill of lading that a vessel shall not be liable for losses by such accidents, there must be a *vis major*; the interfering cause must be irresistible. A loss occurring from the breaking of an apurtenance of the vessel is not included, although the thing broken was tested and appeared sound, and broke in consequence of a hidden flaw. *Central Line of Boats v. Lowe*, 50 Ga. 509. See also *ACCIDENT*, vol. 1, p. 82; *Reaves v. Waterman*, 2 Spears (S. Car.) 107.

Unavoidable is synonymous with inevitable, and inevitable or unavoidable accidents mean any accidents produced by physical causes which are inevitable: such as lightnings, storms, perils of the sea, earthquakes, inundations, sudden death or illness. *Fish v. Chapman*, 2 Ga. 349. That unavoidable accident in this connection is synonymous with "inevitable accident," see *Fowler v. Davenport*, 21 Tex. 626.

In *Swindler v. Hilliard*, 2 Rich. (S. Car.) 286, it was held that "dangers of fire" and "unavoidable accidents by fire," as used in a bill of lading, meant the same thing. See also *INEVITABLE ACCIDENT*, vol. 10, p. 601; *ACT OF GOD*, vol. 1, p. 173.

**Unavoidable Dangers.**—This term in a bill of lading has been held to include ice and cold. *West v. Steamboat Berlin*, 3 Iowa 534.

**Unavoidable Accident—Service of Process.**—A statute provided, where a writ failed of sufficient service by reason of "unavoidable accident," that the plaintiff might have further time within which to commence his action. *Shaw, C. J.*, in speaking of this provision, said: "The term 'unavoidable accident,' we think, must have a reasonable construction, and does not mean to

limit the case to a cause which no possible diligence could guard against, but an unforeseen cause, preventing the service of the writ, where due diligence has been used, by the creditor, to commence his suit seasonably, by the due and ordinary course of law." *Bullock v. Dean*, 12 Met. (Mass.) 15. And in that case it was held that a misdescription of the residence of the defendant, which had been recently changed, fell within the term.

In *Lewis v. Smart*, 67 Me. 207, it was held that a failure by reason of delay in the mail, when the writ might have been mailed earlier, was not an "unavoidable accident."

1. **Conduct Unbecoming an Officer.**—As to the meaning of this term, as applied to the police force, see *People v. Bell* (Supreme Ct.), 3 N. Y. Supp. 314.

2. *Walker v. Great Northern R. Co.*, 28 L. R. Ir. 69. This was an action brought on behalf of the plaintiff, for injuries sustained while the plaintiff was *en ventre sa mere*, and while its mother was traveling on the railroad of the defendant company. Upon demurrer the court held that the declaration setting forth these facts disclosed no cause of action. The court decided the case upon the following grounds: That the statements of the plaintiff's declaration failed to fix any legal liability upon the defendant, since a railroad company does not insure its passengers against any injury that may be sustained during carriage; that the plaintiff's claim must be based upon some breach by the defendant of its duty, either arising generally by reason of its position as a common carrier, or by reason of some contract with the plaintiff; no duty on the part of the defendant was shown upon any ground, for it made no contract with reference to the carriage of the child, received no consideration therefor, and did not even know of the existence of the child, or the condition of its mother. This case goes no farther than the facts involved. The Lord Chief Justice expressly stated that the court did not decide the question whether an action would or would not lie at the suit of a

Under Lord Campbell's Act, an infant may claim compensation for the loss, while *en ventre sa mere*, of an immediate relative.<sup>1</sup>

**UNCHASTE CONDUCT.**—See CHASTE, vol. 3, p. 157.

**UNCONSCIONABLE BARGAINS.**—(See also CATCHING BARGAIN, vol. 3, p. 37; CONTRACT, vol. 3, p. 823; EQUITY, vol. 6, p. 683; FRAUD, vol. 8, p. 635; INADEQUATE CONSIDERATION, vol. 10, p. 325; RESCISSION, vol. 21, p. 24; SALES, vol. 21, p. 444; UNDUE INFLUENCE.)

An unconscionable bargain has been defined to be such a contract as no man in his senses, and not under a delusion, would make, on the one hand, and no honest and fair man would accept, on the other.<sup>2</sup>

A bargain will not be considered unconscionable, and set aside, for the mere inadequacy of price, or any other inequality in the bargain; because, whether the price is inadequate depends upon

child so crippled, for acts done to the mother, while *en ventre sa mere*, with the intention of so injuring the child. Counsel for the plaintiff cited those cases and authorities, both of the civil and criminal law, which hold that, in legal contemplation and for many purposes of the law, an infant *en ventre sa mere* is considered *in esse*.

In *Thelluson v. Woodford*, 4 Ves. 227, Mr. Justice Buller, in reply to an allegation of counsel that a child *en ventre sa mere* was a nonentity, said: "Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian." See also *Rex v. Senior*, 1 Mood. C. C. 346; *Reg. v. West*, 2 Car. & Kir. 784; *Austin v. Great W. R. R. Co.*, L. R., 2 Q. B. 442.

A child *in utero* is considered as living for its own benefit, but not to fix a period of time. *Blasson v. Blasson*, 2 De G. J. & S. 665.

1. In *The George and Richard*, L. R., 3 Adm. & Eccl. 466, the suit was for limitation of the liability resulting from a collision at sea. As a result of this collision several persons were killed, among them the claimant's father, the claimant being *en ventre sa mere*. Sir Robert Phillimore, delivering the judgment of the court, held that the infant *en ventre* would be entitled, within the meaning of Lord Campbell's

Act, 9 and 10 Vict., ch. 93, to claim for the death of its father, and reserved leave to it, if born alive within due time, to prefer its claim for damages before the registrar. The child was afterwards born alive and its claim was assessed. 20 W. R. 245.

In *Nelson v. Galveston, etc., R. Co.*, 78 Tex. 621; 48 Am. & Eng. R. Cas. 8, it was held that a posthumous child could recover damages for the death of his father by the negligence of a railroad, under a statute (*Texas Rev. St.*, art. 2903), providing that an action on account of injuries causing death "shall be for the sole and exclusive benefit of the surviving children," the term "children" including a posthumous child. And a posthumous child is not concluded from suing for damages for the death of his father by a suit brought by his mother and another beneficiary under the statute.

The earlier case of *Blake v. Midland R. R. Co.*, 18 Q. B. 93, turned upon the construction of Lord Campbell's Act. Mr. Justice Coleridge, delivering the judgment of the court, held that the purpose of the act was pecuniary compensation for the injury sustained, and not a solatium for wounded feelings, and further, speaking of a posthumous child, seems to have considered that such a child would come within the purview of the statute.

2. *Chesterfield v. Janssen*, 2 Ves. 125, *per* Lord Hardwicke.

"A contract so obviously unfair that it is inequitable to enforce it; a contract which no rational man would



numerous circumstances, which cannot be considered by the courts without setting afloat all contracts and rendering everything uncertain.<sup>1</sup>

To have this effect, the inadequacy or inequality must be so gross or manifest as to "shock the conscience and confound the judgment of a man of common sense," and furnish satisfactory and decisive evidence of fraud.<sup>2</sup>

But there are cases where equity will not relieve, even where there has been gross inadequacy attended with circumstances which might otherwise induce it to act, unless the parties can be put *in statu quo*; for instance, in cases of marriage settlements, it cannot unmarry the parties, so it will not interfere at all.<sup>3</sup>

In some cases of grossly unreasonable contracts, relief may be had at law.<sup>4</sup>

**UNCOMPLETED.**—See note 5.

**UNDER.**—The term "under" is used sometimes in its literal sense of below in position; but more frequently in its secondary

make and no honest man would accept." Cent. Dict.

1. 2 Bouv. Inst. No. 3852; Borrell v. Dann, 2 Hare 440; Copis v. Middleton, 2 Madd. 409; Warner v. Daniels, 1 Woodb. & M. (U. S.) 110; Erwin v. Parham, 12 How. (U. S.) 197; Cribbins v. Markwood, 13 Gratt. (Va.) 495; 67 Am. Dec. 775.

In Griffith v. Spratley, 1 Cox. 383, it was said that, "The value of a thing is what it will produce, and it admits of no precise standard. One man may sell his property for less than another would; he may sell under the pressure of circumstances which may make a smaller price more beneficial than a greater would have been under different circumstances. If courts of equity were to unravel all these transactions, they would throw everything into confusion and set afloat the contracts of mankind."

2. How v. Weldon, 2 Ves. 516; Gartside v. Isherwood, 1 Bro. C. C. 560; Coles v. Trecothick, 9 Ves. 250; Gwynne v. Heaton, 1 Bro. C. C. 9; Peacock v. Evans, 16 Ves. 517; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 275; 7 Am. Dec. 513; Juzan v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448; McKinney v. Pinckard, 2 Leigh (Va.) 150; 21 Am. Dec. 601; Mayo v. Carrington, 19 Gratt. (Va.) 107; Howard v. Edgell, 17 Vt. 9.

Lord Thurlow, in Gwynne v. Heaton, 1 Bro. C. C. 9, says: "It must be an inequality so strong, gross, and manifest, that it would be impossible to

state it to a man with common sense without producing an exclamation at the inequality of it."

"It is said that if the inadequacy be so gross and manifest that it cannot be stated to a man with common sense without shocking the conscience and confounding the judgment, it suffices of itself, in the absence of adequate explanation, to prove that a fraudulent advantage was taken, as it shows that the person did not understand the bargain he made, or that he was so oppressed that he was glad to make it, knowing its inadequacy." 2 Minor's Inst. (3d ed.) \*669.

3. 1 Story Eq. Jur. (13th ed.) 250; 1 Madd. Ch. Pr. 271; North v. Ansell, 2 P. Wms. 619.

4. As, for example, the celebrated horse-shoe case, where a party stipulated to pay for a horse, a barleycorn, a nail, doubling it every nail, and there were thirty-two nails in the horse's shoes. James v. Morgan, 1 Lev. 111; 1 White and Tudor's Lead. Cas. 668, 676.

5. **Sale of Uncompleted Railroad.**—A railroad may be said to be "uncompleted" which has neither station houses, side tracks, nor turntables, nor rolling stock fit for use, the company having leased what it used about as long as it could, and being unable to complete its construction by furnishing what is necessary for its successful operation. Young v. Toledo and South Haven R. Co., 76 Mich. 485, per Sherwood, C. J.

meaning of inferior or subordinate. "Under" a law or jurisdiction means "subject to" the law, etc.<sup>1</sup>

**UNDERGROUND WATERS.**—(See also DAM, vol. 4, p. 971; DRAINS AND SEWERS, vol. 6, p. 2; MINES AND MINING CLAIMS, vol. 15, p. 499; NEGLIGENCE, vol. 16, p. 386; NUISANCES, vol. 16, p. 922; SURFACE WATERS, vol. 24, p. 896; WATERS AND WATERCOURSES.)

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**I. DEFINITION.**—Subterranean or underground waters are of two kinds: *First*, underground currents of water flowing in defined and known channels;<sup>2</sup> *Second*, water percolating or filtering through the ground beneath the surface, either without a definite channel, or in courses which are unknown and unascertainable.<sup>3</sup>

1. *Mills v. Stoddard*, 8 How. (U. S.) 356.

**Under and Subject to.**—As to the force of this phrase used in a conveyance with reference to a mortgage created by the grantor or some prior holder of the property, see MORTGAGES, vol. 15, p. 832; *Merriman v. Moore*, 90 Pa. St. 78; *Taylor v. Mayer*, 93 Pa. St. 42; *Morris' Appeal*, 88 Pa. St. 368; *Elliott v. Sackett*, 108 U. S. 140; *Fiske v. Tolman*, 124 Mass. 256; IMPLIED COVENANTS, vol. 9, p. 936.

**Under Protest.**—See PAYMENT, vol. 18, p. 219.

**Under Sheriff.**—See DEPUTY, vol. 5, p. 625.

**Under Lease.**—See LANDLORD AND TENANT, vol. 12, p. 658; LEASE, vol. 12, p. 1036.

**Under the Hand.**—See HAND, vol. 9, p. 262.

2. "In this connection, 'defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and 'known,' which is not here synonymous with 'visible,' refers to knowledge by reasonable inference." *Gould on Waters* (2d ed.), § 281.

Where the existence of a subterranean channel can be ascertained by

means of excavations only, it is not considered as "known" within the meaning of the definition. *Ewart v. Belfast Poor Law Guardians*, 9 L. R. Ir. 172.

In *Black v. Ballymera Com'rs*, L. R., 17 Ir. 474. *Chatterton, V. C.*, said: "The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that, without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, when it emerges into light, comes from, and has flowed through, a defined subterranean channel."

**Presumption as to Underground Waters.**—In *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299, it was held that in a controversy respecting the use of the waters of a tunnel, where there is nothing to show that it is defined by any flowing stream, it must be presumed to be formed from the ordinary percolations of water in the soil. See also *Ocean Grove Camp-Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447.

3. *Gould on Waters* (2d ed.), § 280.

**II. WATER FLOWING IN DEFINED CHANNELS.**—No distinction exists between subterranean and surface waters, arising from their location, but, as in the case of surface streams, if the underground waters are well defined and constitute a regular stream, one cannot so divert it as to interfere with the rights of the owner below.<sup>1</sup> It is not necessary that the flow should be continued; it must,

The word "percolate," as used in the cases relating to the right of landowners to use water on their premises, designates any flowage of sub-surface water, other than that of a running stream, open, visible, and clearly to be traced. *Mosier v. Caldwell*, 7 Nev. 363.

"Percolating waters collected or gathered in a stream running in a defined channel, constitute property, or incidents of property, which may be acquired by grant, express or implied, or by appropriation, and when rights in such percolating waters are acquired, the owner cannot be divested thereof by the wrongful acts of another." *Cross v. Kitts*, 69 Cal. 217; 58 Am. Rep. 558.

In a controversy respecting the use of the waters of a spring, where there was nothing to show that it was supplied by any defined flowing stream, it was held, that it must be presumed to be formed by the ordinary percolations of water in the soil. *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299.

1. *Grand Junction Canal Co. v. Shugar*, L. R., 6 Ch. 483; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Cross v. Kitts*, 69 Cal. 217; 58 Am. Rep. 558; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Saddler v. Lee*, 66 Ga. 45; 42 Am. Rep. 62; *Hale v. Lea*, 53 Cal. 578; *Burroughs v. Saterlee*, 67 Iowa 66; *Taylor v. Welch*, 6 Oregon 198; *Redman v. Forman*, 83 Ky. 214; *Keeney v. Carillo*, 2 N. Mex. 480; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Lybe's Appeal*, 106 Pa. St. 626; 51 Am. Rep. 542; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 791; *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316.

Where subterranean water emerges, and afterward sinks and re-emerges, if its entire, exact course can be traced, the proprietor of the land at the lower part will be protected against the diversion of the water. *Saddler v. Lee*, 66 Ga. 45; 42 Am. Rep. 62.

The fact that a stream flows into a

sink, if it flows in a definite direction and emerges upon the surface again, and the connection between the two can be traced clearly, will not prevent the application of the rules of an ordinary watercourse. *Whetstone v. Bowser*, 29 Pa. St. 60.

In *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, *Parke, J.*, said: "Where water is on the surface, the right of the owner of the adjoining land, the usufruct to that water, is not a doubtful matter of fact . . . and indeed, if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterranean course, and then emerge again, it should never be contended that the owner of the soil, in which the stream flowed, could not maintain an action for the diversion of it as if it took place under such circumstances as would enable him to recover if the stream had been wholly above ground."

And in *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721, *Lewis, C. J.*, recognizing the distinction between mere percolation and well-defined underground streams, said: "In limestone regions streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, all for the purposes of life. To say that these streams might be obstructed or diverted, merely because they ran through subterranean channels, is to forget the rights and duties of man in relation to flowing water. But to entitle the stream to the consideration of the law, it is certainly necessary that it be a watercourse in the proper sense of the term." But see *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511.

In *Hale v. McLea*, 53 Cal. 581, a subterranean stream was held to be a well-defined channel, where its course was marked by shrubs and bushes which would grow nowhere save above such waters.

however, be well known and notorious.<sup>1</sup> A stream which can only be ascertained by excavation, is not such a stream.<sup>2</sup>

**III. PERCOLATIONS; WELLS AND SPRINGS—1. Rights Therein—Diversion or Interception of.**—The correlative rights of adjoining proprietors in reference to running streams, whether on the surface or subterranean, and the general principles relating thereto, have no application to undefined subterranean waters which are merely the result of natural and ordinary percolations through the soil; such waters are a part of the land itself, and belong absolutely to the proprietor within his territory; and it has been well settled, by a long and unbroken line of authority, that a proprietor of land may dig a well upon his own premises, mine, drain it, or in any way change its natural condition, even though in so doing he may intercept or impede the natural underground percolations, the sources of supply of his neighbor's spring or well.<sup>3</sup> He may

1. *Shively v. Hume*, 10 Oregon 76; *Chase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419; *Ewart v. Belfast Poor Law Guardians*, L. R., 9 Ir. 172. The fact that the water failed to flow from a spring, when the water was drained from a natural basin on higher ground, is not of itself sufficient to show that the water flowed in a well-defined channel. *Taylor v. Welch*, 6 Oregon 200.

2. *Chasemore v. Richards*, 7 H. L. Cas. 349. But see *Burroughs v. Saterlee*, 67 Iowa 396; 56 Am. Rep. 350.

3. *Chasemore v. Richards*, 7 H. L. Cas. 349; *Hammond v. Hall*, 10 Sim. 552; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 113 E. C. L. 708; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Balston v. Bensted*, 1 Campb. 463; *Galgay v. Great Southern R. Co.*, 4 Ir. C. L. 456; *Greatrex v. Hayward*, 8 Exch. 291; *Stainton v. Woolrych*, 23 Beav. 225; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Trout v. McDonald*, 83 Pa. St. 144; *Haugh's Appeal*, 102 Pa. St. 42; 48 Am. Rep. 193; *Lybe's Appeal*, 106 Pa. St. 626; 51 Am. Rep. 542; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 79; *Williams v. Laden* (Pa. 1894), 29 Atl. Rep. 54; *Frazier v. Brown*, 12 Ohio St. 294; *Columbus Gas Light, etc., Co. v. Freeland*, 12 Ohio St. 392; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn.

84; 71 Am. Dec. 49; *Chase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419; *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 358; *Clark v. Conroe*, 38 Vt. 469; *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 112; 77 Am. Dec. 60; *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114; *Greencastle v. Hazelett*, 23 Ind. 189; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; *Bloodgood v. Ayres*, 108 N. Y. 400; 2 Am. St. Rep. 443; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Radcliff v. Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357; *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72; *Barkley v. Wilcox*, 86 N. Y. 147; 40 Am. Rep. 519; *Bliss v. Greeley*, 45 N. Y. 671; 6 Am. Rep. 157; *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; 45 N. Y. 362; 6 Am. Rep. 100; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 573; 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Mosier v. Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497; *Taylor v. Welch*, 6 Oregon 198; *Shiveley v. Hume*, 10 Oregon 76; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Walker v. Cronin*, 107 Mass. 564; *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107; 50 Am. Dec. 709; *Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447; *Quinn v. Chicago, etc., R. Co.*, 63 Iowa 510; *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353; *Meyer v. Tacoma, etc., Water Co.*, 8 Wash. 144.

In *Acton v. Blundell*, 12 M. & W. 324, *Tindal, C. J.*, says: "The rule of

law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases for any purpose of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. *Mason v. Hill*, 5 B. & Ad. 1; 27 E. C. L. 11; *Wright v. Howard*, 1 S. & S. 190. But there is a marked and substantial difference between watercourses flowing on the surface, and springs beneath the surface. . . . In the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath the surface; no man can tell what changes these underground sources have undergone in the progress of time. . . . No proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow at all. . . . The difference in the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface; he receives as much from his higher neighbor as he sends down to his neighbor below; he is neither better nor worse; the level of the water remains the same. But if the man who sinks the well on his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil, which shall interfere with the enjoyment of the well. He has the power still further, of debarring the owner of the land in which the spring is first

found or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purpose of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage or a drinking place for the cattle, whilst the owner of the adjoining land may be prevented from mining metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring may be confined; in the present case, the nearest coal pit is at a distance of half a mile from the well; it is obvious the law must equally apply if there is an interval of many miles."

In *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511, Strong, J., observes: "A surface stream cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself nor that other can have any knowledge. No such right can be supposed to have been taken into consideration, when either the upper or lower tract was purchased. The purchaser of lands on which there are unknown sub-surface currents, must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of lands on which a spring rises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land. It would seem, therefore, most unreasonable, that the latter should have a right to prevent his neighbor from enjoying his own land in the ordinary way, either by digging wells, cellars, drains, or by quarrying and mining. A further reason for holding that there is no such right, is found in the indefinite nature and great extent of the obligation which would be imposed if the right existed. Instances have occurred where excavations have had the effect of draining land, although at the distance of several miles. Gale

as lawfully drain the natural percolations from his neighbor's land, as prevent the percolations of his own well going into the well of his neighbor.<sup>1</sup> Such underground waters are as much the property of the owners of the land as the ores, rocks, etc., beneath the surface.<sup>2</sup> It has, however, been held in some cases that, to avoid liability for an injury to the adjoining owner by withdrawing the

& Wheatley on Easements 178. Even in the case before us, the mining pit of the defendants is more than three hundred feet distant from the plaintiffs' spring. These appear to us very sufficient reasons for distinguishing between surface and subterranean streams, and denying to inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjainer's land. They are as applicable to unknown sub-surface streams as they are to filtrations and percolations through small interstices. Neither can be defined watercourses, though they may be definable."

In *New River Co. v. Johnson*, 2 El. & El. 445; 105 E. C. L. 434, *Crompton, J.*, in considering the question of the abstraction of percolating water, observes: "The only remedy of the owner of a well, from which such water has been abstracted, is to sink the well deeper."

Damages are not recoverable for injury to a spring between high and low water mark. *Com. v. Fisher*, 1 P. & W. (Pa.) 462. But see *Lehigh Valley R. Co. v. Trone*, 28 Pa. St. 206.

Where a spring was fed solely from percolating waters from a swamp or wet land surrounding the same, and not by any running stream of water, it was held that there was no water at such spring to which the right of use could be acquired, either by statutory appropriation or by adverse user, and no action would lie in favor of one who had collected the water of a spring at a reservoir, and transmitted it by pipe for use, against one who had diverted the water from a reservoir by means of a tunnel and ditch, constructed above the reservoir on his own lands. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615.

**Diversion by Stranger.**—In *Hart v. Jamaica Pond Aqueduct Co.*, 133 Mass. 488, an injunction was granted against a corporation authorized to take land, in favor of the plaintiff, who alleged that the corporation was sinking a ditch and well on the land of which the plaintiff was the owner in fee, and

which the defendant took under the statute, and was erecting thereon powerful manufacturing pumping machinery, to be used in pumping water from the well for the purpose of supplying water to its customers, and the plaintiff was the owner of other land adjoining that so taken, and also valuable water rights and privileges below the land taken, the value of which would be seriously impaired by the acts of the defendant corporation.

1. *Acton v. Blundell*, 12 M. & W. 327; *New River Co. v. Johnson*, 2 El. & El. 435; 105 E. C. L. 434. See also *Hodgkinson v. Ennor*, 4 B. & S. 241; 116 E. C. L. 239.

2. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84; 71 Am. Dec. 49; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721. In *Acton v. Blundell*, 12 M. & W. 324, *Tindal, C. J.*, said: "We think the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within the principle which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock or porous ground or venous earth, or part soil and part water; that the person who owns the surface may take therein and apply all that is there found for his own purpose at his free will and pleasure, and that if, in the exercise of such right, he interrupts so as to have the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria* which cannot become the ground of an action."

In *Frazier v. Brown*, 12 Ohio St. 294, in answering the question, "whether, in the absence of all rights derived either from contract or legislation, a landowner can have any legal claims in respect to sub-surface waters which, without any distinct and definite channel, ooze, filter, and percolate from adjoining lands into his own, when

source of supply, a landowner must make such use of his own property as is reasonable.<sup>1</sup>

In the absence of a condition arising from a grant or otherwise, no right of action arises from a subsidence of land caused by an

such waters are diverted, retained, or abstracted by the owner of such adjoining lands in the use of his property, for any object of either taste or profit, even though the use may be accompanied by a malicious intent to injure his neighbor by means of such use," Brinkerhoff, J., said: "Whatever points of casuistry may arise out of this question, cognizable in the court of individual conscience, under the perfect law of Christian morals, we are of opinion that the law of the land can recognize no such claims; and that, subject only to the possible exception of a case of unmixed malice, the maxim, '*cujus est solum ejus est usque ad cælum et ad infernos*,' applies to its full extent; and whatever damage may result from the exercise of this absolute right of property to adjoining proprietors, from the loss of such percolating sub-surface waters, is *damnum absque injuria*. With the exception of the *nisi prius* decision of Lord Ellenborough, in *Balston v. Bensted*, 1 Campb. 463, and an *obiter* opinion of Parke, B., in *Dickinson v. Grand Junction Canal Co.*, 93 Eng. L. & Eq. 520, the current of decisions, to this effect, both in *England* and the *United States*, is uniform and consistent. I say, the opinion of Parke, B., was *obiter*; for, on an inspection of that case, it will be seen that the plaintiff's rights, as there claimed by him, well rested on a basis of express contract; and there was no occasion to pass upon any principle of natural right growing out of the other relations of the parties." After reviewing the leading cases, the learned judge goes on to say: "The reasoning is briefly this: in the absence of express contract, and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative right in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy. (1) Because the existence, origin, movement and course of such waters, and the causes which govern and direct their movements, are so secret, occult and concealed, that an attempt to administer any set of legal

rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and the general progress of improvement in works of embellishment and utility."

1. While the following *New Hampshire* cases have been considered a departure from the rule laid down in *Acton v. Blundell*, 12 M. & W. 324, they can, it seems, be reconciled on the ground of the reasonableness of the use, by a proprietor, of his own land.

In *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; 82 Am. Dec. 179, the court, by Bartlett, J., said: "No landowner has an absolute and unqualified right to the unaltered natural drainage or percolation to or from his neighbor's land. In general, it would be impossible for a landowner to avoid disturbing the natural percolation or drainage, without a practical abandonment of all improvement or beneficial enjoyment of his land. Any doctrine that would forbid all action of a landowner, affecting the relations as to percolation or drainage between his own and his neighbors' lands, would in effect deprive him of his property; and so far from being an application of the maxim, '*cujus est solum*,' etc., would work a general denial of effect to it. If A has the absolute and unqualified right to receive from and discharge into the adjoining land of B all the drainage and percolation, as they naturally flow between that land and his own, this is substantially a right to a use of B's land, practically depriving the latter of all beneficial enjoyment of his property, and in effect amounting to an appropriation of it; and as B and the other neighboring landowners must have similar rights, the improvement, or beneficial occupation of land, becomes in fact impossible, and property in the soil for nearly all useful purposes is annihilated. But we do not think it follows from this, as some recent cases

adjoining owner exercising the right of draining his own soil, as a man has, at common law, no right to the support of subterranean waters.<sup>1</sup>

Where, in the appropriation and use of land taken for public purposes, subterranean waters are intercepted or diverted, there can be no right of action,<sup>2</sup> except when it is provided by statute

have held, that a landowner has the full and unlimited ownership, and the absolute and unqualified right of control of all water in or upon his land not gathered into natural water-courses; for the non-existence of an absolute right does not conclusively disprove the existence of a qualified right.

We need not argue that some rights exist; that the owner of the land may make some use of the water in it; that he may do some acts that will affect to some extent the drainage; that a well may be dug, under some circumstances, although it will draw water by percolation from a water-course, from adjoining land, or even from the well of a neighbor. If the views we have expressed are correct, they have already indicated the sole ground of the qualification of the landowner's right in such cases, and that is, as in certain cases of water-courses, the similar rights of others; and this will of course determine the extent of the qualification, which, as in the analogous cases suggested, and for the same reasons, is the rule of reasonable use—of a reasonable exercise of one's own right.

As in these cases of the water-course, so in the drainage, a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others. The rights are correlative, and, from the necessity of the case, the right of each is only to a reasonable user or management; and whatever exercise of one's right or use of one's privilege, in such case, is, under all the circumstances, and in view of the rights of others, such a reasonable user or management is not an infringement of the rights of others; but any interference by one landowner, with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable. Every interference by one landowner with the natural drainage, actually injurious to the land of another, would be unreasonable, if not made by the former in the reasonable use of his own property." See also *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Gerrish v.*

*Clough*, 48 N. H. 11; 2 Am. Rep. 165; 97 Am. Dec. 561.

1. *Popplewell v. Hodkinson*, L. R., 4 Exch. 248; *Elliott v. Northeastern R. Co.*, 10 H. L. Cas. 333. See also *Smith v. Thackerah*, L. R., 1 C. P. 564; *Humfries v. Brodgen*, 15 Q. B. 739; *Partridge v. Scott*, 3 M. & W. 220; *Wilson v. Waddell*, L. R., 2 App. Cas. 95.

In *Gumbert v. Kilgore* (Pa. 1886), 6 Cent. Rep. 406, it was held that the owner of coal in lands was liable to the owner of the surface of the land, where a spring was ruined in failure of the former to properly support the surface, but that he was not liable, if the injury was caused by mining operations, when the surface was supported in its natural condition.

2. *New River Co. v. Johnson*, 2 El. & El. 435; 105 E. C. L. 434; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710.

So a city is not liable because, in constructing a sewer, it drains away the water which formerly percolated to a spring. *Elster v. Springfield*, 49 Ohio St. 82.

In *Alexander v. U. S.*, 25 Ct. of Cl. 87, where the plaintiff's well was rendered dry by the construction of the Washington water tunnel, authorized by an act of Congress, it was held that the injury to the plaintiff was *damnum absque injuria*, the *United States* having a clear title to the property.

**Injury to Well or Spring by Railroad Excavation.**—So in *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 112; 77 Am. Dec. 60, it was held that the railroad company, for the purpose of constructing its road, had the same right to excavate within the limits of its right of way, that a private individual had to dig upon his land for any purpose, and that one, whose well or subterranean stream was rendered dry by such excavation, had no action; the injury was *damnum absque injuria*. But in *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 114; 1 Am. Rep. 709, a railroad company was held liable for such damages, the railroad being considered to



that compensation shall be made for consequential damages,<sup>1</sup> or where the defendant has merely a usufruct in the land.<sup>2</sup>

**2. Effect of Grant.**—A landowner, however, may be liable for an interference with underground waters, if his acts are in derogation of an express grant. So, where there has been a grant of water, express or implied, from which it is clearly intended to secure to the grantee a regular supply of water, the grantor is liable, if by interference either with known water-courses or by excavations, he diminishes such supply.<sup>3</sup> But, in the absence of such intent,

have acquired only a special right to, and usufruct in the land, upon the condition of paying all damages which might be thereby occasioned to others.

1. *Trowbridge v. Brookline*, 144 Mass. 139; *Parker v. Boston*, etc., R. Co., 3 Cush. (Mass.) 107; 1 Am. Rep. 709.

In *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; 53 Am. Dec. 212, where damages had been assessed by the commissioners to a landowner for an injury done to him by excavations for the purposes of the railroad, in the manner prescribed by the legislature authorizing the act, it was held that a special action could not be maintained for an injury to the plaintiff's spring; but that such injury must be presumed to have been considered by the commissioners when the damages were assessed.

2. *Hart v. Jamaica Pond Aqueduct Co.*, 133 Mass. 488.

In *Parker v. Boston*, etc., R. Co., 3 Cush. (Mass.) 107; 1 Am. Rep. 709, in regard to the injury to the plaintiff's well, Shaw, C. J., said: "The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*. But the respondents did not own the land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

But in *Hougan v. Milwaukee*, etc., R. Co., 35 Iowa 558, where the railroad acquired "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway," it was held that it had the legal right to dig a well upon such right of way, and to use the

water supplied by percolation for railway purposes, although such use materially diminished the supply of water in a spring upon the grantor's land.

3. *Whitehead v. Parks*, 2 H. & N. 877.

In *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16; 25 Am. Rep. 125, where the defendant granted to a cheese manufactory situated on his land, the use of water which was then conducted to the factory from springs on the defendant's lands, and covenanted to warrant and defend the granted premises against himself and all other persons, he was held liable for withdrawing his supply from such springs. In delivering the opinion of the court, Rapallo, J., said: "We are of opinion that these acts of the defendant were in derogation of his grant and in violation of his covenant, and that the judgment of the court below was justified by the facts. The case of *Bliss v. Greeley*, 45 N. Y. 671; 6 Am. Rep. 157, is cited on the part of the defendant as in conflict with this judgment; but the facts of that case were very different. In that case there was simply a grant of a right to dig and stone up a certain spring and to conduct the water therefrom through the grantor's land, with a covenant of warranty; and the court held that this did not preclude the grantor from sinking another spring on his land at some distance from the one granted, although the effect of it was to render the latter useless, provided such act was not done unnecessarily or maliciously. In that case the parties were regarded in the same light as adjacent owners, and the rule was applied that the defendant might lawfully dig on his own land, though the effect was to cut off the water from the plaintiff's spring by percolation; but there was no grant in that case of any particular supply of water from the spring or from the defendant's lands. The grant was merely of the right to the spring, and secured

as where the grant secures to the grantee no greater right than he would have if he were the owner of the land, the grantor, or those claiming under him, are not precluded from draining their lands as they may see fit, although their acts interfere with the grantee's supply.<sup>1</sup>

**3. Effect of Prescription**—(See also PRESCRIPTION, vol. 19, p. 6).—The owner of land cannot acquire by prescription the right to receive percolations through the land of another,<sup>2</sup> for no pre-

the plaintiff no greater rights than such as he would have had if he had owned the land on which it was situated. In this case the grant was of the use of the water which, at the time of the grant, was being conducted from the spring, and the intent was to secure the continuance of that supply of water, it being essential to the operation of the cheese factory conveyed."

And in *Paine v. Chandler*, 134 N. Y. 385, the defendant was the owner of two adjoining farms, upon one of which was a spring, from which pipes had been laid conducting the water to the barn-yard on the other, thus furnishing sufficient water for the stock thereon and other domestic uses. The defendant sold and conveyed the farm so supplied to the plaintiff by a deed which conveyed the land with appurtenances, but made no mention of the spring or the pipes. The defendant dug a well upon his farm a few feet from the spring, which resulted in lowering the water of the spring below the mouth of the pipes so as to deprive the plaintiff of the use of the water. It was held that the uninterrupted flow of the water being essential to the full enjoyment of the estate conveyed, the defendant could be restrained from the use of the well causing the injury.

1. *Bliss v. Greeley*, 45 N. Y. 671; 6 Am. Rep. 157; *Chesley v. King*, 74 Me. 164; 43 Am. Rep. 569; *Davis v. Spaulding*, 157 Mass. 431; *Brain v. Marfell*, 41 L. T. N. S. 455.

A purchased land subject to the reservation that B should have the right to conduct the water from a certain spring thereon to his adjoining land. Where A, by a well dug upon his own land, cut off the subterranean supply to the spring to the injury of B, it was held that A might lawfully do so, and that B could not claim the absolute right to an uninterrupted flow through A's land. *Lybe's Appeal*, 106 Pa. St. 626; 51 Am. Rep. 542.

So a grant of "a certain spring or

fountain of water," does not deprive the owner of the land of the right of properly draining his land to make it productive, even though in some unknown mode the drainage of the land may affect his supply of water. *Buffum v. Harris*, 5 R. I. 243.

In *Davis v. Spaulding*, 157 Mass. 431, it was held that the grant of a mere easement to draw water from a well by a pipe laid in the ground, which was used at the time of the grant, did not preclude the grantor, or his subsequent vendee, from digging another well or reservoir on his own land, although the result was to destroy the value of the easement by diversion of the water which formerly percolated into the well.

The sale of a well and right to convey the water away gives merely a right to water risen in the well, and interception of the water before it reached the well affords no cause of action. *Brain v. Marfell*, 41 L. T. N. S. 455. See *Huston v. Leach*, 53 Cal. 262.

A grant of the privilege of taking water from springs gives only a right to take it where it issues from the ground by natural forces, and not from wells or orifices in the ground where the water does not flow to the surface. *Mixer v. Reed*, 25 Vt. 254; *Clark v. Conroe*, 38 Vt. 469.

A grant of a well passes a fee in the land occupied by the well. *Johnson v. Rayner*, 6 Gray (Mass.) 107.

2. *Dickinson v. Grand Junction Canal Co.*, L. R., 7 Exch. 282; *Elster v. Springfield*, 49 Ohio St. 82.

In *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352, *Ellsworth, J.*, said: "Nothing is gained by a mere continued preoccupation of water under the surface. Why should any advantage be gained by preoccupation? Each owner has an equal and complete right to the use of his land, and to the water which is in it. Water combined with earth, or passing through it, by perco-

sumption can arise against a party on the ground of long enjoyment of a privilege by another, until it is shown that the privilege in some way interferes with the right of the party whose grant is proposed to be presumed,<sup>1</sup> and in the case of a surface stream,

lation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. . . . No man is bound to know that his neighbor's well is supplied by water percolating his own soil; and he ought not, therefore, to be held to lose his rights, by such continued enjoyment. He cannot know that the first well requires any other than the natural and common use of water under the surface; nor can he know from whence the water comes; nor by what means it appears in one place or the other; nor which of the persons who first or afterwards opens the earth, encroaches upon the right of the other."

In *Frazier v. Brown*, 12 Ohio St. 294, Brinkerhoff, J., in stating the proposition of the text, said: "The doctrine of prescription, or presumption of grant from lapse of time, can have no proper application to the question: 1. Because the party against whom the doctrine will have to be applied, could not be reasonably required to enter his caveat against the appropriation of a thing so hidden and obscure as is percolating underground water; and, 2. Because the appropriation of such waters by an adjoining proprietor is not an infringement of his rights, so as to become the subject of legal redress, until such time as he himself has occasion to appropriate them."

In *Chasemore v. Richards*, 5 H. & N. 988, Lord Chelmsford, commenting upon the case of *Balston v. Bensted*, 1 Camp. 463, said: "The great distinction between water flowing in a definite stream, and water percolating through the ground, was not presented to the mind of the judge; and his observation, that twenty years' exclusive enjoyment was decisive as to the presumption in favor of the party, showed that he thought only of the rights which arose out of the uninterrupted enjoyment of a right to water flowing in a defined stream on the surface of the ground. The case terminating as it did could hardly be considered as an authority upon the point." *Creswell, J.*, in *Chasemore v. Richards*, 5 H. & N. 988, said: "There are two cases in

our books, and I believe two only, which support a claim to water not in a flowing stream—*Balston v. Bensted*, 1 Camp. 463, and *Dickinson v. Grand Junction Canal*, L. R., 7 Exch. 282. In the former of these cases, Lord Ellenborough said: 'There could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it.' His lordship is not reported to have explained the nature of the presumption to be made, but at that period it seems to have been supposed that the right of a riparian owner arose out of some presumption of a grant by those higher up the stream. It is, therefore, probable that in the case then before him, which related to the water springing up in the plaintiffs' lands, he meant that an enjoyment of it for twenty years raised a presumption of a grant—a presumption not generally made against those who had no knowledge of the existence of that which they are to be presumed to have granted; and I do not understand that anyone has insisted in this case upon the doctrine of presumption, which was altogether repudiated in the other case alluded to (*Dickinson v. Grand Junction Canal Co.*, L. R., 7 Exch. 280), where Lord Chief Baron Pollock, in giving the judgment of the court, says: 'We consider it as settled law, that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above and below, but is *ex jure nature*, and an incident of property, as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighboring proprietor, who cannot dig so as to deprive it of the support of his land.' It would seem, therefore, that the court of exchequer, as instituted when that judgment was given, would not have rested an opinion in favor of the plaintiff, in *Balston v. Bensted*, 1 Camp. 463, on the ground stated by Lord Ellenborough."

1. *Cooper v. Barber*, 3 Taunt. 99.

In *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721, *Lewis, C. J.*, said:

the right of a proprietor to have it running in its natural course is not from a presumed grant acquired by the user, but is *ex jure naturæ*, and an incident of property.<sup>1</sup>

In several of the states, and in the case of public lands, however, the rights acquired, by priority of possession, to the use of water for mining and other purposes, are recognized and confirmed by statute.<sup>2</sup>

**4. Effect of Motive of Act of Appropriation.**—The question as to the effect of the motive prompting the diversion or interference of underground waters, has seldom been directly before the courts, but there are numerous conflicting *dicta*. Some authorities lay stress upon it, considering the motive as an important, although not necessarily a controlling, element.<sup>3</sup> However,

"The prior occupancy of the spring for the uses of a tannery, gave no right of servitude over or through the land of the adjacent proprietor. No man, by mere prior enjoyment of the advantages of his own land, can establish a servitude upon the land of another. This is shown in a satisfactory manner by *Mr. Justice Rogers, in Hoy v. Sterrett, 2 Watts (Pa.) 330; 27 Am. Dec. 313*. But it seems to be thought that the enjoyment of the spring by the plaintiff below and those under whom he claims, for the period of twenty-one years, gives him a right to its continued existence, although the neighboring proprietor may thereby be deprived of the chief value of his own land. This depends upon the question whether the enjoyment of the spring was of such a character as to have invaded his neighbor's rights, so as to enable the latter to maintain an action for the injury. No man can be barred by a statute of limitation for not bringing his action within the prescribed period, until it is first shown that he had a cause of action which he could have maintained. . . . Presumption is when the conduct of the party out of possession cannot be accounted for without presuming a conveyance. *Kingston v. Lesley, 10 S. & R. (Pa.) 390; Butz v. Ihrie, 1 Rawle (Pa.) 218*. The *Frederician Code of Prussia* provides that no presumption can take place where no negligence can be imputed, and accordingly by that code a man may raise his house after any lapse of time, although it darkens his neighbor's house. *Frederician Code of Prussia* 48, 55. The same principle is to be found in the law of *Scotland*. *Erskine's Prin. Law of Scotland* 350. The owner of the mine had no right to complain of his

neighbor below for making use of the spring on his own lands. As long as it flowed there, he had a right to make use of it, and the owner of the land through which the supply of water came, was not in any manner injured by such use of the water. Silence or acquiescence, where one is not injured and has no cause of complaint, can never deprive him of his rights on the ground of presumption of a grant. No man can be said to have granted a right about which it would have been an impertinent interference to utter a complaint. *Hoy v. Sterrett, 2 Watts (Pa.) 331; 27 Am. Dec. 313; Merlin's Repertoire de Jurisp., verb. "Cours d'Eau."* . . . By the *Civil Code of Louisiana*, non-apparent servitudes can be established only by title. Immemorial possession alone is not sufficient to acquire them. *Louisiana Civ. Code, tit. "Servitudes," p. 240; Pardessus Traité des Servitudes, § 95*. In a case like the present, therefore, there is no reason whatever for depriving the plaintiff in error of the enjoyment of his rights of property on his own land, on the ground of any servitude established by time, or acquiescence for the benefit of the tannery of the adjacent tract."

1. *Dickinson v. Grand Junction Canal Co., L. R., 7 Exch. 299; Shury v. Piggot, 3 Bulst. 339; Tyler v. Wilkinson, 4 Mason (U. S.) 397; Swett v. Cutts, 50 N. H. 439; 9 Am. Rep. 276; Roath v. Driscoll, 20 Conn. 533; 52 Am. Dec. 352*.

2. *MINES AND MINING CLAIMS*, vol. 15, p. 580.

3. See *Greenleaf v. Francis, 18 Pick. (Mass.) 117; Howland v. Vincent, 10 Met. (Mass.) 373; 63 Am. Dec. 442; Parker v. Boston, etc., R. Co., 3 Cush.*

where the question of motive generally, and its application to the interception of subterranean waters, has arisen, the weight of authority is to the effect that, in accordance with the principle that the law deals with the outward acts, when the use which a landowner makes of his property is lawful in itself, the law will not take cognizance of the motive which prompts the use, even where it results in damage to another, and that the exercise of the legal right cannot be effected by the motive which controls it.<sup>1</sup> The

(Mass.) 115; 1 Am. Rep. 709; Roath v. Driscoll, 20 Conn. 533; 52 Am. Dec. 352; Chesley v. King, 74 Me. 164; 43 Am. Rep. 569; Haldeman v. Bruckhart, 45 Pa. St. 521; 84 Am. Dec. 511. See also Chasemore v. Richards, 7 H. L. Cas. 349; Acton v. Blundell, 12 M. & W. 324.

In Wheatley v. Baugh, 25 Pa. St. 528; 64 Am. Dec. 721, Lewis, C. J., says: "Neither the civil law nor the common law permits a man to be deprived of a well or spring, or stream of water, for the mere gratification of malice." And in Swett v. Cutts, 50 N. H. 439; 9 Am. Rep. 276, Bellows, C. J., said: "Ordinarily a landowner may dig a well upon his own land, even though, by percolation, it draws the water from his neighbor's land, or even his well; but it would present a very different question if the well was dug by him with the express purpose of transferring the water in his neighbor's spring or well to his own, and knowing that this would be the result."

But in none of these cases was the question decided in favor of the plaintiff, upon the ground of the motive of the defendant's act. And in Walker v. Cronin, 107 Mass. 556, Wells, J., commenting upon Greenleaf v. Francis, 18 Pick. (Mass.) 117, said: "It is intimated, in this case, that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly, it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive a not her of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial."

1. Phelps v. Nowlen, 72 N. Y. 39; 28

Am. Rep. 93; Kiff v. Youmans, 86 N. Y. 324; 40 Am. Rep. 543; Corey v. People, 45 Barb. (N. Y.) 262; Mahan v. Brown, 13 Wend. (N. Y.) 261; Delhi v. Youmans, 50 Barb. (N. Y.) 316; Moran v. McClearn, 60 Barb. (N. Y.) 388; Panton v. Holland, 17 Johns. (N. Y.) 92; 8 Am. Dec. 369; Harwood v. Benton, 32 Vt. 734; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Chatfield v. Wilson, 28 Vt. 49; Frazier v. Brown, 12 Ohio St. 294.

See also in analogy, Stevenson v. Newnham, 13 C. B. 285; 76 E. C. L. 285; Floyd v. Barker, 12 Co. 23; Taylor v. Henniker, 12 A. & E. 488; 40 E. C. L. 105; Heald v. Carey, 11 C. B. 977; 73 E. C. L. 976; Clinton v. Myers, 46 N. Y. 511; 7 Am. Rep. 373; Covanhoven v. Hart, 21 Pa. St. 501; 60 Am. Dec. 57; Jenkins v. Fowler, 24 Pa. St. 308; Fowler v. Jenkins, 28 Pa. St. 176; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; 15 Am. Rep. 599; Smith v. Johnson, 76 Pa. St. 191; Hunt v. Simonds, 19 Mo. 583; Auburn, etc., Plank Road Co. v. Douglass, 9 N. Y. 444.

In Jenkins v. Fowler, 24 Pa. St. 308, Black, J., said: "Malicious motives make a bad act worse, but they cannot make that a wrong, which in its own essence is lawful."

"The refusal or discontinuance of a favor gives no cause of action." Mahan v. Brown, 13 Wend. (N. Y.) 261. See also Old Colony R. Co. v. Miller, 125 Mass. 1; 28 Am. Rep. 194.

In Chatfield v. Wilson, 28 Vt. 49, where the defendant had placed within his own land, and near the line of the plaintiff's land, dry, hard earth which prevented the plaintiff from availing himself of water which had before percolated into the plaintiff's land, and supplied a reservoir placed therein, it was held that the act, being lawful of itself, could not subject the defendant to damages, unless by reason thereof some right of the plaintiff had been violated.

In *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93, the defendant was the owner of land upon which there was a mineral spring, surrounded by an artificial embankment. The plaintiff dug a well on his own land, striking a vein of mineral water, which rose high enough to be conducted in pipes to his bathhouse. The defendant, for no purpose beneficial to himself, and simply to divert the water from the plaintiff's well, lowered the embankment on his land, thereby cutting off the supply of water from the plaintiff's well. The court held that the plaintiff had sustained no legal injury, and could not sustain an action for such diversion of the water, and that the maxim *Sic utere tuo ut alienum non laedas*, does not apply to an act legal in itself.

In *Pickard v. Collins*, 23 Barb. (N. Y.) 444, it was held that the injury arising by the use of one's own land so as to injure another's property must be a legal injury; an invasion of some legal right, as erecting a building, or carrying on a business which so obstructs the enjoyment by another of his property, as to amount to a nuisance; or removing the soil, or placing something on the soil of another, and that the liability of the defendant does not depend upon the motives with which the erection was made. It was said that the fallacy of a contrary doctrine, which was contended for, "consists in its overlooking a fatal defect in a right of action in such a case—the absence of any legal injury. Bad motives in doing an act which violates no legal right of another, cannot make that act a ground of action." See also *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373.

In *Frazier v. Brown*, 12 Ohio St. 294, the court, by Brinkerhoff, J., observed: "As an act unlawful in itself, resulting in injury to another, whatever may have been the motive with which it was done, is none the less the subject of legal redress, so the act done, to-wit, the using of one's own property, being lawful in itself, the motive with which it is done—whatever it may be as a matter of conscience—is, in law, a matter of indifference."

In *Porter v. Durham*, 74 N. Car. 767, the court, by Rodman, J., observed: "We have not given any attention to the alleged motives of the defendants. Their motives are immaterial. The question is only as to their rights."

"The civil law deems an act, other-

wise lawful in itself, illegal, if done with a malicious intent of injuring a neighbor, *animo vicino nocendi*. The same principle is adopted in the laws of Scotland, where an otherwise lawful act is forbidden, if done *in æmulationem vicini*; but this principle has not found a place in our law." Lord Wensleydale, in *Chasemore v. Richards*, 7 H. L. Cas. 349.

In considering the question of motive, Mr. Angell, in his work on Water-courses (7th ed.), p. 189, observes: "Whichever side the balance of opinion upon the question under consideration may fall, it is quite evident that it is not settled by authority. Whenever settled, it must be upon principles involving the natural rights of property. These rights are based upon two fundamental maxims, one looking to the extent of one's ownership in land, the other to his mode of using it. The time-honored legal maxim, *Ejus est solum, ejus est usque ad cælum*, has given to the word land, when standing alone and not otherwise restricted, an extension bringing within its scope everything which exists naturally, or has been fixed artificially, between the center of the earth and the confines of the atmosphere; and to this extent the landowner has an absolute right of property. But in as much as every owner or occupier of land may be brought into close proprietary relations with neighbors on all sides of him, it is obvious that he and his neighbors cannot be mutually indifferent to each other's doings. To regulate these relations, the common law, otherwise so jealous of interference between the owner and his property, imposes upon him the simple rule, *Sic utere tuo ut alienum non laedas*. The rights, which spring from the exclusive power, given by common law to every possessor of property, of doing what he likes with his own, when modified by the rule last stated, may be conveniently designated natural rights. Or, to state the same thing somewhat differently, all which can be enjoyed and practised by neighboring proprietors, each within his own territorial space, without materially affecting the natural state of the other's property, or their respective means of dealing with it, constitutes in the aggregate the natural rights of property. Any further restraint, which the owner or occupier may be obliged to put upon the free exercise of his physical power over the land, must rest upon contract,

maxim, *Sic utere tuo ut alienum non lædas*, is held to be applicable to such injuries as the law will redress, and not such as are *damnum absque injuria*.<sup>1</sup> These principles, it will be seen, are not applicable to pollution of such waters.<sup>2</sup>

5. **Pollution of Underground Waters**—(See also NUISANCES, vol. 16, p. 922; SURFACE WATERS, vol. 24, p. 933).—There is a distinction between the appropriation of underground water before it becomes the property of the adjoining landowner, and the poisoning or pollution of such water to which he is entitled; and it is well settled that, where a proprietor permits, or causes, filthy or contaminated water to percolate from his soil into adjoining land to the injury of his neighbor, he is liable in damages;<sup>3</sup>

either express or implied. Now, it becomes important to know the precise force given by courts to the maxim, *Sic utere tuo ut alienum non lædas*. 'Confessedly,' said Strong, J., in *Halde-man v. Buckhart*, 45 Pa. St. 517; 84 Am. Dec. 511, 'the absolute dominion of a proprietor over his land to the center of the earth is restrained by it. But what is an injury? The rightful use of one's land may cause damage to another without any legal wrong. An act done, causing damage which the law will redress, must not only be hurtful, but wrongful. There must be *damnum et injuria*, an act not merely hurtful, but an infringement of another's right.' And in *Ellis v. Duncan*, 21 Barb. (N. Y.) 230, Strong, J., said: 'There can be no doubt of the correctness of the injunction, *Sic utere tuo ut alienum non lædas*; but I have frequently had occasion to remark that it refers to such injuries only as the law will redress, and not to the large class which are usually denominated *damnum absque injuria*.'

1. Broom's Legal Maxims, p. 366; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230.

2. See *infra*, this title, *Pollution of Underground Waters*.

3. *Ballard v. Tomlinson*, 29 Ch. Div. 115; 32 Alb. L. J. 289; 24 Am. L. R. 634; *Hodgkinson v. Ennor*, 4 B. & S. 229; 116 E. C. L. 229; *Tenant v. Goldwin*, 2 Ld. Raym. 1089; 1 Salk. 360; *Fletcher v. Rylands*, L. R., 3 H. L. Cas. 330; *Snow v. Whitehead*, 27 Ch. Div. 588; *Turner v. Mirfield*, 34 Beav. 390; *Smith v. Kenrick*, 7 C. B. 515; 62 E. C. L. 513; *Embrey v. Owen*, 6 Exch. 353; *Wood v. Waugh*, 3 Exch. 748; *Womersley v. Church*, 17 L. T. N. S. 190; *Humphries v. Cousins*, 2 C. P. Div. 239; *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56; *Wilson v. New Bed-*

*ford*, 108 Mass. 261; 11 Am. Rep. 352; *Wahle v. Reinbach*, 76 Ill. 322; *Decatur Gas Light, etc., Co. v. Howell*, 92 Ill. 19; *Perrine v. Taylor*, 43 N. J. Eq. 128; *Haugh's Appeal*, 102 Pa. St. 42; 48 Am. Rep. 193; *Shuter v. Philadelphia*, 3 Phila. (Pa.) 228; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 230; *Jacobs v. Worrell*, 15 Leg. Int. (Pa.) 139; *Collins v. Chartiers Valley Gas, etc., Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 79; *Frazier v. Brown*, 12 Ohio St. 295; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412; 40 Am. Rep. 118; *Red River Roller Mills v. Wright*, 30 Minn. 249; 44 Am. Rep. 194; *Woodward v. Aborn*, 35 Me. 271; 43 Am. Dec. 699.

The injury, it seems, must be positive and substantial, and such as fairly imposes upon the party causing it the duty of restraint. *Columbus Gas Light, etc., Co. v. Freeland*, 12 Ohio St. 392.

He whose filth it is, is required to keep it on his own premises at his peril. *Tenant v. Goldwin*, 2 Ld. Raym. 1089; 6 Mod. 311.

If a person should place, or negligently allow, a deleterious substance to remain, whereby the useful waters of another may be corrupted, either by the ordinary or extraordinary, yet not very uncommon, action of the elements, he is liable for an injury resulting therefrom. *Woodward v. Aborn*, 35 Me. 271; 43 Am. Dec. 699.

In *Kinnaird v. Standard Oil Co.*, 89 Ky. 469, the defendants were the owners of a warehouse which they used for the purpose of storing oil, and the evidence showed that it leaked from the casks and passed into the ground and polluted the stream from which the spring of the plaintiff was supplied; the defendants were held liable for the injury resulting to the plaintiff,

although they were ignorant of the fact that the oil was affecting the spring. Prior, J., said : " It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of the land to use the underground water upon it that originates from percolation, or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor. . . . Because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both ; and, while he can thus appropriate it, he has no right to pollute the water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beasts on his farm. " As soon as water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it ; and, if property, it then becomes as much the property of the last, as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it ; and, still, it will scarcely be insisted that he can poison the atmosphere with noxious odors, that reach the dwelling of his neighbor to the injury of himself or family ; if not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor, producing the same results, and still escape liability for the damages sustained ; and, whether the water escapes the one way or the other, is immaterial."

In *Ballard v. Tomlinson*, 29 Ch. Div. 125, the leading case on this subject, the defendant was held liable for injury to his neighbor's well by permitting sewage from his house to flow into the well. Lindley, L. J., said : " The right to foul

water is not the same as the right to get it ; and in my opinion does not depend on the same principles. *Prima facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbor's supply. In such a case the neighbor must submit to the inconvenience. But *prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbor, and whether the nuisance is effected by sending filth onto his neighbor's land, or by putting poisonous matter on his own land and allowing it to escape on his neighbor's land, or whether the nuisance is effected by poisoning the air which his neighbor breathes, or the water he drinks, appears to me wholly immaterial. . . . So, if a man chooses to poison his own well, he must take care not to poison the waters which other persons have a right to use as much as himself. To hold the contrary, on the ground that the water is not their property until they get it, and that it is poisoned before they get it, is to take an inadequate view of the subject, and to overlook the fact that the law of nuisance is not based exclusively on rights of property."

Hon. Edmund H. Bennett, in a note to *Ballard v. Tomlinson*, 24 Am. Law Reg. 634, says : " The decision of Mr. Justice Pearson in the court below (*Ballard v. Tomlinson*, 26 Ch. Div. 194), was founded upon the proposition that, ' as the defendants were clearly entitled to pump every drop of water out of their well and leave the plaintiff with none, it would be no difference in principle if they deprived him of the water by rendering it unfit for use ; ' and similar views seem to have been entertained in *Upjohn v. Board of Health*, 46 Mich. 549 ; *Green-castle v. Hazelett*, 23 Ind. 186 ; *Brown v. Illius*, 27 Conn. 84 ; 71 Am. Dec. 49. The fallacy of this reasoning is abundantly shown by the judgments in the case on appeal. It does not follow that because one has a right to use a thing on his own land, he may lawfully send it into his neighbor's premises in a condition to work an injury to him. . . . The American cases, therefore, while recognizing to its fullest extent the right of every landowner to use, detain, and even totally abstract all underground percolating water, yet quite agree with the decision in *Ballard v. Tomlinson*, 29 Ch.



and to prevent such injury a court of equity will grant an injunction.<sup>1</sup> So, a recovery has been had against one who has poisoned or contaminated waters of a spring or well of an adjoining owner, by permitting gas to escape therein,<sup>2</sup> by the erection of a cemetery or private burying-ground,<sup>3</sup> or

Div. 115, that he is liable for corrupting it, and thus causing injury to the well of an adjoining owner. . . . The true cause of action therefore in this case, is not exactly that the defendant contaminated underground percolating water, but that he allowed his impure sewage to escape from his premises to the plaintiff's, and the circumstance that it reached there by underground percolation instead of by a surface stream is quite immaterial. The mode of transmission is unimportant."

1. *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 443; *Dillon v. Acme Oil Co.*, 49 Hun (N. Y.) 565; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Haugh's Appeal*, 102 Pa. St. 42; 48 Am. Rep. 193; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56; *Frazier v. Brown*, 12 Ohio St. 294. So in *Turner v. Mirfield*, 34 Beav. 390, a perpetual injunction was granted to restrain the defendant from allowing noxious and unfit refuse matter to flow from the manufactories into his land, but which percolated into the defendant's collieries. And in *Womersley v. Church*, 17 L. T. N. S. 190, the defendant was prevented by injunction from maintaining a cesspool through which water percolated to the plaintiff's well.

2. *Collins v. Chartiers Valley, etc., Gas Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 79; *Ottawa Gas Light, etc., Co. v. Graham*, 28 Ill. 74; 81 Am. Dec. 263; *Ottawa Gas Light, etc., Co. v. Thompson*, 39 Ill. 601; *Decatur Gas, etc., Co. v. Howell*, 92 Ill. 19; *Columbus Gas Light, etc., Co. v. Freeland*, 12 Ohio St. 392.

In *Ottawa Gas Light, etc., Co. v. Graham*, 28 Ill. 74; 81 Am. Dec. 263, the gas company erected its works near the well of the plaintiff, and, by permitting the substances used in the manufacture of the gas to permeate the soil, injured the water in the plaintiff's well; the jury was instructed that if such substances did soak into the ground, percolate through the soil, and render the water of the plaintiff's well

unfit for use, they should render a verdict for him, which was held proper.

In *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257, the company was held liable for the poisoning of the plaintiff's well by reason of fluids percolating from the works of the gas company.

In *Sherman v. Fall River Iron Works Co.*, 5 Allen (Mass.) 213, the court held that the fact that other causes have contributed to render the water of a well impure and unfit for use, is no bar to an action to recover damages for an injury to the water, caused by the escape of gas into it; but it may be shown in mitigation of damages.

3. *Clark v. Lawrence*, 6 Jones Eq. (N. Car.) 83; 78 Am. Dec. 241; *Barnes v. Hathorn*, 54 Me. 124. See also *CEMETERIES*, vol. 3, p. 55.

In *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56, *Foster, J.*, said: "To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precaution which the law requires is, effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence. In the present instance, there was no pretense of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The percolations appear to have been constant, and their existence to have been known to the defendant." See also *Baird v. Williamson*, 15 C. B. N. S. 376; 109 E. C. L. 375; *Fletcher v. Rylands*, L. R., 3 H. L. Cas. 330.

Whenever it can be clearly proved that a burial ground is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere or the water of springs or wells, a court of equity will grant its injunctive relief, upon the ground that the act will be a nuisance of a kind likely to produce

by the construction of sewers and privy vaults.<sup>1</sup> And the fact that the plaintiff appropriates the polluted water by artificial means as, for instance, by pumping, has been held to be immaterial, where a right to the water exists.<sup>2</sup>

There are several cases, however, in which the distinction is apparently not recognized, and the pollution or poisoning by the

irreparable mischief, and one which cannot be adequately redressed by an action at law. *Clark v. Lawrence*, 6 Jones Eq. (N. Car.) 83; 78 Am. Dec. 241.

In *Kingsbury v. Flowers*, 65 Ala. 479; 39 Am. Rep. 14, the court held that a private burial ground near dwellings, is not necessarily a nuisance, and its use can only be enjoined on clear proof of probable injury.

In *Greencastle v. Hazelett*, 23 Ind. 186, the distinction pointed out in the text was not recognized, and it was held that a city had complete authority to establish cemeteries, and discretion to judge of their necessity.

1. In *Alston v. Grant*, 3 El. & Bl. 128; 77 E. C. L. 127, it was held that where, by reason of the faulty construction of a sewer, filth percolated therefrom into the cellars of the adjoining premises, the owner of the land was liable for the damages, even when he was the owner of the premises into which the filth percolated, and the parties complaining were his own tenants. See also *Brown v. Sargent*, 1 F. & F. 112; *Barton v. Syracuse*, 37 Barb. (N. Y.) 292; *Child v. Boston*, 4 Allen (Mass.) 41; 81 Am. Dec. 680; *McSwiney v. Haynes*, 1 Ir. Eq. Rep. 322. See generally DRAINS AND SEWERS, vol. 6, p. 2.

**When the Erection of a Privy Will Be Enjoined as a Nuisance.**—*De Give v. Seltzer*, 64 Ga. 423; *Rand v. Wilber*, 19 Ill. App. 395. In *Wahle v. Reinbach*, 76 Ill. 322, the defendant was about to erect a privy on his own lot, about eight feet from the dwelling house and cellar, and within twenty feet of the well of the complainant. It was held that a bill for an injunction to restrain the completion of the same, would lie, there being no adequate remedy at law for the injury that would result therefrom to the complainant. The court observes: "Privies are regarded as *prima facie* nuisances, and although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet if they are built or allowed to remain in such a condition as to annoy others in the proper enjoyment of their

property, by reason either of the noisome smells that arise therefrom or by the escape of filthy matter therefrom upon the premises of another, or so as to corrupt the water of a well or spring, they are nuisances in fact." See also *Cleveland v. Citizens' Gas Light Co.*, 20, N. J. Eq. 201; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654.

2. In *Ballard v. Tomlinson*, 29 Ch. Div. 115, the defendant polluted his own well with sewage, and the water therefrom percolated into the plaintiff's well, which was on a lower level. The latter used his well by pumping. It was contended that inasmuch as such water came to him, not through the operation of natural causes alone, but was appropriated by artificial means, the defendant was not liable; but the court held otherwise. *Brett, M. R., reversing Pearson, J.*, in *Ballard v. Tomlinson*, 26 Ch. Div. 194, said: "It seems to my mind to be clear from the decisions that no one has at any time any property in water percolating below the surface of the earth, even when it is under his own land, but it is equally clear that everybody has a right to appropriate that percolating water, at least whilst it is under his own land, to the extent that he may take it all so as to prevent any of it going on the land of his neighbor. But his neighbor below him according to the flow of water, has an equal right before the person above has appropriated it to take it all. He has a right to take the water from the percolating stream under his own land to this extent, that he may thereby cause the water which is under the land above him to come on his own land when it otherwise would not, and then to take that, and so on, until he has absolutely dried the land above him. This percolating water below the surface of the earth is therefore a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole. . . . The principle of natural user does not

plaintiff is held to be no ground of action;<sup>1</sup> but these cases, it seems, may be reconciled in the principle, that the use of his own property which causes the injury must be natural, proper, and free from negligence, the question not being as to the property rights, but whether or not the defendant is guilty of a nuisance.<sup>2</sup>

apply at all. The plaintiff, if he has a right to use anything in nature, has a right to exercise that user by all the skill and invention of which man is capable, and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished, because he uses the most artificial or most ingenious methods."

1. In *Upjohn v. Board of Health*, 46 Mich. 542, Cooley, J. observes: "If withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure, and no negligence. The one act destroys the well, and the other does no more." This, however, was mere *dicta*.

In *Brown v. Illius*, 27 Conn. 84; 71 Am. Dec. 49, the action was for a nuisance; the defendant was engaged in operating gas-works, and he had negligently and improperly placed upon the surface of the lot and along the line of the plaintiff's lands, near his well, large quantities of coal tar, gas lime, and other offensive and noxious materials, which were washed by the surface water into the well, and also soaked and penetrated into the ground, and thence into the soil around and adjoining the well, whereby the waters were corrupted, etc. The court held that the negligently leaving of noxious substances on the land, which are washed by the rain along the surface of the ground into a neighbor's well, is actionable, and that it makes no difference if the substances are carried upon the surface of the ground, or have soaked into the soil, and are carried along the surface by means of water diffusing itself according to natural laws; but where such noxious substances, by penetrating or being buried within the soil, have affected the subterranean currents by which a well is supplied, and have corrupted the water, the party placing such substances on or within his soil is not

liable, unless he acted maliciously. See also *Upjohn v. Board of Health*, 46 Mich. 542; *Acton v. Blundell*, 12 M. & W. 324.

And in *Dillon v. Acme Oil Co.*, 49 Hun (N. Y.) 565, the court, by Haight, J., says: "It is only in exceptional cases that the channels of subterranean streams are known and their courses defined; it is only in such exceptional cases that the owner can know beforehand that his works will affect his neighbor's wells or supply of water, and we are, therefore, of the opinion that in the absence of negligence and of knowledge as to the existence of such subterranean water-courses, when the business is legitimate and conducted with care and skill, there can be no liability if such subterranean courses become contaminated." In this case a distinction is drawn between contaminating a subterranean stream and contamination by soaking or percolation, as follows: "In the case of *Womersley v. Church*, 17 L. T. N. S. 190, the owner of the adjoining premises dug a cesspool within fourteen yards of the plaintiff's well, so near that the liquid from the cesspool percolated through and contaminated the water in the well. It was held that the defendant's use of the cesspool should be restrained. To the same effect is the case of *Norton v. Scholefield*, 9 M. & W. 665. It will be observed, however, that the contamination was by soaking or percolating of the sewage matter from the cesspool, and was not from the contamination of subterranean streams, so that in case oil from the defendant's works had soaked or percolated along the surface, thus reaching and contaminating the plaintiff's wells, a different question would have been presented."

2. See *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276. In *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 79, the court, by Mitchell, J., said: "The dividing line between the right to use one's own, and the duty not to injure another's, is one of great nicety and importance, and frequently of difficulty. The *Pennsylvania* decisions have endeavored

with unusual care, to preserve the substance of both rights, as far as their sometimes inevitable conflict may permit. With regard to the use and control of flowing water, and of water courses, the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445, definitely settled the rule that for unavoidable damage to another's land, in the lawful use of one's own, no action can be maintained. No other result seems possible, without restricting the uses, derogating from the full enjoyment, and diminishing the value of property. But the rule does not go beyond proper use and unavoidable damage. It is thus clearly expressed in the opinion of our Brother Clark: 'Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*.' That this is the rule as to surface streams was conceded by the defendant below; but it contended that, as to subterranean waters, or at least as to percolations and hidden streams, an owner was not bound to pay any attention to the effect of his operations within his own land, upon the land of others. The learned judge below, though seeing and expressing the force of the reasons for a uniform rule applicable to both classes of waters, felt himself so far constrained by adjudicated cases that he directed a verdict for the defendant.

"The use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. On the question of negligence, the question of knowledge is always important, and may be conclusive. Hence the practical inquiry is, first, whether the damage was necessary and unavoidable; secondly, if not, was it sufficiently obvious to have been foreseen, and also preventible by reasonable care and expenditure? In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445, the damage was unavoidable. In *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721, it was not ascertainable beforehand; hence the plaintiff had no cause of action in either case. Later cases, following *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721, have held that injury to springs, wells, etc., supplied by mere percolation, was not

actionable, and the reason has always been the same—that the damage could not be foreseen or avoided. If the boundaries of knowledge have been so enlarged as to make an end of the reason, then, *cessante ratione, cessat ipsa lex*. Geology is a progressive, and now, in many respects, a practical science; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, 'Since the decisions in *Acton v. Blundell*, 12 M. & W. 324, and *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721, probably more deep wells have been drilled in Western *Pennsylvania* than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown and merely speculative, as to the flow of water underground, has been, by experience in such cases as this, reduced almost to a certainty.' If this is the state of knowledge at the present day; if the existence of a stratum of clear water, and its flow into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water, which is likely to rise and mingle with the fresh, when penetrated in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense, then, clearly, it would be a violation of the living spirit of the law not to recognize the change, and apply the settled and immutable principles of right to the altered conditions of fact. The learned judge, in his charge, said: 'There is evidence from which the jury could fairly find that the defendant, when the well was drilled, knew, or ought to have known, if he had exercised any reasonable judgment, or investigated or paid attention to it, that the boring of this well in the way it was done, without shutting off the salt water from the fresh water, would almost inevitably ruin these and other wells in the immediate vicinity. And I think there is evidence from which the jury could fairly find that the defendant could, with the outlay of a small amount of money, have shut off the salt water from the fresh water, so that it could not have done any injury.' If the jury had found the facts as this charge assumes that they fairly might on the evidence, then the plaintiff had made out a case of negligence, and was entitled to recover. Negligence in this sense is the absence of such care and regard for the rights of others as a

**IV. ARTIFICIAL OR ENFORCED PERCOLATIONS—INJURIES THEREFROM**

—1. In General.—A distinction has been drawn between natural percolations and percolations caused artificially,<sup>1</sup> and it has been held, both in *England* and the *United States*, that one who accumulates water artificially on his own land, thereby causing percolation through the soil to the damage of his neighbor, is liable

prudent and just man would and should have in the same situation. If the plaintiff showed that the injury was plainly to be anticipated, and easily preventible with reasonable care and expense, he brought himself within the exception of all the cases from *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721, to *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445, inclusive. It may be well to say that, in cases of this nature, juries should be held with a firm hand to real cases of negligence within the exception, and not allowed to pare down the general rule by sympathetic verdicts in cases of loss or hardship from the proper exercise of clear rights. The danger of such result is not to be ignored, but we cannot on that account shut the door to suitors entitled to redress for genuine wrongs. The duty to maintain the line firmly where justice and law put it is, in the first instance and chiefly upon the trial courts."

1. In *Rylands v. Fletcher*, L. R., 3 H. L. Cas. 330, a leading case on this subject, a reservoir was created artificially, from which the water flowed from some passage, apparently filled up and long disused, into the plaintiff's mine. Lord Cranworth said: "If a man brings or accumulates water and allows it to escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. . . . If water naturally rising in the defendants' land had, by percolation, found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. . . . But that is not the real state of the case. The defendants, in order to effect an object of their own, brought onto their land, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the defendants were certainly responsible." This doctrine was approved in

*Nichols v. Marsland*, L. R., 10 Exch. 255. See also *Show v. Whitehead*, 27 Ch. Div. 588; *Humphries v. Cousins*, 2 C. P. Div. 239.

In *Hurdman v. North Eastern R. Co.*, 3 C. P. Div. 168, the defendants placed upon their land and against their wall, which adjoined the house of the plaintiff, large quantities of soil, clay, and limestone, and other refuse, and thereby raised the surface of their land above the level of the land upon which the plaintiff's house was built, so that the rain which fell upon the soil, clay, limestone, etc., oozed and percolated through the wall of the defendants into the house of the plaintiff, causing it to become wet, unwholesome, and unhealthy, etc. It was held that the defendants were liable for the damages. See also, *Broder v. Sailard*, 2 Ch. Div. 692.

And in *Evans v. Manchester, etc., R. Co.*, 3 Ch. Div. 626, on the bank of a canal, constructed under an old act of Parliament, a mill had been built; in consequence of the working of a coal mine, the canal and mill had subsided, and the water leaked from the canal into the mill. In an action brought by the mill owner against the canal company, for an injunction and damages, it was held that the company, being authorized by an act of Parliament, were not under the same liabilities as a private person, but they were liable for damages if guilty of negligence, and that the canal company were guilty of negligence, inasmuch as they might have prevented the damage.

In *Massachusetts*, the doctrine of the English courts seems to be adopted. In *Ætna Mills v. Brookline*, 127 Mass. 69, the defendants, under a statute authorizing them to take the waters of the Charles River for the use of the said town and inhabitants thereof, providing that the town shall be liable in damages to any person injured by such taking, constructed a water gallery on land near the river, which drew off, by percolation, water from the river through the natural soil between the gallery and the river. It was held that

therefor; but in a majority of the states this doctrine is qualified, and in order to create liability, negligence must be shown.<sup>1</sup> Where, however, accumulation is in the first instance wrongful,

there had been a taking of the waters of the river, within the meaning of the act, and that a person whose property was injured by such taking was entitled to indemnity. Endicott, J., said: "It is well settled that water, which flows or percolates underground in defined channels, belongs to the owner of the soil, and he may by a well or other structure appropriate it to his own use, although by so doing he may arrest it on its way to his neighbor's land, or draw it from his neighbor's land into his own. Such water on the land is as much his property as the land itself. But a very different question is presented where the owner of land constructs his well or other structure in such manner as to create an artificial underground current of water from a running stream, thus withdrawing the water of the stream into his own land, under the claim that of right he is entitled to the waters thus found in or coming to his land." See also *Ætna Mills v. Waltham*, 126 Mass. 422; *Bailey v. Woburn*, 126 Mass. 416.

It was held immaterial how the town took the water, whether by pipes or by percolations through an artificial or natural embankment between the gallery and the river in *Cowdrey v. Woburn*, 136 Mass. 409.

And in *Wilson v. New Bedford*, 108 Mass. 265; 11 Am. Rep. 352, Chapman, C. J., observes: "The percolating water belongs to the owner of the land, as much as the land itself, or the rocks and stones in it. Therefore he may dig a well, and make it very large, and draw up the water, by machinery or otherwise, in such quantities as to supply aqueducts for a large neighborhood. He may thus take the water which would otherwise pass by natural percolation into his neighbor's land, and draw off the water which may come by natural percolation from his neighbor's land; and his neighbor may, by a wall or other obstruction, retain the water which is upon his own land, and prevent the water from coming into his soil. . . . But the present case is of a different character. The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars."

In *Fuller v. Chicopee Mfg. Co.*, 16 Gray (Mass.) 46, recovery was had for damages occasioned by raising a pond which affected injuriously the plaintiff's well. See also *Gorham v. Cross*, 125 Mass. 232; 28 Am. Rep. 234.

In *Mears v. Dole*, 135 Mass. 508, one who, by excavations on his land, let in the sea which undermined and injured adjoining land, was held liable in an action for the injury so caused, including an injury to a well by percolation of salt water.

1. The doctrine of *Rylands v. Fletcher*, L. R., 3 H. L. Cas. 330, has been departed from, both in its application to the percolating water, and the escape of water by the overflowing of dams, reservoirs, etc., as in the following cases: *Reed v. State*, 108 N. Y. 407; *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 506; *Loosee v. Buchanann*, 51 N. Y. 476; 10 Am. Rep. 623; *Livingston v. Adams*, 8 Cow. (N. Y.) 175; *Garland v. Towne*, 55 N. H. 55; 20 Am. Rep. 164; *Lapham v. Curtis*, 5 Vt. 371; 26 Am. Dec. 310; *Todd v. Gochell*, 17 Cal. 97; *Everett v. Hydraulic Flume Funnel Co.*, 23 Cal. 225; *Campbell v. Bear River, etc., Water, etc., Co.*, 35 Cal. 679; *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis, etc., Water Co.*, 10 Cal. 541; *Tenney v. Miners' Ditch Co.*, 7 Cal. 335; *Richardson v. Kier*, 34 Cal. 63; 91 Am. Dec. 681; *Jones v. Robertson*, 116 Ill. 543; 56 Am. Rep. 786; *China v. Southwick*, 12 Me. 238; *Higgins v. Chesapeake, etc., Canal Co.*, 3 Harr. (Del.) 411; *Morris Canal, etc., Co. v. Ryerson*, 27 N. J. L. 457; *Bell v. McClintock*, 9 Watts (Pa.) 120; 34 Am. Dec. 507; *Lehigh Bridge Co. v. Lehigh Coal, etc., Co.*, 4 Rawle (Pa.) 9; 26 Am. Dec. 111; *Sheldon v. Sherman*, 42 N. Y. 484; 1 Am. Rep. 569.

In *Reed v. State*, 108 N. Y. 407, it was held that the attempt to collect a large body of water into a limited space, surrounded with a porous and gravelly soil, without taking any adequate precaution to confine it to the receptacle prepared for it, is negligence, and for damages resulting therefrom to adjoining owners, the person chargeable with the negligent act is liable. See also *Jutte v. Hughes*, 67 N. Y.

the defendant is liable, although guilty of no negligence.<sup>1</sup> The general question as to the effect of accumulating water in mines<sup>2</sup> and dams<sup>3</sup> has been treated elsewhere.

**2. Diversion of Surface Streams by Artificial Percolation.**—The distinction between artificial and natural percolations is again apparent in cases of the diversion of surface streams. Although a landowner may appropriate the natural percolations upon his land, he cannot construct his well, or other structure, in such a manner as to create an artificial underground current of water from a running stream, to the injury of his neighbors.<sup>4</sup>

267; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 506; *Clements v. State*, 105 N. Y. 621.

In *Heacock v. State*, 105 N. Y. 246; *Avery v. State*, 105 N. Y. 636, and *Collins v. State*, 105 N. Y. 641, a refusal to award damages for such percolations was reversed, and the claims sent back for a rehearing upon the merits.

A landowner who permits the water taken from artesian wells on his land, and carried through a ditch for the purpose of irrigating his fields, to percolate through the ditch and to saturate his neighbor's land, to his injury, when it might have been drained from the ditch so as probably to prevent such injury, is liable for the damages thereby sustained, and may be restrained by injunction. *Parker v. Larsen*, 86 Cal. 236; 21 Am. St. Rep. 30.

In *Marshall v. Welwood*, 38 N. J. L. 339; 20 Am. Rep. 394, the court, by Beasley, C. J., observes: "The fallacy in the process of argument by which judgment is reached in *Rylands v. Fletcher*, L. R., 3 H. L. Cas. 330, appears to me to consist in this: that the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. . . . It seems to me, therefore, that in this case (the bursting of a steam boiler while in use on the owner's property) it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of, was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents." See also *Simonton v. Loring*, 68 Me. 164; 28 Am. Rep. 32 n; *Parrott v. Barney*, 1 Sawy. (U. S.) 423.

1. *Frye v. Moor*, 53 Me. 583.

2. See MINES AND MINING CLAIMS, vol. 15, p. 499.

3. See DAM, vol. 4, p. 971.

4. *McClellan v. Hurdle*, 3 Colo. App. 430. In *Grand Junction Canal Co. v. Shugar*, L. R., 6 Ch. 487, the defendant, by constructing a drain, drew off water flowing in a defined surface channel, the property of the plaintiff, flowing through adjoining land through which it had percolated into the drain. An injunction was granted. Lord Hatherly, L. C., said: "Where a well had been made to receive underground water, and another man had made a well which took away the water from the first well, he has as much right to use the soil as the digger of the first well. A man cannot compel his neighbor to leave his own soil untouched, and prevent his having a well, too. But, as regards flowing water, the case is quite different. . . . In this case there is, *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the Local Board (the defendants) have made. As far as regards the support of the water, all one can say is this: I do not think *Chasemore v. Richards*, 7 H. L. Cas. 349, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate under ground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all."

In *Emporia v. Soden*, 25 Kan. 588; 37 Am. Rep. 265, the distinction is well maintained. *Brewer, J.*, said: "It is doubtless true, as a general proposition, that the law takes no cognizance of percolating water. The impossibility of proving with reasonable certainty the sources of supply is a strong, if not

**UNDERSTAND; UNDERSTANDING.**—Understanding and agreement are synonymous.<sup>1</sup> An understanding is "anything mutually understood or agreed upon."

the principal, reason therefor. . . . It is also a general proposition that a man may not do indirectly what he may not do directly. Unquestionably a party may not run pipes into plaintiff's millpond, or dig a channel to it, and thus divert the water. May he accomplish the same result by digging a well upon the very banks, and so near thereto that the water oozes out from the pond into the well, and be beyond the reach of the law, so long as he keeps a wall of earth between the well and the pond? If this were the recognized law, protection to the owners of water-power would rest on slender foundations. . . . And, if a well on the very bank would be restrained, may the same result be accomplished by digging one a few feet off? It would seem as though but one answer could in justice be given: that the owner of an established power is entitled to protection against any subtraction therefrom, whether sought to be accomplished by direct or indirect methods. We are aware that the further the well is removed from the banks of the stream, the more difficult and uncertain the evidence of the abstraction of the water; but, when the fact of the abstraction is proved, it would seem that relief must necessarily follow. It is a matter of common knowledge that water, passing through but a narrow passage, and finding at the end an outlet, soon increases by its flow the size of the passage; and thus that which at first was but a mere trickle becomes in time a sizable stream, and the abstraction, which at first was limited, soon increases, until it may eventuate in a general exhaustion. Of course, the mere proximity of the well to the stream does not prove the abstraction; there may be other subterranean sources of supply; and he who alleges the abstraction has the burden of proof, and, if he fails to establish the fact, he fails to show a right to relief, and, if he asks compensation for the abstraction, he can recover only for the amount which he is able to prove."

*Compare* Ellis v. Duncan, 21 Barb. (N. Y.) 230. In this case the water was drawn from a natural spring which was the head and source of a small stream of surface water. The court

held that, "The owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor." See also Goodale v. Tuttle, 29 N. Y. 466.

**Ignorance of the Injury.**—In Dickinson v. Grand Junction Canal Co., L. R., 7 Exch. 282, it was held that ignorance and lack of negligence on the part of the defendant would defeat the right of action. Where the defendant, by digging a well, drew water from a river after it had formed part of a stream, thereby preventing the plaintiff from working his mill, which was situated on the river, it was held that an action would lie. Pollock, C. J., said: "If indeed it appeared that the company were ignorant, and could not by any degree of care have ascertained before making the well that it would have the effect of obstructing the water, and when they discovered that it did, they could not have repaired the mischief, it might have raised the question whether the action was maintainable."

1. Webster's Dict., followed in Bar-kow v. Sandger, 47 Wis. 501. In this case it was held, when the jury were asked whether a certain matter was "understood," between the parties, and they answered that there was no "agreement," that this reply was responsive to the question and not evasive. See also Winslow v. Dakota Lumber Co., 32 Minn. 238; Hill v. Fox, 4 Hurl. & N. 362; House v. Howell, 6 N. Y. Supp. 801; 53 Hun (N. Y.) 638; Fraser v. Davie, 11 S. Car. 68.

"It is understood, in the ordinary use of that phrase, when it is adopted in a written contract, has the same force as 'it is agreed.'" Hoar, J., in Higginson v. Weld, 14 Gray (Mass.) 170. On the other hand, the term sometimes falls short of alleging a distinct agreement. Thus, in Camp v. Waring, 25 Conn. 529, the court said: "The context here shows that the word 'understanding,' always a loose and ambiguous one, unless accom-



**UNDERSTANDINGLY.**—See note 1.

**UNDERTAKING.**—An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise.<sup>2</sup>

### UNDERTAKINGS ON APPEAL.

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**I. DEFINITION.**—An undertaking on appeal or writ of error is a bond of the form and substance provided by the law of jurisdiction, filed by the appellant or plaintiff in error in civil actions in order to perfect his appeal or writ of error, and in most cases to secure also a stay of proceedings in the trial court during the pendency of the cause in the appellate court.

**II. NECESSITY FOR.**—Under modern statutes it is a general rule that an appellant or a plaintiff in error must file a bond or undertaking for the benefit of those opposed to him in interest, as a condition precedent to having the cause reviewed by an appellate court. Accordingly, where no bond of any kind is filed within the time provided by statute, the appellate court acquires no jurisdiction and the appeal should be dismissed.<sup>3</sup> In many jurisdictions, however, executors, administrators, guardians, etc., who sue or defend in a representative capacity, are not required to file the

panied with some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound, was used, not to express anything which was the subject of an agreement or contract between the parties, but only that kind of expectation or confidence upon which parties are frequently willing to rely without requiring any binding stipulation."

In *Black v. Columbia*, 19 S. Car. 419, it was held that the term "understanding" fell short of alleging a distinct and express contract between the parties, the question being whether the cause of action was *ex contractu* or *ex delicto*.

**Express Understanding.**—See EXPRESS, vol. 7, p. 539.

1. **Understandingly.**—Married woman's acknowledgment. See ACKNOWLEDGMENT, vol. 1, p. 169.

2. Bouv. Law Dict., citing *Wain v. Warlters*, 5 East 17; 2 Leon. 225; followed in *Alexander v. State*, 28 Tex. App. 186.

#### Whether It Imports a Consideration.—

In *Thompson v. Blancard*, 3 N. Y. 335, it was held that the term "undertaking" did not *ex vi termini* import a consideration; and, therefore, that, where a statute required an "undertaking" to be entered into, an instrument containing the requisite stipulations was valid, although not expressing the consideration. See also *Alexander v. State*, 28 Tex. App. 186.

3. *Perkins v. Cooper*, 87 Cal. 241; *Scott v. Glen*, 97 Cal. 513; *Von Schmidt v. Widbur* (Cal. 1893), 32 Pac. Rep. 531; *Case v. Spiegel*, 44 Ill. App. 588; *Corbin v. Laswell*, 48 Mo. App. 626; *Santom v. Ballard*, 133 Mass. 464; *Reed v. Creditors*, 37 La. Ann. 907; *Architectural Iron Works v. Brooklyn*, 85 N. Y. 652; *Mann v. Lowry*, 58 Miss. 73; *Sutherland v. Putnam* (Arizona, 1890), 24 Pac. Rep. 320; *State v. Walker*, 82 N. Car. 696; *State v. Patrick*, 72 N. Car. 217; *State v. Donaldson*, 83 N. Car. 683; *State v. Spurtin*, 80 N. Car. 362.

statutory bond on appeal or error.<sup>1</sup> Another exception to the general rule is frequently made for the benefit of those who are financially unable to furnish a bond. Where this exception exists, the appellant files, in place of a bond, an affidavit stating that he is unable to pay the costs or to give security therefor, whereupon the court permits him to prosecute his appeal *in forma pauperis*.<sup>2</sup> Again, it is not an uncommon statutory provision that municipal corporations shall not be required to furnish bonds on appeal.<sup>3</sup> And as the sovereign power is not included in such statutes, unless expressly mentioned, the state may appeal or sue out a writ of error and prosecute it to a final determination without filing the statutory undertaking.<sup>4</sup>

**III. REQUISITES OF THE BOND.**—1. **Description of Judgment Appealed From.**—The appeal bond should contain a sufficient description of the judgment or order appealed from to render its identity certain. This may be done by indicating the trial court and giving the number of the cause, the names of the parties to the action, and that of the party against whom the judgment was rendered, and by giving the date of such judgment or order and stating the effect thereof, or, if it is a money judgment, by

The appellee's waiver of an appeal bond does not help appellant in perfecting his appeal. *Chicago, etc., R. Co. v. Marseilles*, 104 Ill. 91.

1. *Freeman v. Hill*, 45 Kan. 435; *Tompkins v. Page*, 70 Wis. 249; *Stinson v. Leary*, 69 Wis. 269; *Ruch v. Biery*, 110 Ind. 444; *Bake v. Smiley*, 84 Ind. 212; *Kirsch v. Derby*, 93 Cal. 573; *Fite v. Black*, 85 Ga. 413.

An administrator is not relieved from giving bond on appeal from an order revoking his letters and appointing another in his stead. *Erlanger v. Danielson*, 88 Cal. 480.

A judgment surcharging and falsifying an administrator's account, is one in which he is personally interested, and upon appeal from such judgment, he must give bond. *Hicks v. Oliver* (Tex. Civ. App. 1894), 26 S. W. Rep. 641.

The privilege extends only to appeals from a judgment or order in proceedings upon the estate of the decedent. *In re Skerrett's Estate*, 80 Cal. 62.

Where the intestate had appealed, but had filed no bond before his death, it was held that the administrator could not prosecute such appeal without filing the bond, as the privilege extended only to appeals taken by him after his appointment. *Hanlon v. Silk* (Tex. 1887), 3 S. W. Rep. 290.

Receivers appointed by federal courts, who in good faith appeal from

the judgments of state courts, should not be required to give *supersedeas* bonds, because they are officers of the court, and their possession is that of the court. *Central Trust Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 555.

2. *State v. Duncan*, 107 N. Car. 818; *State v. Wylde*, 110 N. Car. 500; *Leach v. Jones*, 86 N. Car. 404; *Fite v. Black*, 85 Ga. 413; *Golightly v. Irvine* (Tex. App. 1890), 15 S. W. Rep. 48; *Perry v. Scott*, 68 Tex. 208; *Harvey v. Cummings*, 62 Tex. 186; *Holmes v. McIntyre*, 61 Tex. 9; *Hearne v. Prendergast*, 61 Tex. 627; *Stewart v. Heidenheimer*, 55 Tex. 644; *Lynn v. Tellico Mfg. Co.*, 8 Lea (Tenn.) 29; *Blair v. North British, etc., Ins. Co., L. R.*, 15 App. Cas. 495; *Fuller v. Montague*, 53 Fed. Rep. 206, decided under Act of Congress, July 20th, 1892, ch. 209, § 1. But the privilege does not extend to a non-resident plaintiff. *Christian v. Gouge*, 58 How. Pr. (N. Y. Super. Ct.) 445.

3. *State v. New Orleans*, 34 La. Ann. 467; *McClay v. Lincoln*, 32 Neb. 412; *Havana Tp. Drainage Dist. v. Kelsey*, 120 Ill. 482; *Miller v. Jacobs*, 70 Wis. 122.

4. *State v. Cannon* (La. 1893), 14 So. Rep. 130; *Merchants' Mut. Ins. Co. v. Board of Assessors*, 40 La. Ann. 371; *State v. Coahoma County*, 64 Miss. 358.

By express enactment, no bond is required of the *United States*, or of

reciting the amount for which judgment was rendered.<sup>1</sup> A laborious description, however, is not required. It is sufficient if the judgment is described with such certainty as will clearly reveal its identity.<sup>2</sup>

**2. Condition of Undertaking.**—A *supersedeas* bond should be conditioned that the appellant or plaintiff in error will prosecute his appeal or writ of error with effect, and in case the judgment is affirmed in whole or in part, will perform and satisfy the same or such part thereof as may be affirmed; and, also, pay all damages and costs.<sup>3</sup> If the condition of the bond is such as to secure to the respondent or defendant in error all that is contemplated

anyone acting under the direction of any of the departments of the government. *United States Rev. Stats.*, § 1001.

1. *Sutherland v. Putnam* (Arizona, 1890), 24 Pac. Rep. 320; *Jackson v. Relf*, 24 Fla. 198; *McMichael v. Eckman*, 26 Fla. 43; *Dinkel v. Wehle*, 61 How. Pr. (N. Y. C. Pl.) 159; *Morgan v. Richardson* (Tex. Civ. App. 1894), 25 S. W. Rep. 171; *Cockrill v. Eason*, (Tex. Civ. App. 1894), 26 S. W. Rep. 464; *In re O'Hara's Estate*, 60 Tex. 179; *Howard v. Malsch*, 52 Tex. 60; *Putnam v. Boyer*, 140 Mass. 235; *Kellogg v. Smith*, 10 Wis. 135; *New Orleans Ins. Co. v. Albros Co.*, 112 U. S. 506.

A bond which misdescribes the judgment as to the date and amount, and omits to state the names of some of the parties in whose favor it is rendered, is not good as a *supersedeas* bond. *White v. Harris*, 83 Tex. 42.

If the bond does not give the number or title of the cause, the amount or character of the judgment, or the court in which it was rendered, it is fatally defective. *Thebodeaux v. Thebodeaux* (La. 1893), 13 So. Rep. 805.

But the bond need not set out the judgment appealed from. *Daniel v. Phelps*, 86 Ga. 363.

2. *Witten v. Caspary* (Tex. App. 1890), 15 S. W. Rep. 47; *People's Brewing Co. v. Boebinger*, 40 La. Ann. 277; *Acker v. Alexandria, etc., R. Co.*, 84 Va. 648; *Smith v. Nescatunga Town Co.*, 36 Kan. 758; *Mathews v. Morrison*, 13 R. I. 309.

The identification in the appeal bond of the judgment appealed from is sufficient if it is certain, even though it be inartificial. *Forbes v. Porter*, 23 Fla. 47.

An appeal bond should recite the date of the judgment appealed from. *Shuster v. Overturf*, 42 Kan. 668; *Din-*

*kel v. Wehle*, 13 Abb. N. Cas. (N. Y. C. Pl.) 478.

If the record shows no judgment of the date of that described in the bond and notice of appeal, the appeal should be dismissed. *Atkinson v. Chicago, etc., R. Co.*, 69 Wis. 362.

A misrecital of the date of the judgment appealed from, is not fatal to the appeal, where the trial court, the amount and effect of the judgment, the number of the case, and names of the parties are correctly stated. *Forbes v. Porter*, 23 Fla. 47; *Southern Pac. R. Co. v. Stanley*, 76 Tex. 418; *Warren v. Marberry*, 85 Tex. 193; *Bauer v. Fields* (Tex. Civ. App. 1893), 22 S. W. Rep. 180; *Bauer v. Adkins* (Tex. Civ. App. 1893), 22 S. W. Rep. 181; *Alderman v. Jones*, 2 Tex. Civ. App. 336; *Eichman v. State*, 22 Tex. App. 137; *Johnson v. King*, 83 Wis. 8.

Where more than one appeal is taken in a case, and but one undertaking is filed, it should refer separately to the different judgments or orders appealed from, otherwise it is a nullity. *McCormick v. Belvin*, 96 Cal. 182; *Field v. Andrada* (Cal. 1894), 37 Pac. Rep. 180; *Berniard v. Bucher* (Cal. 1888), 16 Pac. Rep. 510; *Sebree v. Smith*, 2 Idaho 327.

3. *Richardson v. Richardson*, 82 Mich. 305; *Hollister v. McNeill*, 31 Hun (N. Y.) 629; *Anderson v. Meeker County*, 46 Minn. 237; *Southern Pac. R. Co. v. Stanley*, 76 Tex. 418; *Halbert v. Alford* (Tex. 1891), 16 S. W. Rep. 814; *Allison v. Gregory*, (Tex. App. 1890), 15 S. W. Rep. 416; *Davis v. Estes*, 4 Tex. Civ. App. 207; *Prewitt v. Day* (Tex. 1893), 23 S. W. Rep. 982; *Caldwell v. Ballow* (Tex. 1888), 7 S. W. Rep. 677; *Clark's Code of Civ. Proc.* (N. Car.), § 554; *Wisconsin Stat.*, § 3053.

Where the appellant can be subjected

by the statute, it is sufficient, although it does not follow the language of the statute.<sup>1</sup>

In some jurisdictions a party may have a judgment reviewed without obtaining a *supersedeas* or stay of proceedings pending appeal. When this is the course pursued, it is sufficient to file a bond for costs only and permit the opposing party to proceed with the enforcement of his judgment at the risk of a reversal.<sup>2</sup>

**3. Penalty of the Bond.**—The amount for which the bond must be given in any particular case must be ascertained by the statutory law of the jurisdiction, being made in many cases by statute to depend on the character of the case or the amount of the judgment appealed from; in other cases, being left to the discretion of the trial court.<sup>3</sup>

**4. To Whom the Bond Should Run.**—The bond should run to all parties interested adversely to the appellant or plaintiff in error, whether they are plaintiffs or defendants below.<sup>4</sup>

**5. Signature of Appellant.**—The decisions are not in harmony as to whether the appellant or plaintiff in error must join in the execution of the bond. In some jurisdictions, it is held that the

to no greater judgment than one for costs, a bond conditioned to pay costs is sufficient. *State v. Rightor*, 44 La. Ann. 564; *State v. King*, 42 La. Ann. 1191.

Thus, on appeal from a judgment for costs only, it is sufficient if the bond is conditioned to pay the costs in both courts, in case the judgment is affirmed. *Moove v. Alston* (Tex. App. 1890), 15 S. W. Rep. 47.

It is a necessary part of the condition, that the appellant will prosecute his appeal with effect. *Russ v. Creditors* (La. 1893), 12 So. Rep. 627; *Prudhomme v. Williams* (La. 1893), 12 So. Rep. 628; *Figures v. Dunkin*, 68 Tex. 644.

It is not sufficient that the bond declares the obligors to be held and firmly bound; it should also recite what they are held and firmly bound to do. *Munzesheimer v. Wickham*, 74 Tex. 638.

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the *United States*, or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fails to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only, where it is not a *supersedeas* as aforesaid." *United*

*States Rev. Sts.*, § 1000. See *Gay v. Parpart*, 101 U. S. 391.

1. *Riley v. Mitchell*, 38 Minn. 9; *Goodwin v. Bunzl*, 102 N. Y. 224; *Miller v. Holding*, 5 Del. 494; *Walker v. Williams*, 88 N. Car. 7.

The fact that the bond is given for a definite amount will not be fatal, although the statute does not provide that the obligation shall name any particular amount. *Howard v. Russell*, 75 Tex. 171; *Hicks v. Oliver*, 71 Tex. 776.

2. *United States Rev. Sts.*, § 1000; *Steward v. Corneau*, 102 U. S. 161; *Kelley's Minnesota Stat.* (1891), § 5074; *Minnesota Gen. Stat.* (1878), ch. 86, § 9. See *Erickson v. Elder*, 34 Minn. 370.

3. Consult the statutes of the *United States* and the various states.

4. *First Nat. Bank v. Preston Nat. Bank*, 3 Tex. Civ. App. 545; *Terry v. Cutler* (Tex. Civ. App. 1893), 21 S. W. Rep. 726; *Grant v. Collins*, 5 Tex. Civ. App. 45; *Cockrill v. Eason* (Tex. Civ. App. 1894), 26 S. W. Rep. 464; *Stafford v. Blum* (Tex. Civ. App. 1894), 27 S. W. Rep. 12; *Meade v. Bartlett*, 77 Tex. 366; *Young v. Russell*, 60 Tex. 684; *Smith v. Parks*, 55 Tex. 82; *Johnston v. Letson* (Arizona, 1892), 29 Pac. Rep. 893; *Kasson v. Broucker*, 47 Wis. 79.

In an appeal by an intervenor, the bond should run to both plaintiff and defendant. *Greenwade v. Smith*, 57 Tex. 195.

The fact that some parties not inter-

bond is invalid unless he signs it as principal obligor;<sup>1</sup> while in others, it is held that it is not necessary for him to sign the undertaking, because he is bound by it without signing it.<sup>2</sup>

6. *Sureties*.—It is essential to the validity of an appeal bond that it be signed by at least the number of sureties required by statute.<sup>3</sup> But a surety and guaranty company, duly empowered by its charter to transact such business, has been accepted as sufficient surety in lieu of the two or more individuals required by statute.<sup>4</sup> A necessary party to an appeal is not competent to sign the appeal bond as a surety.<sup>5</sup> It has been held that an appeal bond given by a defendant in replevin, is not sufficient where the

ested in the appeal are named as obligees will not invalidate the bond. *Hill v. Chicago, etc., R. Co.*, 129 U. S. 170.

If no obligee is named in the bond, it is void. *Garrett v. Shove*, 15 R. I. 538.

And a bond running to the state is void, unless there is a statute authorizing such a bond. *Dorsey v. Raleigh, etc., R. Co.*, 91 N. Car. 201.

1. *Savannah, etc., R. Co. v. Clark*, 23 Fla. 308; *Hileman v. Beale*, 115 Ill. 355; *McGean v. McKellar*, 67 How. Pr. (N. Y. Super. Ct.) 277.

The principal should execute the bond in the same capacity in which he is a party to the action. *Thebodeaux v. Thebodeaux* (La. 1893), 13 So. Rep. 805.

It is sufficient if the bond is signed by the obligor's attorney in fact, duly authorized so to do by power of attorney. *Jackson v. Haisly*, 27 Fla. 205; *Scotfield v. Felt*, 10 Colo. 146.

But a bond executed by an attorney at law in the name of his client is voidable unless ratified under seal by the client. *Bowen v. Johnson*, 17 R. I. 779.

A joint appeal will be dismissed unless all the appellants sign the bond. *Dingler v. Strawn*, 36 Ill. App. 563; *Hileman v. Beale*, 115 Ill. 355.

An appeal bond signed by a surety only, and with the amount of the penalty not named, is a nullity. *St. Louis, etc., R. Co. v. Morse*, 50 Kan. 99.

2. *Easton v. Wash.* (Tex. App. 1890), 16 S. W. Rep. 788; *State v. Cochran*, 28 Neb. 798; *Walker v. Williams*, 88 N. Car. 7.

A guardian *ad litem* need not sign an appeal bond as principal; it is sufficient if the bond be executed in behalf of the appellant with sufficient surety. *Dahl v. Tibbals*, 5 Wash. 259.

3. *Bartlett's Appellant*, 82 Me. 210; *Harris v. Regester*, 70 Md. 109; *Grim-*

*wood v. Wilson*, 66 How. Pr. (N. Y.) 283; 31 Hun (N. Y.) 215; *Pfiefer v. Hartman*, 60 Miss. 505; *Hudson v. Gray*, 58 Miss. 591.

And a bond without sureties cannot be made good by stipulation of the parties where the statute requires a bond with sureties. *Henderson v. Benson*, 141 Mass. 218.

The firm name of a copartnership as sureties on the bond, is not sufficient; the members should sign as individuals. *Buchard v. Cavins*, 77 Tex. 365; *Frees v. Baker* (Tex. 1887), 6 S. W. Rep. 563.

4. *Travis v. Travis*, 48 Hun (N. Y.) 343; *Hurd v. Hannibal, etc., R. Co.*, 33 Hun (N. Y.) 109; 67 How. Pr. (N. Y.) 516; *McGean v. McKellar*, 67 How. Pr. (N. Y.) 273; *Gutzeit v. Pennie*, 95 Cal. 598.

But a bond with such surety will not be approved when there is reason to question the power of the security company to bind itself by such an obligation. *Black v. Black*, 53 Fed. Rep. 985.

Such corporation must justify in the same manner as natural persons, if exception is taken to the sufficiency of the security, in which case, it must not only show authority to do business, but also surplus assets equal to the amount of its undertaking. *Fox v. Hale, etc., Silver Min. Co.* (Cal. 1893), 40 Am. & Eng. Corp. Cas. 388.

But aside from the matter of justification, such corporation need not possess the qualifications required of natural persons. *Earle v. Earle*, 49 N. Y. Super. Ct. 57.

5. *Barrow v. Clack* (La. 1893), 12 So. Rep. 631; *Morse v. Hasbrouck*, 63 How. Pr. (N. Y. Supreme Ct.) 84; 10 Abb. N. Cas. (N. Y.) 407; *Nichols v. MacLean*, 98 N. Y. 458.

The fact that a party to the action signed the bond as a surety, is not a sufficient ground for dismissing the

sureties therein are the same as those in the delivery bond;<sup>1</sup> but a surety for costs below may, also, be a surety on his principal's appeal bond.<sup>2</sup> It is not necessary that the names of the sureties be given in the body of the bond.<sup>3</sup> Where each surety on an appeal bond is required to make affidavit that he is worth double the penalty of the bond, a bond unaccompanied by such affidavits is of no effect.<sup>4</sup>

**UNDERTOOK**.—(See generally ASSUMPSIT, vol. 1, p. 882).—Agreed; promised. The technical word by which the promise is alleged in *assumpsit*.

**UNDERWOOD**.—Underwood is described to be coppice of any wood not accounted timber.<sup>5</sup>

**UNDERWRITER**.—An underwriter is one who agrees to insure another on life or property in a policy of insurance. He is also called the insurer. The title is almost exclusively confined to insurers on marine risks, and is derived from the method of obtaining such insurance formerly in vogue, usually as follows. A premium having been agreed upon between the insured and an insurance broker, a statement of such premium and of the ship or cargo, and of the voyage or time, was written at the head of a sheet, which was laid on the broker's table. Then such merchants as were willing to insure such property on the terms named, subscribed their names to the statement, stating the amount they were willing to insure; and so on until the desired amount was obtained.<sup>6</sup>

**UNDIVIDED**.—The term "undivided," when applied to lands by proprietors of common and undivided lands, implies land set apart from their general domain, and not subject to partition, or to be divided, set off, or allotted to individuals to hold in severalty.<sup>7</sup>

appeal, the bond having been approved by the court below. *Voss v. Feurmann* (Tex. Civ. App. 1893), 23 S. W. Rep. 936.

And a bond signed by a party to the action as surety, is good, where the record shows that his interest is not affected by the appeal. *Syme v. Badger*, 91 N. Car. 272; *Leffel v. Obenchain*, 90 Ind. 50.

1. *Lee v. Lord*, 75 Wis. 35.

But in that case, the delivery bond is not rendered invalid. *Lee v. Lord*, 75 Wis. 35.

2. *Trammell v. Trammell*, 15 Tex. 291; *Saylor v. Marx*, 56 Tex. 90; *Sampson v. Solinsky*, 75 Tex. 663; *Long v. Cruger*, 4 Tex. Civ. App. 145.

3. *Guez v. Dupuis*, 152 Mass. 454; *Factors', etc., Ins. Co. v. New Harbor Protection Co.*, 39 La. Ann. 583; *Vignie v. Brady*, 35 La. Ann. 560; *Coyle v. Creevy*, 34 La. Ann. 539; *Union Bethel*,

etc., *Church v. Civil Sheriff*, 33 La. Ann. 1461.

4. *Turner v. Quinn*, 91 N. Car. 92; *State v. Wagner*, 91 N. Car. 521; *Bailey v. Rutjes*, 9 N. Car. 420; *Morpheus v. Tatem*, 89 N. Car. 183; *Bryson v. Lucas*, 85 N. Car. 397.

Each surety must be worth double the penalty of the bond. It is not enough that the justification of the two may show that they are together worth said amount. *Anthony v. Carter*, 91 N. Car. 229.

5. *King v. Ferrybridge*, 1 B. & C. 379; 8 E. C. L. 160. And see note to that case for an exhaustive review of the authorities upon the question of what constitutes underwood in *England* when the question arises in actions for waste.

6. *Bouv. Law Dict.*; 1 *Pars. Mar. Ins.* 14; *MARINE INSURANCE*, vol. 14, p. 319.

7. *Wellington's Petition*, 16 *Pick.*

**UNDUE INFLUENCE.**—(See also AGENCY, vol. 1, p. 331; ATTORNEY AND CLIENT, vol. 1, p. 942; CATCHING BARGAIN, vol. 3, p. 37; CONTRACT, vol. 3, p. 823; FRAUD, vol. 8, p. 635; GIFTS, vol. 8, p. 1308; GUARDIAN AND WARD, vol. 9, p. 85; HUSBAND AND WIFE, vol. 9, p. 789; MARRIAGE SETTLEMENTS, vol. 14, p. 538; PARENT AND CHILD, vol. 17, p. 331; TRUSTS AND TRUSTEES, vol. 27, p. 1; WILLS.)

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(Mass.) 98. In this case it was held that where by a vote of the proprietors a certain tract of land was to remain "undivided," that this did not mean

that the land should not be divided in parcels; but that it should not be set off in severalty to individual proprietors.

**I. IN GENERAL**—1. **Definition**.—Undue influence has been defined to be any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do if left to act freely.<sup>1</sup> What will constitute such "constraint, machination, or urgency of persuasion" will depend largely upon whether the term is used with regard to wills or instruments *inter vivos*. In both connections, however, the underlying idea is that the influence, to be undue, must be such as to destroy free agency, and substitute the will of another for that of the person nominally acting.<sup>2</sup>

1. **Definitions**.—2 Abb. L. Dict., p. 615; FRAUD, vol. 8, p. 649.

"Influence: Most frequently used in connection with 'undue,' and refers to persuasion, machination, or constraint of will presented or exercised to procure a disposition of property by gift, conveyance, or will." Anderson's Law Dict.

Undue influence "consists in acts which, though not fraudulent, amount to an abuse of the power which circumstances have given to the will of one individual over that of another." Holland's Elements of Jur. (5th ed.), p. 231.

Black's Law Dictionary adopts the definition of the *California* Civil Code, § 1575, which is as follows: "Undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress." See also *Dakota* Civil Code, § 886.

Pomeroy considers undue influence as a "moral, social or domestic force—there being no coercion amounting to duress—exerted upon a party, controlling the free exercise of his will and preventing any true consent." Pomeroy's Eq. Jur. (2d ed.), § 951.

In *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385, it is said by the court, speaking by Van Fleet, V. C.: "No definition of what the law denominates undue influence can be given. Every case must stand upon its own special facts. All that can be said in the way of formulating a general rule on this subject is, that whatever destroys free agency and constrains the person whose act is brought in judg-

ment to do what is against his will, and what he would not have done if left by himself, is undue influence."

**Distinguished from Duress**.—The distinction between duress and undue influence is not very clearly marked. Duress implies physical force either actually used or threatened. Holland's Elements of Jur. (5th ed.) 231. Undue influence embraces those more subtle forces which operate upon the mind. Anderson's Law Dict.; *Munson v. Carter*, 19 Neb. 293; *Pomeroy's* Eq. Jur. (2d ed.), § 951; *Story's* Eq. Jur. (12th ed.), § 239; FRAUD, vol. 8, p. 649.

The authorities pretty generally agree in excluding actual violence, but influence through threats is often included. Abbot's Law Dict. But see *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385, where actual violence is considered undue influence. The more accurate use of terms, however, would cause such influence to be relegated to the head of duress.

In testamentary law, the term "undue influence" has a much wider significance, and is used as embracing duress. Schouler on Wills (2d ed.), § 228.

**In Criminal Law**.—The term "undue influence," in criminal law, is used in reference to elections, and signifies the interference with the free exercise of a voter's franchise, by violence, intimidation, or otherwise. Such undue influence is a misdemeanor. Black's Law Dict.

2. *Elkinton v. Brick*, 44 N. J. Eq. 165; *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385; *Eckert v. Flowery*, 43 Pa. St. 46; *Schmidt v. Schmidt*, 47 Minn. 457; *Mitchell v. Mitchell*, 43 Minn. 73; *Schulz v. Schaeffe*, 16 Jur. 909; Schouler on Wills, (2d ed.) § 229.

In order to vitiate an act, the influence must be such that the actor stands *in vinculis*. *Conley v. Nailor*, 118 U. S. 135. It must be equivalent to moral



Influence which exists through attachment, affection, or a desire to gratify,<sup>1</sup> or which results from argument and appeals to reason and judgment,<sup>2</sup> is not undue.

2. **Effect.**—Undue influence is a species of fraud.<sup>3</sup> It renders all transactions *inter vivos* tainted by it voidable.<sup>4</sup> Until avoided, they stand, and the privilege of avoiding them is generally barred if the rights of innocent purchasers have intervened.<sup>5</sup>

In order that undue influence may affect a transaction, it must be an influence, whether actually proven or presumed, operating at the time of the transaction, and inducing it. The particular contract, gift, or will must be brought about by the influence.<sup>6</sup>

3. **Transactions Affected**—(See also GIFTS, vol. 8, p. 1308).—Of all

coercion. *In re Carroll's Will*, 50 Wis. 437.

It "must amount to force and coercion, destroying free agency." It must be "fraudulent and controlling." *Anderson's Law Dict.*

There must be some ascendancy preventing the person acting from exercising an unbiased judgment. In some measure, at least, free agency must be destroyed. *Herster v. Herster*, 122 Pa. St. 239.

"If such influence be exerted upon him (any party conveying or contracting), such mental, moral, or physical coercion employed towards him, that the act is not really his own, but is another's, then it is voidable. But within this limit there is no objection to argument, persuasion, or even influence brought to bear upon a party, provided his mind is able to act and is left free to decide and act upon the considerations which are addressed to it, so that the agreement is really his own voluntary act. Still, persuasions and other such conduct by the one benefited are always looked upon as suspicious; they throw upon him the burden of showing that the other party acted freely." *Pomeroy's Eq. Jur.* (2d ed.), § 951, n. 1. To constitute undue influence the actor's will must be overcome. *Dunlap v. Robinson*, 28 Ala. 100.

It is impossible to lay down any hard and fast rule as to what acts will overcome the actor's will, and render the influence exerted thereby undue. The effect of all acts must depend upon the relations of the parties, the character, strength, and condition of each. Each case must stand largely upon its own merits. *Elkinton v. Brick*, 44 N. J. Eq. 154.

In most cases influence will not be

undue if there is no motive of wrong, and if the act done results to the advantage of the person influenced. Thus, inducing an old and feeble person to do that which is just and for his own good has been held not to be an instance of undue influence, even though an incidental advantage resulted to the one inducing. *Dailey v. Kastell*, 56 Wis. 444.

1. *Anderson's Law Dict.*; *Schofield v. Walker*, 58 Mich. 96; *Hoges' Estate*, 2 Brews. (Pa.) 450; 2 *Warvelle on Vendor and Purchaser*, p. 867.

2. But influence obtained by flattery is undue. *Schofield v. Walker*, 58 Mich. 96.

3. See *EQUITY*, vol. 6, p. 717.

4. See *CONTRACT*, vol. 3, p. 933; *Pomeroy's Eq. Jur.* (2d ed.), § 944; *Bispham's Principles of Equity* (4th ed.), §§ 202, 234; *Robinson's Elementary Law*, § 320; *Bayliss v. Williams*, 6 Coldw. (Tenn.) 440. The interest of the one from whom property has been gotten by means of undue influence is not a right only, but is a devisable estate. *Bispham's Principles of Equity* (4th ed.), § 198; *Gresley v. Mousley*, 4 De G. & J. 78; *Stump v. Gaby*, 2 De G. M. & G. 623. See also the *California and Louisiana Codes*.

5. *Pomeroy's Eq. Jur.* (2d ed.), § 709.

But the one receiving property obtained by the one transferring it through undue influence, must be a purchaser for a valuable consideration. If he took it as a gift, "let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow." *Huguein v. Baseley*, 14 Ves. 289; 2 *Lead. Cas. Eq.* 406, *per Eldon*, Chancellor.

6. *Brownfield v. Brownfield*, 43 Ill. 147; *Monroe v. Barclay*, 17 Ohio St. 303; 93 Am. Dec. 620.

transactions, gifts are most closely scrutinized by the courts.<sup>1</sup> If a confidential relationship exists, the presumptions arising from it are the hardest to overcome.<sup>2</sup> If there is actual undue influence, the gift, though trifling, will be tainted and rendered voidable.<sup>3</sup> All contracts and conveyances obtained by undue influence are on similar principles voidable.<sup>4</sup>

Wills and testaments may be refused probate, either in whole or in part, upon the same ground.<sup>5</sup>

**II. KINDS OF UNDUE INFLUENCE.**—For purposes of convenience, undue influence is considered as of two kinds—actual and presumptive. The former is established by actual proof; the latter is presumed from the existence of confidential relationship and certain other circumstances. The two kinds differ only in the method employed in establishing each; in their nature and effect they are alike.<sup>6</sup>

The two classes of undue influence certainly exist in matters of contract and gift. In regard to wills there is a difference of opinion. Some authorities hold that the presumptions existing in

1. Pomeroy's Eq. Jur. (2d ed.), § 951; Bispham's Principles of Equity (4th ed.), § 231. The case of *Cook v. Lamont*, 15 Beav. 240, pushes the rule to the extent of holding that there is a presumption against every gift, whether a fiduciary relation exists or not.

2. **Gifts.**—Thus, if a wife makes a gift of her sole and separate property to her husband, it will only stand if there be clear and satisfactory evidence that the transaction was intended as a gift. *Comstock's Appeal*, 55 Conn. 214. See also *Darlington on Personal Property*, p. 73.

The leading authority on the subject of gifts is *Huguein v. Baseley*, 14 Ves. 273; 2 Lead. Cas. Eq. 406, where a widow executed a voluntary settlement upon a clergyman, who had ingratiated himself with her, and had induced her to withdraw her affairs from the hands of her solicitor, by whom they had been previously managed. The settlement was set aside on the ground of the confidential relationship of the parties; the court, by Lord Eldon, saying: "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all care and providence were placed around her, as against those who advised her, which, from their situation and relation in respect to her, they were bound to exert in her behalf." The subjects of both contracts and gifts—but especially the lat-

ter—were thoroughly considered, and the rules stated in the text enunciated.

3. The case of *Rhodes v. Bate*, L. R., 1 Ch. 258, draws a distinction in this regard between gifts tainted with actual undue influence and presumed undue influence, holding that the former may be avoided, even if trifling, while the latter must be a substantial donation to call for interference.

4. Pomeroy's Eq. Jur. (2d ed.), § 951.

5. See *infra*, this title, *In Wills*. A part of a will may be set aside and the rest admitted to probate. *Rockwell's Appeal*, 54 Conn. 119; *Matter of Baker's Will*, 2 Redf. (N. Y.) 179.

6. "In the vast majority of cases, undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding—his dependent or fiduciary relation toward the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, and not essential. Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be proved by satisfactory extrinsic evidence. The rules of equity and the remedies which it bestows are exactly the same in each of the two cases." Pomeroy's Eq. Jur. (2d ed.), § 951.

the case of transactions *inter vivos* prevail; <sup>1</sup> others either discard them entirely and consider that the conclusions drawn from the existence of certain relations are inferences of fact only, or else confine them within much narrower limits than those existing in case of transactions *inter vivos*.<sup>2</sup>

1. **Actual Undue Influence.**—In cases of actual undue influence, the influence is established as a fact without the aid of any presumption. A fiduciary relation between the party influencing and the party influenced may be present, but its existence is accidental and immaterial.<sup>3</sup> Neither need the person influenced be under any disability.<sup>4</sup> If disability does exist, it is always a material fact as determining the amount of influence necessary to move the acting party, and as furnishing evidence from which the inference of influence may be drawn.<sup>5</sup>

The burden of proving such undue influence is on the party alleging it.<sup>6</sup> Direct proof of the very fact of the influence itself can seldom be had, and is never required. It can be inferred from other facts proved,<sup>7</sup> but never from mere opportunity.<sup>8</sup> The relation of the parties may be shown, but not declarations of the testator or grantor, either before or after the execution of the will or deed, unless to establish mental condition.<sup>9</sup>

2. **Presumptive Undue Influence.**—(See also FRAUD, vol. 8, p. 635).—Certain transactions are presumed, on grounds of public policy, to be the result of undue influence.<sup>10</sup> Such transactions are generally those occurring between persons in some relation of confidence, one toward the other. The presence of such relationship creates a presumption of influence,<sup>11</sup> which can generally

1. *Harvey v. Sullins*, 46 Mo. 147; 2 Am. Rep. 491; *Boyd v. Boyd*, 66 Pa. St. 283.

2. *Schouler on Wills* (2d ed.), § 246; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Matter of Smith*, 95 N. Y. 516; *Parfitt v. Lawless*, L. R., 2 P. & M. 462.

3. *Pomeroy's Eq. Jur.* (2d ed.), § 955.

4. *Watkins v. Brant*, 46 Wis. 419.

5. *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385, lays down the rule that for the same reason the physical health of the person is material. In this case a gift from a husband seventy-five years old, very weak in mind and body, of \$9,000, over one-third of his fortune, to his wife, who had great influence over him, who talked over his money matters with him daily, and urged him to give her his property, was set aside.

6. *Schouler on Wills* (2d ed.), § 239; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Webber v. Sullivan*, 58 Iowa 260; *Ireland v. Geraghty*, 15 Fed. Rep. 35; *Davis v. Davis*, 123 Mass. 590.

7. *Drake's Appeal*, 45 Conn. 9; *Saunders' Appeal from Probate*, 54 Conn. 108; *Main v. Ryder*, 84 Pa. St. 217; *Woodbury v. Woodbury*, 141 Mass. 329.

8. *Cudney v. Cudney*, 68 N. Y. 148; *Kimball v. Cuddy*, 117 Ill. 213.

9. *Massey v. Huntington*, 118 Ill. 80.

10. *Perry on Trusts* (4th ed.), §§ 168, 194.

11. *Benjamin's Principles of Contracts* (3d ed.), p. 82.

In this connection, the only fact really in issue is "the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element in the transaction; if any such fact be present, it is incidental, not necessary; immaterial, not essential. . . . Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine." 2 *Pomeroy's Eq. Jur.*

be rebutted by proof that the parties dealt as strangers, at arm's length, that no unfairness was used, and that facts in the knowledge of the one in the position of influence affecting the matter were communicated to the other.<sup>1</sup>

**III. IN TRANSACTIONS INTER VIVOS.**—While undue influence frequently exists over persons under no technical disability, most of the cases are referable to other heads and are considered elsewhere. Among those of whom advantage is most frequently taken, but who are *sui juris*, are aged persons, persons of slight intelligence, although not insane, and sailors.<sup>2</sup>

**1. Upon Persons of Weak Mind.**—Weakness of mind may or may not be sufficient to destroy the capacity of contracting. If the person whom it is sought to hold upon his agreement be insane, or if his weakness of mind be very great, he lacks the requisite capacity to contract, and his attempted contract, if made, will, except in certain special cases, be either void or voidable.<sup>3</sup> With such incapacity we have here no concern. The weakness of mind to be considered is such as does not take away capacity, but renders the party peculiarly susceptible to the undue influence of others. If no such influence be exerted, the contract is perfectly valid.<sup>4</sup> The condition of the contractor's mind is important only

(2d ed.), § 955. While this is so, and the importance of keeping the two kinds of influence clearly separated is great, the matter has been much confused in the courts. The two classes are hence considered together in this article, but an effort will be made to indicate in each case whether the influence is actual or presumed.

**1. Greenfield's Estate, 14 Pa. St. 505.** In *Hunter v. Atkins*, 3 Myl. & K. 135, Lord Brougham said: "There are certain relations known to the law, as attorney, guardian, or trustee. If a person standing in these relations to a client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take the gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequences of kindness arising

out of that relation." See also 1 Perry on Trusts (4th ed.), § 195; Weeks on Attorneys at Law (2d ed.), § 268; Georgia Code (1882), § 3175.

**2. Pomeroy's Eq. Jur. (2d ed.), § 951; Benjamin's Principles of Contract (3d ed.), p. 84.**

The principle that undue influence may exist, in the absence of technical disability, is illustrated by the case of *Watkins v. Brant*, 46 Wis. 419, where a conveyance by a younger married sister, of full age, to an older sister, much stronger in will and of greater intelligence, made without the knowledge of the grantor's husband and without legal advice, was set aside.

Age is always an important fact in this connection. From its existence alone, however, weakness of mind will never be presumed. *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

**3. Benjamin's Principles of Contract (3d ed.), p. 59; 1 Parsons on Contracts (7th ed.), \*383; Pomeroy's Eq. Jur. (2d ed.), § 947; Smith's Law of Contracts (7th Am. ed.), \*356 et seq.; INSANITY, vol. 11, p. 132.** So in *California*, under the code. *Deering's California Code*, vol. 2, § 39.

**4. Benjamin's Principles of Contract (3d ed.), p. 85; Perry on Trusts (4th ed.), § 190; Allore v. Jewell, 94 U. S. 506.**

as determining the amount of influence likely to overcome it, and as affording grounds for the inference that it was so overcome.<sup>1</sup>

Within these limits, however, the question of mental strength is an important one. Its effect will be to lessen the amount of evidence necessary to support the allegation of undue influence. If mental weakness is present, slight circumstances of imposition or ascendency will establish the existence of undue influence.<sup>2</sup>

Such influence must, in most cases, be actual, but there is an exception to this rule. If one of the parties to a contract be of weak mind, and there is either no consideration or a very inadequate one, a presumption against its validity arises; undue influence is presumed without proof of other circumstances.<sup>3</sup>

While, on the one hand, the weakness of mind, as the term is used in this connection, does not amount to incapacity, on the other hand, it must be sufficient to give the other contracting

1. Bispham's Principles of Equity, (4th ed.), § 230; *Oakey v. Ritchie*, 69 Iowa 69; *Jones v. Thompson*, 5 Del. Ch. 374; *Harding v. Handy*, 11 Wheat. (U. S.) 125; 2 *Warvelle on Vendor and Purchaser*, p. 872; *Perry on Trusts*, (4th ed.), § 189.

2. Thus, a deed by one in a weak state of mind, of all his property to his brother, in whom he had entire confidence, and who had great influence over him, and where a fair consideration is not clearly shown, will not be supported. *McCraw v. Davis*, 2 Ired. Eq. (N. Car.) 618. This will be so, especially if the consideration is very inadequate. *McFadden v. Vincent*, 21 Tex. 47; *Hale v. Brown*, 11 Ala. 87; *Wilson v. Oldham*, 12 B. Mon. (Ky.) 55; *McLean v. Equitable L. Assur. Soc.*, 100 Ind. 127; 50 Am. Rep. 779.

Where both confidential relationship and weakness of mind exist, the court will scrutinize the contract with the greatest care. *Graves v. White*, 4 Baxt. (Tenn.) 38.

The presence or absence of an adviser at the making of the contract, will affect the amount of evidence required to set it aside on the ground of undue influence. *Hinchman v. Emmons*, 1 N. J. Eq. 100.

3. 2 *Pomeroy's Eq. Jur.* (2d ed.), § 947; *Allore v. Jewell*, 94 U. S. 506, note, where a woman between sixty and seventy years of age, of feeble mind and subject to vagaries of different sorts, executed a conveyance of all her property, upon a very inadequate consideration. A decree refusing to set aside the deed was reversed, although

no actual undue influence appeared other than the circumstances stated. The court by Field, J., said: "It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. . . . It may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and reasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside, and the present case comes directly within this principle." This case was approved in *Griffith v. Godey*, 113 U. S. 89, where a conveyance of property worth twelve thousand dollars, for a consideration of five hundred dollars, by a man of weak mind who could barely read and write, was held of no avail, and the purchasers compelled to account as trustees for the proceeds. *Conley v. Nailor*, 118 U. S. 133. Where a woman laboring under great mental and physical prostration, it being the second day after the funeral of her husband, and she being pregnant and without independent advice, conveyed the entire interest in her late husband's estate worth \$47,000 without consideration, a demurrer to a bill al-

party some real ascendancy.<sup>1</sup> To establish or disprove this weakness, the declarations of the testator as to his intention in regard to his property, taken in connection with other facts, are admissible.<sup>2</sup>

Substantially the same principles as those enunciated above apply to contracts with persons in a state of intoxication.<sup>3</sup>

Illiteracy also, and the lack of professional advice, are material facts in questions of undue influence.<sup>4</sup>

**2. Seamen.**—The carelessness and improvidence of seamen have always caused courts to be especially jealous of their interests.<sup>5</sup> As to their contracts generally, there is no presumption against validity, unless prohibited by statute.<sup>6</sup> It is only when they affect some matter peculiar to their occupation—as agreements about wages or prize-money—that they are subject to any different rules of law than those governing other men. In such cases their occupation becomes a circumstance affecting the amount of evidence required to annul them.<sup>7</sup> In *England*, courts of equity

leging the above facts, but setting up no undue influence in express words, was overruled. *Moore v. Moore*, 56 Cal. 89. Where a father, old and dotting, makes a conveyance of all his property to a person not a relative, it may be set aside after his death. *Keeble v. Cummins*, 5 Hayw. (Tenn.) 43; *Paris v. Cobb*, 5 Rich. Eq. (S. Car.) 450.

Where a man of seventy, of weak mind and eccentric, having no legal advice and being much worried by a debt of £100, conveyed property worth £900 to his creditor, on consideration that the debt should be cancelled, and of an annuity of £1 a week, the conveyance was set aside as an absolute deed, but allowed to stand as security for the debt. While no undue influence was proven, it was presumed from the facts above. *Longmate v. Ledger*, 2 Giff. 157. See also *Gates v. Cornett*, 72 Mich. 420; *Sand v. Sand*, 112 Ill. 225; *Dickson v. Kempinsky*, 96 Mo. 252; *Wilkinson v. Sherman*, 45 N. J. Eq. 421; *Jones v. Thompson*, 5 Del. Ch. 374.

It has been held that the burden of proving an adequate consideration, is upon the one dealing with the person of weak mind. *Neely v. Anderson*, 2 Strobb. Eq. (S. Car.) 267.

The rule substantially as stated in the text, exists in *Georgia*. *Georgia Code* (1882), § 3179.

1. *Bispham's Principles of Equity* (4th ed.), § 230.

A deed by which an elderly woman transferred to her nephew and his wife her estate, reserving a life interest, executed without solicitation, and understandingly, the consideration being

the repair of her house and her support for life, to carry out which agreement they had come from a distant state, will not be set aside. *Creswell v. Welchman*, 95 Cal. 359.

2. *Howe v. Howe*, 99 Mass. 89.

3. *Perry on Trusts* (4th ed.), § 191; *Huguenin v. Baseley*, 2 Lead. Cas. Eq. (Phila. ed. 1851) \*441, note; *Pittenger v. Pittenger*, 3 N. J. L. 156; *Conant v. Jackson*, 16 Vt. 335.

4. *Pomeroy's Eq. Jur.* (2d ed.), § 948; *Fish v. Leser*, 69 Ill. 394; *Lightfoot v. Heron*, 3 Y. & C. 586; *Haberdashers' Co. v. Isaac*, 3 Jur. N. S. 611; *Connelly v. Fisher*, 3 Tenn. Ch. 382, which held that where a contract was made between an intelligent man, acting under legal advice, and an illiterate old woman who had no such advice, the burden of proving that the contract was intelligently entered into was upon the man; the court saying, however, that the presence or absence of legal advice is immaterial where the parties are upon an equal footing. But a complaint seeking to set aside a contract and setting up only that one of the parties was illiterate and signed the contract without reading it, is demurrable. *Hawkins v. Hawkins*, 50 Cal. 558.

5. *Story's Eq. Jur.* (13th ed.), § 332; 1 *Parsons on Contracts* (7th ed.) \*389; *Baldwin v. Rochford*, 1 Wils. 229.

6. *The Atlantic*, 1 Abb. Adm. 470; 3 *Kent's Com.* (11th ed.) \*193. As to the statutory provisions, see *United States Rev. Stat.*, tit. 53; 24 Stat. at L. 79; 23 Stat. at L. 53.

7. See authorities cited in the two preceding notes.

often take cognizance of the peculiar contracts made by seamen for the purpose of avoiding them if unfair.<sup>1</sup> In the *United States*, the same jurisdiction exists in theory, but is seldom exercised,<sup>2</sup> owing to the specific statutory provisions and the wide jurisdiction of the admiralty courts,<sup>3</sup> which carefully scrutinize such contracts—especially those made in reference to wages and prize-money. If their contracts for wages differ from those in ordinary use, there is a presumption against their validity, and they will be upheld only if there has been full explanation to the sailor and an additional advantage secured to him thereby.<sup>4</sup>

**3. Expectant Heirs, Reversioners, etc.**—Contracts affecting interests in expectancy, as those with heirs, reversioners, and the like, are jealously watched by courts of equity for two reasons: they are generally hard bargains, made with persons peculiarly exposed

1. Thus, where one purchased from two sailors their prize-money, on an inadequate consideration, viz.: about one-fourth of its value, having made inquiry as to its value and ascertained the same; having represented to them the danger of loss of the prize-money through peril of the sea and punishment by the captain, the court of equity held that there had been imposition, and set aside the contract; but decreed that it should stand as security for money actually due. *Baldwin v. Rochford*, 1 Wils. 229; *Taylor v. Rochford*, 2 Ves. 281; *How v. Welden*, 2 Ves. 516.  
2. *Brown v. Lull*, 2 Sumn. (U. S.) 443.

3. *Pomeroy's Eq. Jur.* (2d ed.), § 952, note.

4. 1 *Parsons on Contracts* (7th ed.) \*389; *Brown v. Lull*, 2 Sumn. (U. S.) 443, in which case the shipping articles, which were otherwise in the ordinary form, provided that in case the vessel was taken or lost in the course of her voyage, no wages should be demanded nor received except the advance wages received at the time of entry on board; and that if the vessel should be restrained for more than thirty days at any one time, the wages should cease during such restraint. It did not appear that this provision was explained to the seamen, nor that they received on account of it any extra wages. The court of admiralty held that it therefore had no effect, saying, by Story, J.: "Whenever, therefore, any stipulation is found in the shipping articles which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition or undue advantage taken of their necessities and

ignorance and improvidence, unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed entirely adequate to the new restriction and risks imposed upon them thereby."

To a libel by seamen for wages, the defense was that the libellants agreed to look to the charterer only for their pay, and to relinquish their lien upon the vessel. It did not appear that the effect of this agreement was explained to them nor that an additional compensation was paid because of it. It was held not to be binding upon them. *The Schooner Highlander*, 1 *Sprague* (U. S.) 510.

A clause in the shipping articles reading: "If any of the said crew disobey the order of master or other officer of said vessel, or absent himself at any time without liberty, his wages due at the time of said disobedience or absence shall be forfeited; and in such case such person or persons so forfeiting wages shall be reinstated and permitted to do further duty, it shall not do away with such forfeiture," is in derogation of the general rights of seamen, and is not a defense to a suit for wages, it not appearing that its effect was explained or additional compensation given. *The Almatia*, *Deady* (U. S.) 473.

A clause of the shipping articles forfeiting all wages and property of the crew upon an unauthorized absence from the vessel for forty-eight hours, is void in a case where it was not properly explained to them. *The Quintero*, 1 *Low*. (U. S.) 38.

A stipulation to sue for wages in a

to temptation to sacrifice future advantages for present and temporary gain, on the one hand; and on the other, they cause a violation of moral if not legal duties toward the ancestor or particular tenant. Such contracts are presumed to be invalid. The burden of proof is upon the one contracting with the holder of the expectancy to establish validity. To do this, he must show that the contract was fair and that it was upon an adequate consideration.<sup>1</sup>

**4. Those in Confidential Relations—*a*. THE GENERAL RULE.**—This head embraces a large proportion of the cases involving undue influence. While the fact of relationship is always important, as assisting in the determination of the question whether or not there has been actual undue influence, the principal importance of the subject is in the presumption to which it gives rise—the rule being that, the existence of a fiduciary relation once established, there is a presumption against the validity of a transaction between the parties,<sup>2</sup> on the grounds of public policy.<sup>3</sup>

The term fiduciary or confidential relation, as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted in all cases in which "influence has been acquired and abused—in which confidence has been reposed and betrayed."<sup>4</sup>

The origin of the confidence and the source of the influence are

court of common law alone is binding only if fully explained. *The Sarah Jane*, B. & H. Adm. 401.

An agreement to forfeit wages on the seaman's leaving the ship without leave, unless explained, is void. *Heard v. Rogers*, 1 *Sprague* (U. S.) 556.

A stipulation that the master might displace a seaman whom he judged incompetent, and decrease his compensation, which was not brought especially to the attention of the seaman, was held void in *Matern v. Gibbs*, 1 *Sprague* (U. S.) 158. See also *The Juliana*, 2 *Dods*. 504; *Harden v. Gordon*, 2 *Mason* (U. S.) 541; *The Australia*, 3 *Ware* (U. S.) 240; *The San Marcos*, 27 *Fed. Rep.* 567; 3 *Kent's Com.* (11th ed.) \*193.

1. *CATCHING BARGAIN*, vol. 3, p. 37; *PARENT AND CHILD*, vol. 17, p. 336; *POST OBIT CONTRACT*, vol. 18, p. 871.

**English Rule.**—The law is now changed in *England* by statute. No purchase of an expectant interest, if made *bona fide* without fraud or unfair dealing, can be set aside on the ground of under value only. 31 and 32 *Vict.*, ch. 4.

2. *Dunn v. Dunn*, 42 *N. J. Eq.* 431; *Tate v. Williamson*, L. R., 2 *Ch.* 61.

This presumption is generally rebuttable by testimony which differs according to the relation in which the parties

stand. *Bispham's Principles of Equity* (4th ed.), § 232; *Darlington on Personal Property*, p. 73.

Independent advice to the party presumed to be influenced will go far toward rebutting the presumption. *Rhodes v. Bate*, L. R., 1 *Ch.* 252.

In *Darlington's Appeal*, 86 *Pa. St.* 519; 27 *Am. Rep.* 726, the general requirements to rebut the presumption are stated by the court, by *Trunkey, J.*, as follows: "To show the utmost good faith on his part, that he took no advantage of his influence or knowledge, and that he brought everything to the knowledge of the party which he himself knew."

3. *Caspari v. First German Church*, 12 *Mo. App.* 314. The doctrine that transactions between persons in confidential relations are *prima facie* voidable, rests "upon the importance of preventing a general public mischief, which may be brought about by means secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relations of the parties." *Trunkey, J.*, in *Darlington's Appeal*, 86 *Pa. St.* 519; 27 *Am. Rep.* 726.

4. Wherever one is in such a relation that he can exercise dominion over



immaterial.<sup>1</sup> The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, Does such a relation in fact exist?<sup>2</sup>

b. TRUSTEE AND CESTUI QUE TRUST.—(See also TRUSTS AND TRUSTEES, vol. 27, p. 1).—The application of the principle under discussion to the relation of trustee and *cestui que trust* results from the existence of the broader one, that a trustee cannot place himself in a position antagonistic to his *cestui que trust*,<sup>3</sup> a principle which not only prevents him from purchasing or acquiring any adverse rights in the trust property,<sup>4</sup> but which goes farther and creates a presumption against his dealings with his beneficiary. The rule as now established is as follows: All dealings between trustee and *cestui que trust* are presumed to be voidable as effected through undue influence exerted by the trustee upon the *cestui que trust*; they are binding upon the trustee, but *prima facie* voidable at the election of the *cestui que trust*.<sup>5</sup>

This presumption is rebuttable, however, by proof of perfect fairness on the part of the trustee, and thorough understanding and voluntary action on the part of the *cestui que trust*. This requirement will be met by satisfactory evidence that there was no actual undue influence, fraud, or imposition; that all material facts within the knowledge of the trustee, or which should have

another, relief is given from all transactions which are not affirmatively shown to be fair and voluntary. *Dent v. Bennett*, 4 Myl. & C. 277.

1. *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Huguein v. Baseley*, 2 Lead. Cas. Eq. (Phila. ed. 1851), p. 74, note.

2. 2 *Pomeroy's Eq. Jur.* (2d ed.), § 956. The age of the party is not a controlling circumstance. *Rhodes v. Bate*, L. R., 1 Ch. 252; *Smith v. Kay*, 7 H. L. Cas. 770.

In *Smith v. Kay*, 7 H. L. Cas. 750, the rule is thus stated by the court, by Lord Wensleydale: "The relations with which the court of equity most ordinarily deals are those of trustee and *cestui que trust*, and the like. It (the principle under discussion) applies especially to those cases, for this reason and this reason only, that from these relations, the court presumes confidence put and influence exerted. Whereas, in all the cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a court of equity are just as applicable to the one case as in the other." *Beach on Modern Eq. Jur.*, § 114;

*Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

3. *Trustee and Cestui que Trust*.—*Bispham's Principles of Equity* (4th ed.), § 92; *Ashuelot R. Co. v. Elliot*, 57 N. H. 397; *Puzey v. Senier*, 9 Wis. 370. This principle is recognized by the code in *California*. *Deering's California Code*, vol. 2, §§ 2228–2233.

4. *Staats v. Bergen*, 17 N. J. Eq. 297; *Winter v. Truax*, 87 Mich. 324; 24 Am. St. Rep. 160; *Morse v. Hill*, 136 Mass. 60; *Colburn v. Morton*, 42 N. Y. 296; *Hammond v. Hopkins*, 143 U. S. 224.

5. *Leach v. Leach*, 65 Wis. 284; *Schwarz v. Wendell*, Walk. (Mich.) 267, where an agreement by which one-half of the benefit of a transaction into which a trustee entered on behalf of his *cestui que trust*, should go to the trustee, was declared not binding in equity, no evidence being produced to rebut the presumption against it. Where a conveyance from the *cestui que trust* to the trustee is avoided, the court will decree that the complainant repay the money which actually passed as purchase-money with interest, together with the amount expended by the trustee for permanent improvements. *Smith v. Townsend*, 27 Md. 390; 92 Am. Dec. 637. This presumption ex-

been within his knowledge, were communicated to the beneficiary, and that the beneficiary acted knowingly, voluntarily, and freely.<sup>1</sup>

Independent advice to the beneficiary is not essential,<sup>2</sup> but will go far to assist in rebutting the presumption.

The rule is most strictly applied to gifts.<sup>3</sup> It must clearly appear that the gift sought to be upheld was intended as such.<sup>4</sup>

Contracts and conveyances stand upon the same principle and differ only in the amount of evidence required to sustain them.<sup>5</sup> Inadequacy of consideration is a material circumstance, but not conclusive against validity.<sup>6</sup> In all these transactions, the bene-

ists in *California* under a provision of the code. *California* Civil Code, §§ 22, 35.

1. *Miggett's Appeal*, 109 Pa. St. 520; *Spencer's Appeal*, 80 Pa. St. 317; *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 509; *Bispham's Principles of Equity* (4th ed.), § 237; *Beach's Modern Eq. Jur.*, § 118; *Nichols v. McCarthy*, 53 Conn. 299; 55 Am. Rep. 105; *Sallee v. Chandler*, 26 Mo. 124; *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137, which held that where certain persons who stood in the position of trustees disclosed all the facts within their knowledge, there being no imposition or actual undue influence, and the one in the position of *cestui que trust* availed herself of independent advice and relied upon it, any presumptions of undue influence that might have existed in regard to contracts between them were fully rebutted.

*Waldrop v. Seaman*, 30 S. Car. 449, where an assignment to a trustee, of an interest in an estate by a *cestui que trust*, of full age and understanding, having independent advice, and no information being withheld by the trustee, was sustained, in spite of the fact that the price paid was a low one. The court, by Simpson, C. J., said: "If the parties are of full age, *sui juris*, and capable of understanding their rights, with full opportunity of ascertaining them, under no disability, advised of all the circumstances surrounding the matter or in a situation by reasonable and proper diligence to be thus advised, and they proceed, they must abide the result; and should their action subsequently result in loss, there is no reason . . . why the court of equity, or any other, should be called to protect them from loss."

In sales by a *cestui que trust* to his trustee, the test is defined as follows: Did he intend the trustee to buy? Was

there any fraud, concealment, or advantage taken by the trustee of information acquired by him in his character of trustee? *Bryan v. Duncan*, 11 Ga. 77.

*Farnam v. Brooks*, 9 Pick. (Mass.) 234, where the rule is laid down that if the subject-matter of the contract is complicated, such as an account running through many years, all that is required on the part of the trustee in the way of disclosing the facts to the *cestui que trust*, is to give fairly and without equivocation such facts as lie in his mind and will be sufficient to put him on his guard as to the other circumstances.

The *cestui que trust* must be informed that the trustee is the purchaser, where a contract of sale between them is sought to be enforced. Otherwise there is no complete disclosure of all the circumstances. 1 *Perry on Trusts* (4th ed.), § 195; *Randall v. Errington*, 10 Ves. 423. The rule laid down in the text is substantially that in *California*, under the code. *Deering's California Code*, vol. 2, § 2230.

2. *Pomeroy's Eq. Jur.* (2d ed.), § 958.

But see *Caspari v. First German Church*, 12 Mo. App. 316, where a gift made by an aged widow to the church to which she belonged, at the solicitation of the pastor, who was also her business adviser, and having no independent advice, was set aside.

3. 2 *Pomeroy's Eq. Jur.* (2d ed.), § 958. See *Georgia Code* (1882), § 2666.

4. *Leach v. Leach*, 65 Wis. 293.

5. The rule applies not only to a sale, but also to a conveyance of property as security for debt. *Pairo v. Vickery*, 37 Md. 485, where such a conveyance was set aside.

6. *Juzan v. Toulmin*, 9 Ala. 686; 44 Am. Dec. 448, which holds, however, that very great inadequacy is a badge of fraud, and from it undue influence may be presumed. But see *Richardson v.*

ficiary seeking to avoid them must act promptly.<sup>1</sup> Third parties have no interest and no right to avoid; as to them, they are valid and binding.<sup>2</sup> Like other voidable transactions, they may be ratified; but confirmation to be effectual must be intentional, and made with full knowledge of all the facts, the ignorance of which made the transaction originally voidable.<sup>3</sup>

Not only trustees proper are embraced in the rule, but *quasi* trustees of various kinds, as well as administrators and the like;<sup>4</sup> but mere passive trustees, as trustees to preserve contingent remainders, are not, the reason of the rule failing as to them.<sup>5</sup>

Spencer, 18 B. Mon. (Ky.) 450, where a contract between a trustee and *cestui que trust* was set aside, the court saying that the inadequacy alone was a sufficient ground of avoidance. To the same effect is Pugh v. Bell, 1 J. J. Marsh. (Ky.) 399.

1. The question of laches is in one sense independent of the Statute of Limitations, but in another sense the two are related. Thus, where the matter in dispute is land, the court grants a longer indulgence than when it is personal property; the statutory period of limitations being longer. Hammond v. Hopkins, 143 U. S. 224. Johnson v. Johnson, 5 Ala. 97, held a delay of eleven years, after discovery of the wrong, laches. In Pairo v. Vickery, 37 Md. 488, where a voidable mortgage was made in 1865; the grantor died in 1869; and a bill was filed by his representatives to set it aside in 1870, at which time the parties first had the benefit of legal advice and first ascertained their rights. It was held that there was no laches. See also article on "Effect of Lapse of Time on Suits in Equity," by George Wharton Pepper, Am. Law Reg. & Rev., vol. 32, no. 4.

2. Baldwin v. Allison, 4 Minn. 25.

3. Johnson v. Johnson, 5 Ala. 96, where a bill for an account and settlement of an estate in the hands of an administrator who stood in the position of *quasi* trustee, and also *in loco parentis* to the complainant, was filed. It was held that a voidable settlement between the parties was not confirmed by the subsequent execution of a distributee's bond, the object of such a bond not being in any way to confirm a previous act, but merely to provide indemnity for future debts against the estate, and it not being in the contemplation of the parties that it would have any such effect. There was,

therefore, no intention to confirm, and no confirmation.

Pairo v. Vickery, 37 Md. 485, where a deed of trust referring to a voidable mortgage, but not made with the intention of confirming it, was held not to have the effect of a confirmation.

4. Johnson v. Johnson, 5 Ala. 90; Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242; 89 Am. Dec. 779.

Williams v. Powell, 66 Ala. 20; 41 Am. Rep. 742, where a bill to set aside a sale of an interest in an estate, made by a distributee to the administrator, was dismissed, there being no fraud nor neglect to disclose material facts. There was an adequate consideration, although the court did not regard this as a necessary element to the validity of the agreement.

Wright v. Smith, 23 N. J. Eq. 106, where relief was granted against a mortgagee to one who, although not strictly a trustee, yet stood in a trust relation. The court, by Dodd, V. C., said: "That he was not formally constituted an agent, with authority to bind the complainant, or that his agreement to act for him was not formally made, are points which, if true, are of no sort of importance. Nor is it important that no agreement was made to compensate him for his services. It is sufficient that he accepted and held a situation of trust in reference to procuring the lands. Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others. . . . The rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those engaged for that purpose, and paid for it."

5. Perry on Trusts (4th ed.), § 195;

c. ATTORNEY AND CLIENT—(See ATTORNEY AND CLIENT, vol. 1, p. 942)—(1) *Contracts*.—For obvious reasons of public policy, dealings between attorney and client are closely scrutinized by the courts, and are sustained only if there be *uberrima fides*.<sup>1</sup> As to contracts between parties in such a relation, the rule is substantially the same as that applying in case of trustee and *cestui que trust*.<sup>2</sup> The same presumption arises, and it is rebutted in the same manner.<sup>3</sup> The proof required for this purpose has the same elements as that which the trustee must produce, with the qualification that there are minor differences resulting from the nature of the relation between the parties, as

Bispham's Principles of Equity (4th ed.), § 237; *Pooley v. Quilter*, 4 Drew. 189; *Sutton v. Jones*, 15 Ves. 587.

1. ATTORNEY AND CLIENT, vol. 1, p. 959.

2. Bispham's Principles of Equity (4th ed.), § 236; *Weeks on Attorneys at Law* (2d ed.), § 268.

3. *Burnham v. Haselton*, 82 Me. 495, where an attorney, to whom a note had been given for collection, purchased it for less than one-third of its face value, without communicating to his client the facts, which were in his knowledge, that the debtor was perfectly able and willing to pay the note in full. The matter came before the court on an appeal from the lower court in a suit brought for money had and received, the client thereby seeking to recover the difference between the amount collected, and that paid the client for the note. It was held that there was a presumption against the validity of the transaction, and that it was error for the court to charge that the jury might consider the presumption of innocence, and the improbability that an attorney of established reputation would commit a wrong of this character, the court considering that these presumptions do not apply to an ordinary civil case of this character. The court, by Emery, J., laid down the rule that the attorney must "affirmatively show that there was in fact no abuse of confidence; that the contract was in fact fairly made; that the other party was in truth made acquainted with all the material facts and reasons known to the fiduciary. The very making of the contract is incongruous—*prima facie* inconsistent with the fiduciary relation. The transaction may be valid, but there is no presumption in its favor. The presumption is of invalidity, which can only be overcome, if at all, by clear evidence of good faith, full knowledge, and

of independent consent and action.

... He cannot get behind the presumption of innocence and await the coming of hostile evidence. He must be aggressive, and advance against the presumption of invalidity and overcome it, if he can, by evidence of 'the perfect fairness, adequacy and equity of the transaction,' and particularly must he show that his client was informed of all material facts known to himself." To the same effect is *Marshall v. Joy*, 17 Vt. 546.

*James v. Steere*, 16 R. I. 367, where a man, sick and troubled by domestic affairs, conveyed property to his counsel in trust for his children, for the purpose of coercing his wife to a separation and settlement on advantageous terms, and with the understanding—although a mistaken one—that the lawyer had power to reconvey on the accomplishment of the object which he had in mind. The court set aside the conveyance, on the ground that it was the lawyer's duty to see that he acted understandingly, and it was immaterial whether there was any actual undue influence or not. It was held no defense that the conveyance was contrary to public policy, and that, were it not for the relation which existed, the parties would have been *in pari delicto*.

Similarly it was held in *Goodenough v. Spencer*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 248, that a conveyance from a client to an attorney, intended by both parties to hinder and delay creditors, might be set aside as against the attorney's grantee with notice. The presence of the fiduciary relationship prevents the usual effect of transactions between parties *in pari delicto* from attaching. To the same effect are *Ford v. Harrington*, 16 N. Y. 285; *Weeks on Attorneys at Law* (2d ed.), § 270; *Merryman v. Euler*, 59 Md. 588;

that the attorney must give in good faith legal advice as to the rights of the client in the matter.<sup>1</sup> The presence of independent

43 Am. Rep. 564, where an assignment of the mortgagee's interest in property to his attorney was declared invalid as an absolute assignment, but allowed to stand as security for money actually due, on the ground that it was *prima facie* voidable, although there was no proof of actual undue influence.

*Mills v. Mills*, 26 Conn. 213, where an ignorant man, in consideration of an agreement on the part of his attorney to give a bond for the costs of a suit, of a small loan, and of the expenses of the suit which the attorney advanced, conveyed to him real property worth three hundred dollars, the lawyer agreeing in writing to reconvey on the satisfaction of the client's obligations to him as above. It was held that the agreement was a mortgage, and the right to redeem it was not barred by the acceptance of ten dollars by the client, who did not intend it as a settlement, although it was so understood by the attorney.

The *prima facie* right which a client has to set aside a conveyance to his attorney, is a real interest and a devisable estate. *Gresley v. Mousley*, 4 De G. & J. 78; *Stump v. Gaby*, 2 De G. M. & G. 623. *Greenfield's Estate*, 14 Pa. St. 509, where a woman, aged eighty-six, and infirm, executed a deed conveying all her property of the value of \$200,000, to four trustees, one her lawyer, who drew the deeds, two others, her confidential advisers who had great influence over her, and the fourth introduced to her by the others, for the purpose of acting as trustee, and the trust provided that \$40,000 should be paid to the trustees for their services. The deed was set aside on the ground of presumptive fraud, although there was absolutely no evidence of actual fraud. The court, by Bell, J., said: "In this feature, the case presents what is called constructive fraud, springing from the confidential relations existing between the parties. This peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. . . . (The principle) has been beneficially applied to those confidences which owe their birth to the relation of parent and child, guardian and ward, trustee and *cestui*

*que trust*, and, above all, attorney and client."

The attorney must show that his client executed the instrument under which he claims understandingly and freely in pursuance of a well-considered, defined, and settled purpose. *Brock v. Barnes*, 40 Barb. (N. Y.) 521. Where an attorney at law, who had acquired, as such, a knowledge of the title of his client to certain goods, purchased of claimants their right for a very inadequate consideration, recovered judgment for the whole amount for his own benefit, the assignment was adjudged to be void, and on the assignors refunding the consideration paid, a perpetual injunction was awarded. *Arden v. Patterson*, 5 Johns. Ch. (N. Y.) 44.

*Montesquieu v. Sandys*, 18 Ves. 313, where a purchase was made by an attorney of a reversionary interest held by his client, both parties being ignorant of its value, and the proposition to make the contract coming from the client, a bill to set aside the purchase was dismissed.

*Cooper v. Lee*, 75 Tex. 114, which applies the rules to purchases by a client from an attorney. And see *Tancré v. Reynolds*, 35 Minn. 476; *Downing v. Major*, 2 Dana (Ky.) 228; *Smith v. Thompson*, 7 B. Mon. (Ky.) 305; *Gray v. Emmons*, 7 Mich. 533; *Starr v. Vanderheyden*, 9 Johns. (N. Y.) 253; 6 Am. Dec. 275; *Miles v. Ervin*, 1 McCord Eq. (S. Car.) 524; 16 Am. Dec. 623; *Bibb v. Smith*, 1 Dana (Ky.) 582; *Kisling v. Shaw*, 33 Cal. 425; 91 Am. Dec. 644; *De Rose v. Fay*, 4 Edw. (N. Y.) 40; *Taylor v. Barker*, 30 S. Car. 238; *Bingham v. Salene*, 15 Oregon 208; 3 Am. St. Rep. 152; *Place v. Hayward*, 117 N. Y. 497, and cases cited in ATTORNEY AND CLIENT, vol. 1, p. 959.

1. Beach on Modern Equity Jurisprudence, § 121; Weeks on Attorneys at Law (2d ed.), § 273; *Morrison v. Smith*, 130 Ill. 319; *Felton v. LeBreton*, 92 Cal. 457, where it was held that, when a client, through the inducement of his counsel, included certain property in a trust deed, the burden rested upon the counsel of showing that he fully advised his client of the legal effect and consequences of his act.

advice, whether legal or otherwise, is a circumstance peculiarly important in this connection, although it is not essential if the transaction be otherwise fair and valid.<sup>1</sup> The requirement that all material facts in the possession of the attorney must be communicated is very strict, and it is no defense that the attorney did not in fact have the information, if he might have procured it by the exercise of ordinary diligence.<sup>2</sup>

The *prima facie* disability of attorneys applies to purchases of the subject-matter of the litigation from their clients,<sup>3</sup> to agreements other than with reference to such subject-matter,<sup>4</sup> to assignments of mortgages,<sup>5</sup> agreements as to compensation made after the relation has begun,<sup>6</sup> to assignments of judgments, and,

In *Dunn v. Dunn*, 42 N. J. Eq. 431, where an assignment from a woman to her counsel was held invalid on the ground of presumed undue influence, the court, by Magie, J., held that the attorney was bound to give to the client disinterested advice, while she on her part must act freely and with knowledge. "We are not required to determine that the attorney actually failed in the performance of these duties. The invalidity of the transaction will result from a judicial determination that he has failed to show that he performed those duties." It must appear, in order that a contract between an attorney and client be upheld, that the client is no worse off than if he had consulted a disinterested lawyer. *Rogers v. R. E. Lee Min. Co.*, 9 Fed. Rep. 722. See also *Miles v. Ervin*, 1 McCord Eq. (S. Car.) 548; 16 Am. Dec. 623.

1. *Pomeroy's Eq. Jur.* (2d ed.), § 960; *Readdy v. Pendergast*, 55 L. T. N. S. 767, where a sale of a reversion, by the reversioner, to his solicitor was allowed to stand, although the seller had no independent advice. *Contra*, *Lercombe v. Saunders*, 34 Beav. 386.

2. *Weeks on Attorneys at Law* (2d ed.), § 273; *Howell v. Ransom*, 11 Paige (N. Y.) 538; *Rogers v. R. E. Lee Min. Co.*, 9 Fed. Rep. 722; 3 McCrary (U. S.) 76.

3. *Yeaman v. James*, 27 Kan. 195, where a conveyance of property in litigation was made by a client to his attorney upon an adequate consideration, and the jury found that the transaction was fair, and that the attorney had communicated to his client all material facts. It was held that the contract was unimpeachable. *Taylor v. Young*, 56 Mich. 289; *Dunn v. Record*, 63 Me. 17.

It has been held in some jurisdic-

tions, that such transfers are void for champerty. *Perry on Trusts* (4th ed.), § 202; *West v. Raymond*, 21 Ind. 305; *Berrien v. McLane*, 1 Hoffm. Ch. (N. Y.) 421; *Merritt v. Lambert*, 10 Paige (N. Y.) 358. But this doctrine is opposed to the current of authority. See article by Frank Hagerman, 14 Cent. L. J. 168, 172, and cases cited above.

It has been held that a sale by a client to an attorney, where it appears that the attorney, while negotiating for the property, was, at the same time and as a part of the same transaction, advising the client as to the probable outcome of the litigation concerning it, is void, even if made with good faith on the part of the attorney. *Rogers v. Marshall*, 3 McCrary (U. S.) 76; 9 Fed. Rep. 722 (annotated by Marshall D. Ewell); 14 Cent. L. J. 168 (annotated by Frank Hagerman). But see in this connection, *Pacific R. Co. v. Ketcham*, 101 U. S. 289.

Statutory provisions allowing attorney's fees to be settled by agreement of the parties, do not abrogate the rules governing purchases by attorneys of the subject-matter in litigation. *Anonymous*, 16 Abb. Pr. (N. Y. Super. Ct.) 423; *Barry v. Whitney*, 3 Sandf. (N. Y.) 696.

4. *Tancré v. Reynolds*, 35 Minn. 479; *Jennings v. McConnell*, 17 Ill. 148. It is immaterial that the conveyances sought to be impeached were not actually drawn by the attorney. *Carter v. West* (Ky. 1892), 19 S. W. Rep. 592.

5. *Lewis v. J. A.*, 4 Edw. Ch. (N. Y.) 599.

6. *Weeks on Attorneys at Law* (2d ed.), § 276; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Rose v. Mynott*, 7 Yerg. (Tenn.) 30. An agreement after employment, that compensations shall be

generally speaking, to all contracts and agreements between the parties.<sup>1</sup>

In all of these matters the attorney, to be protected, should disclose to the client that he is the party with whom he is contracting. Concealment is a badge of fraud.<sup>2</sup>

(2) *Gifts*.—In regard to gifts the law is even stricter. As to them, there are three rules, each supported by authority. Some cases declare that all gifts from client to attorney are void;<sup>3</sup> others pronounce them *prima facie* voidable and subject to the same rules as contracts between attorney and client;<sup>4</sup> while a third class of

increased, is invalid. *Lecatt v. Sallee*, 3 Port. (Ala.) 115; 29 Am. Dec. 249.

A contract between a client and an attorney, in which the attorney undertakes to resist a motion for a new trial, in consideration of a portion of the land involved, is binding on the client, if no concealment or improper practices were to be used, or were in fact used by the attorney in performing his part of the contract, and a court of equity will not refuse to enforce specific performance of such contracts. *Ballard v. Carr*, 48 Cal. 74.

But it has been held that the principle under discussion has no application to ordinary suits to recover professional fees. *Isham v. Parker*, 3 Wash. 755.

But a contrary rule is laid down in *McMahon v. Smith*, 6 Heisk. (Tenn.) 167, where a contract for fees of a lawyer was upheld only when he had cleared it of the presumption of unfairness and unreasonableness.

A statute allowing an attorney and client to contract for higher fees than those provided by law, does not abrogate the rule that, where the relation exists at the time of the contract, the onus of proving its fairness is upon the attorney. *Thomas v. Turner*, 87 Va. 1. See also *Burling v. King*, 46 How. Pr. (N. Y. Supreme Ct.) 452.

Such is certainly the rule where the relation exists and contracts for further and other services are made. *Planters' Bank v. Hornberger*, 4 Coldw. (Tenn.) 578.

1. As to assignments of judgments, *Morrison v. Smith*, 130 Ill. 304; *Howell v. Ransom*, 11 Paige (N. Y.) 538, where a client assigned a judgment for one-tenth of its value to his attorney. The transaction was set aside, it not appearing that the attorney communicated all the facts to his client. The question of whether or not there was actual fraud, was considered immaterial.

As to securities for loans which must

be in ordinary form, or so explained that the client fully understands them, *Beach on Modern Eq. Jur.*, § 121; *Cockburn v. Edwards*, 18 Ch. Div. 449, where a mortgage from a client to a solicitor, containing a provision for sale without the usual notice, on default of which provision was not explained to the mortgagor, was held void. The court, by Jessel, M. R., said: "The defendant, therefore, in the present case, is bound to show that he explained to his client, the plaintiff, the nature of the power of sale, supposing it to be in an unusual form. He was bound to take care that his client had the same protection as if he had employed an independent solicitor. A solicitor who lends money on mortgage to his client on any but strictly usual terms, would be wise if he always required the intervention of another solicitor. If that is not done, he must preserve evidence that the circumstances were explained to the client."

2. *McPherson v. Watt*, L. R., 3 App. Cas. 254, where the court considered a non-disclosure a fatal objection to the validity of a sale, and set it aside therefor. *Howell v. Ransom*, 11 Paige (N. Y.) 538. But see *contra*, *Yeamans v. James*, 27 Kan. 209.

3. *Bispham's Principles of Equity* (4th ed.), § 236; *Welles v. Middleton*, 1 Cox 125; *Tomson v. Judge*, 3 Drew. 306; 24 L. J. Ch. 787; *Holman v. Loynes*, 4 De G. M. & G. 282; *Newman v. Payne*, 2 Ves. Jr. 200; *Lecatt v. Sallee*, 3 Port. (Ala.) 115; 29 Am. Dec. 249; *Berrien v. McLane*, 1 Hoffm. Ch. (N. Y.) 421.

4. *Darlington on Personal Property*, p. 73; *Hunter v. Atkins*, 3 Myl. & K. 135; *Jennings v. McConnell*, 17 Ill. 148; *Greenfield's Estate*, 14 Pa St. 506. And see *Edwards v. Meyrick*, 2 Hare 60. In *Nesbit v. Lockman*, 34 N. Y. 167, where a client made a gift to the clerk of her attorneys, during the existence

authorities lays down a rule which goes far to harmonize the cases in so far as they are not absolutely inconsistent, as follows: a gift from a client to an attorney is presumed to be voidable. This presumption can be rebutted by proof of knowledge and fairness, and by the further proof that, as to the matter in question, the relation of attorney and client did not exist, *viz.*, that the client acted under independent advice.<sup>1</sup> The age, position, and intelligence of the client are not material; the relation must either have terminated or must at least *pro hac vice* have been suspended.<sup>2</sup>

of the relation, and it was found that it was "freely and voluntarily made and given by said Mary (the client), as and for a gift and donation by said Mary to said Lockman, with intent to transfer and deliver the said bonds and mortgages and check to him as his own, without any fraud, deceit or undue influence on the part of said Lockman, or advantage taken by reason of his business relations to her, and without suggestion or inducement on his part, but of her own free will and purpose," it was held that the complaint was rightly dismissed. It is to be observed, however, that the case does not consider the effect of the fact that it was an attorney's clerk, and not the attorney himself with whom the dealings were had. The opinion implies, however, that the rule is the same in all confidential relations.

In *Whipple v. Barton*, 63 N. H. 613, where an action of *assumpsit* was brought by a client against his attorney, the defense was that the money claimed was a gift. Judgment was given for the plaintiff, on the ground that there was no preponderance of evidence in favor of the defendant, the court, by Carpenter, J., saying: "To establish a gift from a client to his attorney, in whatever form the question may arise, it is incumbent upon the latter to show affirmatively, not only that it is voluntary, but also that it is made with full knowledge on the part of the client of all material facts known to the attorney, and that it is not brought about by undue influence, either actually exerted or arising from the relation between them."

1. Beach on Modern Eq. Jur., § 122, where it is said: "It is not necessary, in order to sustain such a gift, that the relation of attorney and client should cease in general and in respect to other matters; it is enough that the client has independent advice in respect to the matter of the gift, and that the

attorney is not the advisor *in hoc re*. The circumstance that there was or was not independent advice is the all-controlling one." To the same effect is *Pomeroy's Eq. Jur.* (4th ed.), § 960, note. *Re Holmes' Estate*, 3 Giff. 337, 346, where the Vice Chancellor thus states the rule: "That relation (attorney and client) is only looked at as creating the influence; and as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of the solicitor is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty and to be the recipient from his client of a gift which will be valid at law and in equity."

2. In *Morgan v. Minett*, 6 Ch. Div. 645, where releases of debts given by a client to an attorney were set aside, on the ground that while the relationship continued there could be no gift, it was held to be immaterial that the attorney had sent another and disinterested attorney to the client, who to him affirmed his previous act, no independent advice being given by that attorney. In order to render a gift good, the relation must be severed, and there must be independent advice. See also *Walker v. Smith*, 29 Beav. 394.

"In regard to gifts, the rule is definitely settled, although it may not always have been followed by American courts, that no gift from a client to his attorney, made while the relation is still subsisting, is valid. In order that a gift from a client to his own attorney may be sustained, the donee must not only show affirmatively the perfect good faith of the transaction, the absence of any pressure or influence on his own part, the complete knowledge, intention, consent and freedom of action on the donor's part, but it must also appear that, *pro hac re*—that is, in all the dealings connected with the gift itself—the relation of attorney and



(3) *Who Is an Attorney.*—In determining who is an attorney within the rule above stated, courts do not closely regard the technical significance of the word. The term includes not only a lawyer regularly admitted to practice, but one who, though unadmitted, assumes to give legal advice and attend to legal business.<sup>1</sup> Any other rule would put it into the power of a man to shield himself behind his own wrong.<sup>2</sup> An attorney's clerk comes within the meaning.<sup>3</sup>

The principle applies only to dealings between a man and his attorney.<sup>4</sup> Where such a relation does not exist, it is immaterial that one of two parties to a contract is a lawyer.<sup>5</sup>

In order that the usual presumptions may arise, the contract or gift must be made after the relation is established. If the

client between the two parties has been suspended, by means of independent advice furnished to the client by some disinterested and competent third person, through which the client was instructed and upon which he acted." *Pomeroy's Eq. Jur.* (2d ed.), § 960.

As to gifts to an attorney by one lately a minor, in *Georgia*, see *Georgia Code* (1882), § 2666.

1. *Pomeroy's Eq. Jur.* (2d ed.), § 960; *Perry on Trusts* (4th ed.), § 203. Thus, one who, although not a licensed attorney, attends to suits before the justice courts, and advises in legal matters, comes within the rule. *Freelove v. Cole*, 41 Barb. (N. Y.) 318. And one who, although not a lawyer, acts as the confidential advisor of a party in a suit before a magistrate, and represents him in the magistrate's court, is also embraced. *Buffalow v. Buffalow*, 2 Dev. & B. Eq. (N. Car.) 241.

2. Article by Frank Hagerman, 14 Cent. L. J. 172.

3. *Perry on Trusts* (4th ed.), § 203; *Hobday v. Peters*, 28 Beav. 349; 6 Jur. N. S. 794; *Nesbit v. Lockman*, 34 N. Y. 167; *Poillon v. Martin*, 1 Sandf. Ch. (N. Y.) 569, where a managing clerk in the office of an attorney, purchased from a client of his employer a mortgage, paying therefor bills of little value. It was held that there was a presumption against the validity of the transaction, which was not rebutted; and it was decreed that the mortgage be restored to the client. The court, by Sandford, Ass't V. C., said: "Nor do I feel any difficulty in extending to this transaction the principle so justly applied to purchases by attorneys and solicitors. Not that I would say that in every case the principle should be applied to a clerk

in the office of the attorney. Each case must depend upon its circumstances. It is well known that in the course of professional business, where there are two or three partners, and, as is usual, a principal clerk, the latter will necessarily be brought into contact with many of the clients, oftener than either one of the partners, and not unfrequently obtain the confidence of some clients to a far greater extent than the partner who has but seldom met with these clients. Yet such partner, although there may be no sort of intimacy between him and the client, nor any real confidence or influence, cannot purchase of that client without subjecting himself to the burden of proving that he advised the client against himself, as he would have done against a stranger bargaining for the same property. And it would be trifling with this great and valuable principle of equity to say that while the partner is thus restricted, the clerk having the client's confidence, could buy of him property, the existence and situation of which came to his knowledge as clerk, and negotiate and consummate the purchase in the office of the attorneys, on the same footing that he could deal with an entire stranger. . . . I do not consider the rule of equity so lame, as not to afford protection to clients against the influence thus naturally and inevitably acquired."

4. But the rules apply in the case of a purchase by an attorney from the trustee of his bankrupt client, the theory being that the client has an interest still, and is really one of the contracting parties. *Luddy v. Peard*, 33 Ch. Div. 520.

5. In *Stout v. Smith*, 98 N. Y. 25;

parties stood "at arm's length" at the time of the transaction, any relationship subsequently arising will not affect its validity.<sup>1</sup> The relation continues until the business in which the attorney is employed is finished,<sup>2</sup> and until the influence resulting from the relation is at an end, even though considerable time has elapsed since the employment was ended.<sup>3</sup> If the influence is no more, the fact of the prior relationship is immaterial.<sup>4</sup>

A relation of attorney and client once proved is presumed to continue until the contrary is shown.<sup>5</sup> Its cessation may be proved by affirmative acts or lapse of time,<sup>6</sup> but the mere fact that the services of the attorney are not called into play of itself proves nothing. There may have been no occasion for them.<sup>7</sup> Where the attorney has assumed the attitude of a pressing creditor, and as such deals with his former client, the presumptions no longer apply.<sup>8</sup>

The lawyer, however, must be employed in a professional capacity, such as trying a case, advising on points of law,<sup>9</sup> searching titles,<sup>10</sup> representing clients in insolvency proceedings,<sup>11</sup> and the like. If the business is altogether minor and such as gives the attorney no insight into the client's affairs and no control over his will, no presumption arises against the validity of the transactions.<sup>12</sup>

50 Am. Rep. 632, the rule is laid down that the fact that a party to a contract is an attorney, and, offering himself to do so, draws the papers, making no charge, does not establish the relationship of attorney and client, nor impose upon the attorney the duties of that relationship, nor raise any presumption of undue influence exerted by him upon the client.

1. *Davis v. Freethy*, 24 Q. B. Div. 519. But where a man is about to employ a lawyer as his attorney, and the latter visits him for the purpose of arranging the terms of the employment, the relation has begun, and the usual presumptions exist. *Ryan v. Ashton*, 42 Iowa 365.

2. *Weeks on Attorneys at Law* (2d ed.), § 268. In *Rhodes v. Bates*, L. R., 1 Ch. 252; 4 Giff. 670, where the solicitor advised his client to employ his London agent, but continued to actively interfere in the client's behalf, the relation of attorney and client was held to continue.

3. *Bispham's Principle of Equity* (4th ed.), § 236; *Perry on Trusts* (4th ed.), § 202; *Mason v. Ring*, 2 Abb. Pr. N. S. (N. Y. Ct. App.) 322, where transactions which took place eight months after the technical relationship had ceased, the influence still continuing, were set aside. *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 509.

4. *Perry on Trusts* (4th ed.), § 202; *Oldham v. Hand*, 2 Ves. 259; *Wood v. Downes*, 18 Ves. 127; *Tancré v. Reynolds*, 35 Minn. 476; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291.

5. *PRESUMPTIONS*, vol. 19, p. 75; 1 *Greenleaf on Evidence* (15th ed.), § 41; *Rhodes v. Bates*, L. R., 1 Ch. 259; 4 Giff. 670.

6. *Beach on Modern Eq. Jur.*, § 115.

7. *Rhodes v. Bates*, L. R., 1 Ch. 260; 4 Giff. 670, where the court, by Turner, J., said: "Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The mere fact that the relation is not called into action, is not, I think, sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it." To the same effect is *Ahearn v. Hogan*, 1 Drury 323.

8. *Bispham's Principles of Equity* (4th ed.), § 236; *Perry on Trusts* (4th ed.), § 202; *Johnson v. Fesemeyer*, 3 De G. & J. 13.

9. See notes 4 and 5 page 470.

10. The rule extends also to non-professional men who, as a business, examine titles and make abstracts. *Vallette v. Tedens*, 122 Ill. 607; 3 Am. St. Rep. 502.

11. *Broder v. Conklin*, 77 Cal. 330.

12. *Perry on Trusts* (4th ed.), § 202;

d. PHYSICIAN AND PATIENT—(1) *Gifts and Contracts*.—The same presumption arises in regard to contracts and conveyances between a physician and his patient as in the case of like dealings between an attorney and client,<sup>1</sup> with this qualification, that it is one not so difficult to overcome, for the reason that, as the physician does not deal with property matters, his influence as to them will probably be less than that of the attorney or other confidential business agent.<sup>2</sup> The presumption is, however, of the same kind, and is rebutted by the same evidence of fairness, good faith, knowledge, and free agency on the part of the persons contracting.<sup>3</sup> As the physician has to do generally with those either

Devinney v. Norris, 8 Watts (Pa.) 314; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 350, where it was held that the fact that one party to a contract was an attorney, and occasionally did small business for the other as a scrivener, did not raise a presumption of *fraus annexa clienti*.

1. Bispham's Principles of Equity (4th ed.), § 237; Pomeroy's Eq. Jur. (2d ed.), § 963; Story's Eq. Jur. (12th ed.), § 314; Ahearne v. Hogan, 1 Drury 310.

Billage v. Southee, 9 Hare 534; 10 Eng. L. & Eq. 37; 16 Jur. 188, where a bill was filed seeking to restrain the defendant from proceeding to recover the amount of a promissory note for £325, on two grounds: first, that the plaintiff had signed it in the belief that it was for £25 only; second, that it was given by the plaintiff, the patient, to his medical attendant, on the occasion of an accession of fortune to the family of the patient, without any account delivered, and for an amount more than would be due for medical attendance on the most extravagant scale of charges. As to the second ground of relief, the court held that the plaintiff was entitled to a declaration that the note should stand as a security only for the amount due for medical attendance on the plaintiff, although the case of the plaintiff, as to the first ground of relief sought by his bill, was wholly disproved. Turner, Vice Chancellor, in his opinion, said: "No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other.

... It is said 'that he intended to be liberal,' but intention imports knowledge, and liberty imports the absence of influence. I see no evidence in this case either of knowledge or of the absence of influence; and where a

gift is set up between parties standing in a confidential relation, the onus of establishing it by proof rests upon the party who has received the gift."

In Popham v. Brooke, 5 Russ. 8, where a patient, suffering from apoplexy and brain disease, scarcely able to talk, gave to the surgeon on board the vessel on which he had been voyaging, and under whose care he had been, an annuity of £100 for life, on consideration that the surgeon would live with him and attend him for life, it appeared that the patient had in all probability at the time the agreement was made only a short time to live, which fact was known to the surgeon, but so far as appeared, not known to the patient. It was held that the agreement was void.

Cadwallader v. West, 48 Mo. 497, where a patient who was aged, feeble, deaf, and of very weak mind, transferred all his property to his attending physician, who had great influence over him and who lived with him, for a very inadequate consideration—a provision for a support for life being the consideration recited—it was held that the transaction should be set aside. Currier, J., in delivering the opinion, said: "The presumption that West exerted an undue influence over Cadwallader's mind in procuring the deed, springs out of the relations which they sustained towards each other, and is intensified by the circumstances of Cadwallader's mental and physical condition. . . . It has been repeatedly declared by learned chancellors that the mere relation of patient and medical adviser is sufficient to avoid the contracts of the former made with the latter during the continuance of such relation." But see Doggett v. Lane, 12 Mo. 215.

2. Pratt v. Barker, 1 Sim. 1; 4 Russ. 507.

3. Article in 22 Abb. L. J. 264, 266;

physically or mentally weak or diseased, contracts of this nature present many questions of actual undue influence.<sup>1</sup> They are subject to the usual rules as to influence of this kind.<sup>2</sup>

The law in regard to gifts is the same as that governing contracts. There is a presumption against the validity of donations from a patient to his medical adviser, but it is rebutted in much the same manner as in the case of other transactions,<sup>3</sup> although it is of course harder to overcome.<sup>4</sup> Independent advice is generally, but not universally, held not indispensable, although a most important fact to be established.<sup>5</sup> Any evidence which shows that the influence presumed, did not in fact exist, is sufficient.<sup>6</sup>

The above statement of the law is that deducible from the majority of the cases. Some courts, however, have held contrariwise, that the relation in question is not one from which influence is presumed, and that its existence is merely a circumstance tending, in connection with other evidence, to establish the facts of actual undue influence.<sup>7</sup> These authorities are, however,

Dent v. Bennett, 4 Myl. & C. 273; Cadwallader v. West, 48 Mo. 497.

1. Audenreid's Appeal, 89 Pa. St. 114; Cadwallader v. West, 48 Mo. 502.

2. Dent v. Bennett, 4 Myl. & C. 269, where a medical attendant obtained from his patient, who was eighty-five years of age, an agreement to pay him £25,000 for services completed two years before, the regular charge for which had been previously paid, it being done privately, without the intervention of any third person, and concealed until after the death of the patient. In holding the agreement void, Lord Chancellor Cottenham said: "The relief, as Sir S. Romilly says in his reply in *Huguenin v. Basely* (14 Ves. 273), 'stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another,' and when I find an agreement so extravagant in its provisions, secretly obtained by a medical attendant from his patient of a very advanced age, and carefully concealed from his professional advisers and all other persons, and have it proved that the habits, views and intentions of the testator were wholly inconsistent with those provisions, I cannot but come to the conclusion, that the medical attendant did obtain it by some dominion exercised over his patient."

3. In *Gibson v. Russell*, 2 Y. & C. N. C. C. 115, where a deed of gift of real estate from an aged and infirm person of weak mind, and subject to insane delusions, to his intimate friend and medical attendant, was set aside for

fraud and undue influence, one of the circumstances in the proof being that the deed stated, contrary to the truth, a money consideration of £1,000, the decision of the court proceeded upon the ground that there was both actual undue influence, and also influence presumed from the relation of the parties.

Pratt v. Barker, 1 Sim. 1; 4 Russ. 507, where a voluntary deed was executed by an old and infirm man in favor of a person who had attended him as a surgeon, and secured dividends of certain stock for him. As it was proven that the donor understood the nature of the debt, and had the deed read over and explained to him, and had independent advice, the court refused to set it aside.

4. Bispham's Principles of Equity (4th ed.), § 231.

5. Darlington on Personal Property, p. 73; Audenreid's Appeal, 89 Pa. St. 114; *Gibson v. Russell*, 2 Y. & C. N. C. C. 115. But see *Mitchell v. Homfray*, 45 L. T. 694, where it is considered necessary that there be independent advice, in order that a gift from a patient to a physician be sustained. See also *Pratt v. Barker*, 1 Sim. 1; 4 Russ. 507.

6. See cases in note 3, page 472.

7. Audenreid's Appeal, 89 Pa. St. 114, where a patient transferred certain stock to his physician, alleged to be for the consideration of one dollar, and certain services in having obtained for him the block of stock of which the shares transferred were a part. The patient was seventy years

believed to be opposed to what is decidedly the current of opinion.<sup>1</sup>

(2) *Who is a Physician.*—Like the term “attorney,” that of “physician” has a broad meaning. It is, as elsewhere used in the law, defined as “one lawfully engaged in the practice of medicine.”<sup>2</sup> As here used, its meaning is even wider. We must look to the fact of the relation, rather than to its legality. The rules above enunciated apply to the relation of patient to physician,<sup>3</sup> surgeon,<sup>4</sup> dentist,<sup>5</sup> and to any other who as a fact practises the art of healing in any of its branches, whether a regularly licensed practitioner or not.

As to the time during which the *prima facie* disqualification lasts, the same principles apply as in case of attorney and client.<sup>6</sup>

c. CLERGYMAN AND PARISHIONER.—The relation of clergyman and parishioner is generally considered as raising a presumption of undue influence, in case of contracts between the parties, or gifts to the former from the latter, the presumption being of the same nature, and rebuttable by the same evidence as that arising in like transactions between physician and patient.<sup>7</sup> The rule is not so generally established as in that case, however,

of age, very wealthy, infirm, and confined to his house, although of sound mind and judgment. On a suit brought by the executors of the patient to set aside the transaction, the court, affirming the judgment of the court below (33 Leg. Int. 82; 11 Phila. 183), held that the physician could defend by showing that the transfer of the stock was by way of gift, and not for the consideration stated; that a physician is not prevented from receiving a donation from his patient by reason of the relation between them, and that the burden of proof was on the plaintiff to show fraud and undue influence, and not upon the physician to clear the transaction of the taint of unfairness. See Darlington on Personal Property, p. 73.

1. Article in 22 Alb. L. J. 264, and authorities cited above.

2. PHYSICIAN AND SURGEON, vol. 18, p. 427.

3. Billage v. Southee, 9 Hare 534; 10 Eng. L. & Eq. 37; 10 Jur. 188; Dent v. Bennett, 4 Myl. & C. 269; Gibson v. Russell, 2 Y. & C. N. C. C. 115; Cadwallader v. West, 48 Mo. 483.

4. Pratt v. Barker, 1 Sim. 1; 4 Russ. 507; Popham v. Brooke, 5 Russ. 8, which held that the rule applied to the surgeon on board the vessel in which a party voyaged, and who attended him during the journey.

5. Allen v. Davis, 4 De G. & S. 133,

where an aged captain in the navy accepted a draft of £262 in favor of a dentist, the latter, by his answer, stating the consideration for the draft to have been a verbal agreement that the dentist would, during the captain's life, attend to his teeth and supply him with new ones as occasion might require. It was held that the draft must be surrendered.

6. Dent v. Bennett, 4 Myl. & C. 277, where it was held that the relation was not necessarily at an end, merely because no medicine was being administered at the time of the transaction. There may have been no occasion for it.

7. Pomeroy's Eq. Jur. (2d ed.), § 963; Bispham's Principles of Equity (4th ed.), § 237; Cooley on Torts (2d ed.) \*530; Parfitt v. Lawless, L. R., 2 P. & M. 469; Norton v. Rely, 2 Eden 286; Ford v. Hennessy, 70 Mo. 580.

Contracts.—Pironi v. Corrigan, 47 N. J. Eq. 135, where the defendant, a Catholic priest, promised to secure a divorce for a lady from her husband, if she would settle certain property on him. She agreed to the proposition, and made the settlement. An action was brought to have the transaction set aside. The court, in granting the prayer of the bill, held that when confidential relations exist between two persons, resulting in one having influence over the other, and a business transaction takes place between them,

and high authorities have repudiated it, holding that there is no presumption of law from the fact of the relationship, which is important only as bearing upon the question of actual undue influence.<sup>1</sup> The more general doctrine is believed, however, to be that first stated.

It is immaterial whether the influence be exerted in favor of

giving a benefit to the person in the position of influence, the law raises a presumption against the transaction, and casts upon the person benefited the burden of proving that the confidential relations had been, as to the transaction in question, suspended, and that it was fairly conducted, the parties dealing at arms' length. In this connection independent advice is a most important factor.

**Gifts.**—The leading authority is *Huguein v. Baseley*, 14 Ves. 300; 2 Lead. Cas. Eq. 406, where certain instruments were executed in favor of the spiritual adviser of a widow, who had induced her to discharge her solicitor and put her affairs in his hands. The settlements, which were voluntary, were set aside on account of the undue influence presumed from the relation of the parties. The court, by Lord Chancellor Eldon, said: "Repeating therefore, distinctly, that this court is not to undo voluntary deeds, I represent the question thus—whether she executed these instruments, not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants, Baseley and the attorney, were bound by their duty to communicate to her, before she was suffered to execute them. And though perhaps they were not aware of the duties which this court required from them in the situation in which they stood, where the decision rests upon the ground of public utility for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had. These parties, therefore, cannot possibly hold the benefit of these instruments."

*Corrigan v. Pironi*, 48 N. J. Eq. 607, which decided that a gift of a remainder in lands, reserving life use to a priest, the spiritual adviser of the donor, who was an aged, eccentric and illiterate Roman Catholic, will be set aside, where the donee fails to sustain the burden of proof, and to show that the donor knew the legal effect of the conveyance, and that she acted independ-

ently of the confidential relationship between them, although there is no suspicion of fraud or imposition.

*Ross v. Conway*, 92 Cal. 632, which held that a gift by a dying person—especially if of weak mind—through the influence of a spiritual adviser, whether to such adviser or to a recipient who is made the beneficiary through his influence, will be set aside in equity without investigation of the extent of the influence, where the donor had no independent advice, and such adviser remained in the room during the interview of the donor with the only other person who was permitted to see her.

*Caspari v. First German Church*, 12 Mo. App. 293, where there was a gift disproportioned to her means, made by an aged widow, to a church at the solicitation of the pastor thereof, who was also the donor's spiritual and business adviser, without disinterested advice from others, upon the condition, subsequently repudiated by the donee, that she was to receive an interest therein during her life. It was held that a gift made through the solicitation of one sustaining confidential relations to the donor must be free from the least taint of fraud; that a presumption of fraud arises from the existence of confidential relations between the donor and donee, and that it is incumbent on a donee who sustains confidential relations to the donor to show that he had competent, disinterested advice. Hence a decree setting aside the gift was rendered.

1. *Greenfield's Estate*, 24 Pa. St. 240; *Jackson v. Ashton*, 11 Pet. (U. S.) 229, where a decree of the circuit court for the District of Pennsylvania dismissing a bill was affirmed. The bill sought to set aside a bond and mortgage made by a woman to a clergyman, on the ground that they were induced by undue influence. The court found that there was no actual influence. As to the contention of the complainant that it should be presumed from the relation of the parties, the court, by McLean, J., said: "But he is represented to have been her pastor. Some years before the

the clergyman himself or some third person, who receives a benefit from the transaction.<sup>1</sup>

The religion or position of the clergyman is immaterial, the principle extending to contracts with priests,<sup>2</sup> ministers of the English established church,<sup>3</sup> dissenting ministers,<sup>4</sup> and pastors of different denominations in the *United States*.<sup>5</sup>

A similar rule makes voidable *prima facie* gifts from nuns to their convents.<sup>6</sup> For the same reason, the presumption above

mortgage deed was signed, Mrs. Goodwin did belong to the church under the charge of the defendant; but this relation had ceased long before the death of Goodwin: but if this relation existed in fact, it is not charged in the bill. Does the profession of a clergyman subject him to suspicions which do not attach to other men? Is he presumed to be dishonest? It would, indeed, exhibit a most singular spectacle if this court, by its decision, should fix this stain on the character of a class of men who are generally respected for the purity of their lives, and their active agency in the cause of virtue. They are influential, it is true; but their influence depends upon the faithfulness and zeal with which their sacred duties are performed. Acquainted, as we are, with the imperfections of our nature, we can not expect to find any class of men exempt from human infirmities. But why should the ministers of the gospel, who, as a class, are more exemplary in their lives than any other, be unable to make a contract with those who know them best and love them most? Their influence, by precept and example, does more to reform the actions of men, and restrain their vicious inclinations, than all the institutions of society. And yet we are called upon to denounce this whole class, and hold them incapable of making a contract with those who are under their pastoral charge, and who, like Mrs. Goodwin, are distinguished for their piety. Why not give them the same measure of right which is enjoyed by others? If any minister should become a traitor to his master, and disgrace his high and holy calling by using, for fraudulent purposes, his influence over the weak or unwary, the law affords a remedy; and the proceedings in this case show that the disposition will not be wanting to bring him to an account."

1. *Ford v. Hennessy*, 70 Mo. 580, where the facts were as follows: One F., a few days before his death, gave all

his money, and made a will devising his other property to one H., a Roman Catholic priest who had for six years been his father confessor and pastor, and had visited him repeatedly, as such, during an illness of a year preceding his death. No relative of F. was with him during this time, and he had no advice from any other source. F. lived as a single man, and sometimes, though not always, represented himself to be single. H. had heard, however, that he had a wife without the country. He, however, made no inquiry to ascertain the fact, and never suggested to F. that he ought to provide for her. H. gave the money to the archbishop of the church, who gave it to a convent. In an action by the representatives of the donor against H., the archbishop and the convent, to set aside the gift and recover the money, it was held that it was the duty of H., before accepting the gift, to have investigated and satisfied himself, either that F. had no family, or that he was determined to disregard its members. H. had not done this, and the gift could not stand. The fact that he had no selfish motive, and received no personal benefit from the transaction, was immaterial. See also *Ross v. Conway*, 92 Cal. 632; *Caspari v. First German Church*, 12 Mo. App. 293.

2. *Pironi v. Corrigan*, 47 N. J. Eq. 135; *Ford v. Hennessy*, 70 Mo. 580; *Ross v. Conway*, 92 Cal. 632.

3. *Huguein v. Basely*, 14 Ves. 273; 2 Lead. Cas. Eq. 406.

4. *Norton v. Rely*, 2 Eden 286, where a grant of an annuity obtained by a dissenting minister having a spiritual ascendancy over a woman under a state of religious delusion, was set aside on principles of public policy.

5. *Caspari v. First German Church*, 12 Mo. App. 293.

6. *Whyte v. Meade*, 2 Ir. Eq. Rep. 420; *McCarthy v. McCarthy*, 9 Ir. Eq. Rep. 620; 1 H. L. Cas. 703. But see *In re Metcalfe's Trust*, 10 Jur. N. S. 287; 2 De G. J. & S. 122, in which it was held that where one becomes a

applies to transactions between a spiritualistic medium and one of his followers.<sup>1</sup>

*f.* PRINCIPAL AND AGENT—(See AGENCY, vol. I, p. 331).—Not only do the relations of trustees and professional men to those for whom they perform their services give rise to presumptions of undue influence, but the doctrine extends further, and embraces transactions between the parties to the ordinary relationship of principal and agent.<sup>2</sup> The rules as to them are the same

nun, and assigns all her property in trust for the benefit of a Roman Catholic congregation, the assignment is good, and the court or her petitioner will order the payment of the fund assigned to the trustees. This case is criticised in an article in 10 Jur. N. S., pt. 2, p. 91, where it is said: "It seems to be clear, that if a nun were to make a gift of her property to her convent, she or her representatives might have such deed set aside upon the ground of undue influence, the exercise of which the court of chancery, taking into consideration the vows she had taken and the circumstances under which she was placed, would, according to the principles upon which it ordinarily acts, undoubtedly presume."

1. *Lyon v. Home L. R.*, 6 Eq. 655, where a widow aged seventy-five, within a few days after seeing one who claimed to be a spiritualist medium, through belief that she was fulfilling the wishes of her deceased husband, made an irrevocable gift to him of £30,000 and an estate in remainder subject to her life interest of £30,000. The gift was set aside. In this case there was also actual fraud inferred, from the fact that the medium translated rappings to mean that the widow's late husband wished her to adopt the medium as her son, and make him independent for life.

*Nottidge v. Prince*, 2 Giff. 246, where a gift was made by a person of weak intellect, of her whole fortune, to a person who had acquired great influence over her mind, by making her and others believe that he sustained a supernatural character. It was held to be invalid on the ground that no person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been interposed against the exercise of such influence.

In *Connor v. Stanley*, 72 Cal. 556; 1

Am. St. Rep. 84, the facts were as follows: J was seventy-two years old, feeble both mentally and physically. He was a firm believer in spiritualism. Shortly after the death of his wife, he consulted the plaintiff as a medium, and afterward settled a sum of money on her. It was held that the settlement was voidable, because of the existence of a relation of peculiar trust and confidence between them, similar to that between a religious devotee and his spiritual adviser, and the proof of which would throw upon the plaintiff the burden of showing fair dealing, which requirement of the law had not been satisfied.

*Leighton v. Orr*, 44 Iowa 679, where one W lived for years in unlawful cohabitation with a woman who claimed to be a spiritualistic medium, and to have daily communication with his deceased wife, whose memory he greatly revered. During this time she acquired great influence, and had great control over him in business affairs. At the same time, he was in the habit of indulging considerably in the use of alcoholic liquors. Before his death, he conveyed large portions of his property to this "medium" for the consideration of one dollar and friendship. It was held that the conveyances should be set aside, on the ground that they were procured by undue influence.

2. *Perry on Trusts* (4th ed.), § 206; *Beach's Modern Eq. Jur.*, § 125; *Pomeroy's Eq. Jur.* (2d ed.), § 959, where it is said, his words being quoted with approval in *Rochester v. Levering*, 104 Ind. 569: "In any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome. . . . The mere fact that a reasonable consideration is paid and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which



equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness, as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction, and of the person with whom he was dealing, and gave full and free consent—if all these are affirmatively proved—the presumption is overcome, and the transaction is valid. These general doctrines are applied under every variety of circumstance and to every kind of transaction." See also *Condit v. Blackwell*, 22 N. J. Eq. 486; *Burke v. Taylor*, 94 Ala. 530.

*McHarry v. Irvin*, 85 Ky. 342, where a decree dismissing a petition to set aside a deed procured by an agent of his principal through fraud and undue influence was reversed. The conveyance was by a widow to her son-in-law, who as her agent had charge of her affairs. It was procured for an inadequate consideration, without the communication of material facts. The court, by Lewis, J., said: "The doctrine is too well settled to need a reference to authorities, that 'contracts between principal and agent should be jealously scrutinized, and slight circumstances of inequality, surprise and hardship may be sufficient to vacate them even sometimes without proof of fraud.' . . . The relation of parent and child is, of course, to be always considered in determining, as a question of fact, whether a gift or bounty from one to the other has been unfairly obtained; for the same implication or presumption of undue influence or fraud does not arise in such case as when the parties are strangers, and the relation of principal and agent exists. But there is no reason for a rule, nor is there a rule, which will enable a son-in-law, who is her agent, to profit by a gift or purchase obtained from his mother-in-law by undue influence or fraud, or exempt him from the consequences thereof, if the fact be established by proof."

*Rochester v. Levering*, 104 Ind. 562, where a confidential agent to sell a tract of land, purchased it himself, having communicated fully and correctly all the facts of which he had notice about the tract and its value, and hav-

ing made no misrepresentations, and the price being not manifestly inadequate. The court upheld the transaction, on the ground that, although it was presumptively invalid, the agent had sustained the burden of proving its fairness.

*Keith v. Kellam*, 35 Fed. Rep. 243, where a sale of a principal's land to one interested jointly with the principal's agent, the agent not having disclosed the relation of the parties and other material facts, was avoided. See also *Murphy v. O'Shea*, 2 J. & L. (Segden's Dec.) 422; 8 Ir. Eq. Rep. 329; *Selsey v. Rhoades*, 2 Sim. & S. 49; *Barker v. Harrison*, 2 Colby 546; *Moloney v. Kernan*, 2 Dr. & W. 31; *Brooks v. Berry*, 2 Gill (Md.) 83; *Moore v. Mandlebaum*, 8 Mich. 433; *Kerby v. Kerby*, 57 Md. 350; *Porter v. Woodruff*, 36 N. J. Eq. 182; *Georgia Code* (1882), §§ 2186-2188, 3177, which provisions are declaratory of the common law. *Ralston v. Turpin*, 129 U. S. 663.

**Gifts.**—*Le Gendre v. Byrnes*, 44 N. J. Eq. 372, where a daughter, who acted as the confidential business agent of her mother, who was old and feeble, received from her a gift of real estate of the value of \$40,000, of which property she had the charge, and had collected the rents. The daughter withheld the deed from record until after the mother's death. In a suit to set aside the conveyance, a motion to dismiss the bill was denied. The court, by Van Fleet, V. C., said: "Whether we say the defendant, at the time she obtained title, was simply the agent of her mother, or stood in a relation to her mother where she was subject to higher duties and greater responsibilities than those of an agent, is, in my judgment, of no importance whatever. As agent simply, she was bound, in all her dealings with her mother, to practise toward her mother the utmost good faith. The law on this subject is settled beyond question, and rests upon the highest considerations of justice and safety. An agent is bound to serve his principal to the best of his skill, knowledge, ability, and judgment. The law, to prevent him from being tempted to betray his principal, will not allow him to place his interests in conflict with those of his principal, and if, in any case, this rule be violated, the agent, in order to keep what he has obtained, must show that, in the particular transaction, he served his

as those governing contracts and gifts between trustee and *cestui que trust*, with the exception that, as the confidence reposed and the inequality between the parties are less, the presumptions are more readily overcome.<sup>1</sup> As in the previous instances, the rules proceed out of the great principle that one may not serve himself, while serving another, in such a way as to injure that other.<sup>2</sup>

The rule is most strictly applied where there is a dealing concerning the very subject-matter of the agency,<sup>3</sup> but is not confined to such transactions, the only restriction being that the subject must be such that there will be naturally an influence arising out of the relation.<sup>4</sup> Whether such an agency exists as will disqualify the agent, is a question of fact to be determined from all the circumstances of the case.<sup>5</sup> While a special agency to perform some defined duty will not prevent the agent from contracting with his principal, in respect to matters totally dis-

principal, against himself, with the same fidelity that he would have been required to use against a third person.

. . . If an agent obtains from his principal, the title to lands of which he has charge for his principal, and the validity of his title is subsequently assailed, he must, even in a case where he has given a consideration, in order to maintain his title, show affirmatively that there was no undue influence exercised, no advantage taken, and no imposition practised. . . . Now, I think, the facts stated in the bill demonstrate, beyond dispute, that the parties to the transaction under review did not deal on terms of equality. On the one side there were weakness, dependence, and trust, and on the other there was a person in a position of influence, where she could practice fraud with ease and with little danger of detection. Besides, the transaction on its face renders it highly probable that all was not fair, open, voluntary, and well understood. The gift was a very large one, amounting in value to at least \$40,000. The fact that the evidence of it was concealed until after the death of the donor, or rather withheld from the public records, where a prudent grantee, under ordinary circumstances, would have placed it very soon after getting it, if not a strong badge of fraud, is a circumstance which, I think, the complainants have a right to have explained in a judicial proceeding."

*Todd v. Grove*, 33 Md. 191, where a gift from a principal to an agent was set aside, the agent not having sustained the burden of proving the fair-

ness of the transaction, and the knowledge and free agency of the donor.

1. Beach's Modern Eq. Jur., § 125; Pomeroy's Eq. Jur. (2d ed.), § 959.

2. Pomeroy's Eq. Jur. (2d ed.), § 959; Wharton on Agency and Agents, § 231; *Michoud v. Girod*, 4 How. (U. S.) 503.

Thus, an agent cannot purchase the property which is the subject of the agency. *McClendon v. Bradford*, 42 La. Ann. 160; *Tyler v. Sanborn*, 128 Ill. 136; 15 Am. St. Rep. 97; 4 L. R. A. 218, and note, where the authorities are collected. See also AGENCY, vol. 1, pp. 372, 375; AUCTIONS AND AUCTIONEERS, vol. 1, p. 981; BROKERS, vol. 2, p. 576; CONTRACT, vol. 3, p. 871.

3. *Norris v. Tayloe*, 49 Ill. 17; 95 Am. Dec. 568, where an agent who had the care of the land of his non-resident principal, paid the taxes and exercised a general supervision over it, purchased the same from his principal. The sale was set aside, the agent not having communicated all the material facts.

4. In *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 444, where a board of directors of a corporation sold their mill and machinery to their superintendent, who had charge of the books, accounts, and other papers of the corporation, and was the principal director of its general business, affirmative proof of fairness being wanting, the sale was set aside.

5. In *Keith v. Kellam*, 35 Fed. Rep. 245, one who had the entire charge of his principal's land, paid the taxes, attended to the fencing, and performed

connected therewith,<sup>1</sup> yet, if the circumstances show that an influence in fact probably exists, the rule will be applied with full vigor. The burden of establishing the agency is on the one alleging it.<sup>2</sup>

The fact that the principal stands in a relation *in loco parentis* to the agent, is a fact which may be shown to help rebut the presumption of undue influence, but is not conclusive upon that point.<sup>3</sup>

Independent advice is not generally regarded as necessary to the validity of the transaction.<sup>4</sup>

Some authorities have not extended the doctrine of presumptive undue influence to the case of gifts from principal to agent. They lay down the rule that equity will closely scrutinize such donations, but that the burden of proof is upon those seeking to set them aside. They draw a distinction between the technical relations of confidence—those already treated—and the more informal relations, considering that, in regard to the former, influence in case of gifts is presumed; while in the latter, it must be proven.<sup>5</sup> The Supreme Court of the *United States* has greatly narrowed the domain of presumptive undue influence in this regard. In case of principal and agent, it has not only not directly recognized it, but has used an expression which would seem to imply that it does not hold the doctrine of the majority of the courts.<sup>6</sup>

g. HUSBAND AND WIFE—(See also MARRIAGE SETTLEMENTS, vol. 14, p. 538)—(1) *Exerted Upon the Wife*—(a) *Contracts*.—No relation known to the law affords so great opportunity for the

all other acts required, was held to be *prima facie* disqualified from purchasing.

1. Keith v. Kellam, 35 Fed. Rep. 245.

2. Spratt v. Wilson, 94 Ala. 608.

3. McHarry v. Irvin, 85 Ky. 342. But see Le Gendre v. Byrnes, 44 N. J. Eq. 377, where the court, by Van Fleet, V. C., said: "The fact that the person standing in the relation of agent to the grantor [of a voluntary deed of a large amount of property] in this case was a child, and not a stranger, neither changes the rule of law to be applied, nor mitigates its rigor."

4. Todd v. Grove, 33 Md. 104.

5. Note by Walter B. Hill to Ralston v. Turpin, 25 Fed. Rep. 24; Hunter v. Atkins, 3 Myl. & K. 113; Ralston v. Turpin, 25 Fed. Rep. 7.

It is submitted that this distinction is neither logical nor supported by the cases. See cases elsewhere cited, and McCormick v. Malin, 5 Blackf. (Ind.) 523; also Pomeroy's Eq. Jur. (2d ed.), § 959.

6. In Ralston v. Turpin, 129 U. S.

674, the rule is laid down as follows by the court, speaking by Harlan, J.: "The agent is bound to act with absolute good faith toward the principal in respect to every matter intrusted to his care and management. In accepting a gift from his principal, he is under obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. All transactions between them, whereby the agent derives an advantage beyond legitimate compensation for his services, will be closely scrutinized by courts of equity, and set aside if there be any ground to suppose that he has abused the confidence reposed in him." The decision of the case sheds no clear light on the question. The court found that the donor had acted independently, deliberately, and with knowledge, and hence upheld the gift. In the opinion of the court below—Speer, J., 25 Fed.

exercise of undue influence as that existing between husband and wife. Owing, however, to the common-law disabilities of married women, the older cases do not present many instances of the application of the rules governing their transactions with their husbands.

At common law, the existence of the wife was merged in that of her husband.<sup>1</sup> She could make no contract with him,<sup>2</sup> and none—save as his agent and in his name—with third parties.<sup>3</sup> Her contracts were, however, recognized in equity, although to a limited extent.<sup>4</sup> Under the modern statutes, which give to married women, to a great extent, the rights and subject them to the liabilities of a *feme sole*, the scope of their contracts with their husbands has largely increased.<sup>5</sup> In our discussion of the subject, we shall presuppose that the contracts in question are valid—by statute or otherwise—if freely made, and shall consider the effect of the influence of the husband—how it may be proved to actually exist, when it is presumed, and how the presumption of the law may be rebutted.

Under the head of actual undue influence, it may be said that it is always competent to show the relation of the parties and the surrounding circumstances, and that in case the contracting parties sustain to each other the relation of husband and wife, and the agreement is such as to operate to the advantage of the former, equity will most closely scrutinize the transaction, and will set it aside upon evidence which might be insufficient were the parties in no confidential relation to each other.<sup>6</sup> This prin-

Rep. 7—the doctrine of presumptive undue influence, as applied to gifts from principal to agent, is repudiated, the court holding that there is no presumption against them. See also *Jackson v. Ashton*, 11 Pet. (U. S.) 229; *Jenkins v. Pye*, 12 Pet. (U. S.) 253; *Darlington on Personal Property*, p. 73.

1. HUSBAND AND WIFE, vol. 9, p. 789.

2. HUSBAND AND WIFE, vol. 9, p. 792. And such was the law of *New York* up to 1887. Some exceptions were probably made by a law of that year. See *Hendricks v. Isaacs*, 117 N. Y. 411; 15 Am. St. Rep. 524.

3. MARRIED WOMEN, vol. 14, p. 604.

4. HUSBAND AND WIFE, vol. 9, p. 792. See also *Hendricks v. Isaacs*, 117 N. Y. 411; 15 Am. St. Rep. 524. As courts of equity alone recognize the contracts, they are the only tribunals which can give relief in cases of unconscionable contracts between husband and wife. *Wood v. Chetwood*, 44 N. J. Eq. 66.

5. HUSBAND AND WIFE, vol. 9, p. 793.

6. Kelly on Contracts of Married

Women, p. 124; *Regan v. Holliman*, 34 Tex. 412; *Meldrum v. Meldrum*, 15 Colo. 478. *Corcoran v. Corcoran*, 119 Ind. 138; 12 Am. St. Rep. 390, where the court, by Mitchell, J., said: "Contracts between husband and wife are void in law, and are only upheld when they are supported by the clearest and most satisfactory equity."

In *Witbeck v. Witbeck*, 25 Mich. 439, a conveyance of land on an inadequate consideration from a wife to her husband was set aside, it appearing that it was made in order to preserve family peace, and through the influence of the husband. The court, by Campbell, J., said: "The law certainly does not prevent persons in this confidential relation from doing, without urgency, of their own accord and under the natural impulses of kindness and affection, such generous acts as are the results of mutual confidence and good will. But the same principle which encourages confidence, protects it by preventing any profit to be gained from abusing it. The law recognizes the fact that a married woman is easily subjected to a

ciple is independent of any presumption, and is universally recognized. Nearly all courts, however, go farther than this, and bring the matter in line with the decisions as to agreements between other parties to fiduciary relationship, viz. : that a presumption of undue influence exerted by the husband arises which is rebuttable by proof of the fairness of the transaction, full understanding and free agency on the part of the wife, and that there was no fraud, concealment, or imposition on the part of the husband.<sup>1</sup>

The rule embraces not only transactions between the parties, but applies to contracts made by the wife which operate to the benefit of a third party. If such a transaction results from the undue influence of the other party to the marriage relation, it will be voidable.<sup>2</sup> The fact of whether or not the wife duly and regularly acknowledged a conveyance, is always a material fact, and strong evidence tending to disprove undue influence.<sup>3</sup> The same principle as to ratification and confirmation after disability removed applies to contracts voidable through abuse of their relation as to other voidable transactions.<sup>4</sup>

species of coercion, very much more effectual than any ordinary operation of fear or fraud from strangers. It has always been found necessary to examine jealously into all transactions whereby the husband gets an advantage over the wife, not plainly spontaneous on her part. Any undue advantage gained by the use of the marital relation, is a legal fraud on the wife, which courts of equity will not allow to stand to her prejudice." But see *Shelby v. Burtis*, 18 Tex. 644, which held that where it appeared that a wife had mortgaged her property for the benefit of her husband, through an appeal to her sympathy, but not through any coercion that took away her free agency, the transaction should stand.

1. *Bispham's Principles of Equity* (4th ed.), § 237; *Pomeroy's Eq. Jur.* (2d ed.), § 963; *Coulson v. Allison*, 2 De G. F. & J. 521; *Dolliver v. Dolliver*, 94 Cal. 648; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Switzer v. Switzer*, 26 Gratt. (Va.) 582; *Bradish v. Gibbs*, 2 Johns. Ch. (N. Y.) 550. *Miller v. Miller*, 16 Ohio St. 527, which held, that in order to be available as a defense, in an action brought by a widow against an executor for her distributive share of her husband's estate, a post-nuptial agreement, made in view of a voluntary separation, and fully executed on the part of the husband, must be shown in the pleadings, and proved to have been fair, reasonable, and just to the wife, under the then existing circumstances. Hence

a bill setting up merely the fact of the agreement is demurrable. But see, *Field v. Sowle*, 4 Russ. 112. See also *MARRIAGE SETTLEMENT*, vol. 14, p. 559.

2. *Green v. Scranage*, 19 Iowa 461; 87 Am. Dec. 447; *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537.

3. *Green v. Scranage*, 19 Iowa 461; *Connecticut L. Ins. Co. v. McCormick*, 45 Cal. 580. But the acknowledgment is not conclusive evidence of free agency. See *Wiley v. Prince*, 21 Tex. 637; *Central Bank v. Copeland*, 18 Md. 305; *Eyster v. Hatheway*, 50 Ill. 521; 99 Am. Dec. 537. But it makes a *prima facie* case.

In *Hadden v. Larned*, 87 Ga. 635, loans had been made to a husband on the strength of land conveyed to him by his wife, which land was afterward levied on, in execution of a judgment against the husband. To the claim set up by the wife, that she never parted freely with the property, the court said, as the wife had executed this deed, and solemnly acknowledged the same, it was in conflict with all the analogies of the law to treat it as *prima facie* void, before any fact whatever tending to impeach it had been introduced, and that, though wives were to be protected against undue influence, it was of equal importance that honest creditors should be protected against wily husbands.

4. *Kelly on Contracts of Married Women*, p. 125.

(b) *Gifts*.—(See also GIFTS, vol. 8, p. 1308). — Gifts between husband and wife were void at common law, but valid in equity.<sup>1</sup>

When made by the wife to the husband, they are jealously regarded by the courts,<sup>2</sup> and presumptions attach, similar to those in case of contracts between the parties.<sup>3</sup> While it is not necessary to interpose a trustee,<sup>4</sup> nor that the donor have independent advice,<sup>5</sup> it must appear that the transfer of property was made freely, voluntarily, understandingly, and with the intention of granting a benefit to the donee.<sup>6</sup> The husband must have done everything in his power to see that his wife understood the nature and value of the property, and must show affirmatively that he exerted no pressure upon her.<sup>7</sup>

The same principles apply to gifts induced by the husband in favor of third persons as if in his own favor.<sup>8</sup> The property given

1. GIFTS, vol. 8, p. 1333.

2. In *Dolliver v. Dolliver*, 94 Cal. 642, it was held that a conveyance of property by a wife to her husband, obtained by means of moral pressure, through the existence of divorce proceedings against the wife, she having no counsel, should be set aside. See also *Jackson v. Jackson*, 94 Cal. 446.

3. *Dolliver v. Dolliver*, 94 Cal. 642.

4. GIFTS, vol. 8, p. 1333.

5. *Kelly on Contracts of Married Women*, p. 137; *Dolliver v. Dolliver*, 94 Cal. 642. But independent advice is an important fact. Thus, where a woman of sixty-five executed a deed in favor of her husband, who was but twenty-six, which disinherited a son by a former marriage and also a grandson, it was held that, there being no evidence of weakness of mind or body and the presence of independent advice being shown, the gift was valid. *Ravens v. Nau*, 110 Mo. 416.

6. *Lane v. Lane*, 76 Me. 525; *Dolliver v. Dolliver*, 94 Cal. 648; *Jennings v. Davis*, 31 Conn. 134; Article by David Stewart, on "Possession by Husband and Wife," 23 Am. L. Reg. N. S. 630.

7. *Boyd v. De La Montagnie*, 73 N. Y. 503; 29 Am. Rep. 197, which holds that in gifts from a wife to her husband, the burden is upon the husband to show that the gift was fair and proper. Hence, where a wife gratuitously transferred real property to her husband in order to delay parties to whom she wrongly believed she was indebted, such belief being induced by the husband, although there was no evidence of fraud, the conveyance was set aside, and it was held no defense that the transfer was made to defraud creditors,

the plea of *particeps criminis* being allowed only where the parties stand upon an equal footing.

Where a woman, soon after her marriage, conveyed her property, on a nominal consideration, at the request of her husband, to a third party, who immediately thereafter conveyed the same to the husband, it was held that the deed might be avoided if, in the words of the court, speaking by Trunkey, J., there is no "affirmative evidence that it was the purpose of that woman, free from her husband's undue influence, to give him the land, and that his conduct was fair and conscionable." It is immaterial that the certificate of acknowledgment is in due form. *Darlington's Appeal*, 86 Pa. St. 512.

The same presumptions apply in case of dealings between husband and wife as in those between attorney and client, guardian and ward, and trustee and *cestui que trust*. *Meldrum v. Meldrum*, 15 Colo. 478; *Witbeck v. Witbeck*, 25 Mich. 439. But see *Jones v. Gorham*, 90 Ky. 622, where it was held that proof that a wife had conveyed her property to a trustee to be transferred to her husband, with the understanding and upon the agreement that the husband should make his will in her favor, is not sufficient so to justify a court in setting the deed aside as procured by the exercise of undue influence.

8. In *Edwards v. Bowden*, 107 N. Car. 58, where a wife, sick in bed, was threatened with abandonment by her husband, and her husband was also threatened with unlawful prosecution if she did not sign a deed of mortgage, and she signed the same under these

must be that of the wife; that it stands in her name is not necessarily conclusive on this point.<sup>1</sup>

The influence is presumed to exist so long as the relation continues. The law will not permit an inquiry into the question of whether or not confidence and trust are in fact reposed. It is immaterial even, that proceedings for divorce are pending.<sup>2</sup>

(2) *Exerted Upon the Husband*.—While the familiar instances of undue influence are those where advantage is taken of the wife, the rule works in both ways, and transactions may be avoided on the ground of undue influence exerted by the wife upon the husband. There is naturally no presumption of its existence, but it may be inferred from circumstances.<sup>3</sup> In certain cases, a presumption of undue influence arises, not from the relation of the parties, but from weakness of mind or some other circumstance, the marital relation being incidental and not essential to it.<sup>4</sup>

(3) *Similar Relations*.—Not only do the rules above stated apply when persons occupy the relation of husband and wife, but they extend to relations which, though differing widely from them in other regards, are like them in so far as there is in them the same element of influence.

threats, the court held her act void on the ground of duress and undue influence.

In *Holt v. Agnew*, 67 Ala. 371, the appellant (Mrs. Holt) assigned certain policies of insurance on her husband's life to satisfy demands on her husband for money which he had embezzled. She expressed her willingness to make the assignments without solicitation or persuasion, or any allusion to the prosecution of her husband, and other facts showed that she acted freely and voluntarily. Her suit to set aside the assignment was not sustained.

1. In *Allen v. Drake*, 109 Mo. 626, where a husband, who had settled an ample amount upon his wife, of which he kept a separate account, managing it as her trustee, purchased property with his own funds, and assumed an incumbrance upon it, but took title in her name and subsequently she conveyed it to him, acknowledging the deed separate and apart, it was held that the conveyance could not be avoided.

2. *Dolliver v. Dolliver*, 94 Cal. 648.

3. In *Turner v. Turner*, 44 Mo. 535, the plaintiff, on his marriage to the defendant, had purchased land, and at her desire, request, and importunity, had permitted the deeds to be taken in her name. Subsequent events showed

that the husband had been made the victim of a deliberate attempt by a faithless wife, in conjunction with guilty confederates, to wrest from him all his property. The court considered that a wife in whom her husband reposed confidence, might well be able to exert an influence on his mind and obtain the title to property in her own name. If she should exercise this influence with a design of despoiling her husband, and then abandoning him, the husband would be entitled to redress. Hence a demurrer to a bill setting up the above facts was overruled.

In *Ximines v. Smith*, 39 Tex. 49, it was held that a transfer of notes from a husband to his wife, given her on consideration that she would continue to live with him as his wife, she having threatened desertion, was voidable, there being no consideration, and the transaction not being a voluntary gift.

But the rule in *California* seems to be otherwise. Deering's *California Code*, vol. 2, § 1575, as construed by *Breson v. Breson*, 90 Cal. 336.

4. *Haydock v. Haydock*, 34 N. J. Eq. 570; 38 Am. Rep. 385, affirming the decree in 33 N. J. Eq. 494, where a husband of weak mind and feeble body, who depended greatly upon his wife, who had much control over him, with-

Thus, transactions between persons betrothed come within the principle.<sup>1</sup> The rule embraces also transactions between persons living in illegal sexual relations.<sup>2</sup>

*h. PARENT AND CHILD*—(See also PARENT AND CHILD, vol. 17, p. 331; GIFTS, vol. 8, p. 1308)—(1) *Exerted Upon the Child*.—The influence of a parent over his child who is still a minor, or has recently attained his majority, is in many respects similar to that of a husband over his wife, and some authorities hold that transactions between the parties to that relation stand upon the same ground as those between persons in the fiduciary positions already considered. According to this view—which is, perhaps, the more logical and tends most strongly to make systematic the law upon these subjects—the presumptions usual in confidential relations

out other advice, made a gift to the wife of a substantial part of his estate, it appearing also that the gift was intended mainly as a testamentary provision. It was set aside, although there was no direct proof of fraud or imposition.

1. *Paige v. Horne*, 11 Beav. 236; *Corbett v. Brock*, 20 Beav. 524; *Kline's Estate*, 64 Pa. St. 122; *Tiernan v. Binns*, 92 Pa. St. 248; *Bierer's Appeal*, 92 Pa. St. 265; *Neely's Appeal*, 124 Pa. St. 406; 10 Am. St. Rep. 594; *Pierce v. Pierce*, 71 N. Y. 154; 27 Am. Rep. 22 and note p. 26; *Rockafellow v. Newcombe*, 57 Ill. 186, a case where the influence was exerted by the woman upon the man; *Taylor v. Rickman*, Busbee Eq. (N. Car.) 278.

In *Gilmore v. Gilmore*, 7 Oregon 374, a suit was brought to set aside a deed made by a woman to the man to whom she was engaged to be married, and by whom she was pregnant. The deed was ordered canceled. The court, by Boise, J., said: "The law seems to be well settled that when one occupies a confidential or fiduciary relation to another, as that of guardian and ward, attorney and client, and the like, where the donee or grantee is supposed to exercise an unusual and commanding influence over the grantor, courts will set aside the conveyance, unless the grantee can show that the transaction was fair, and without fraud and undue influence. It is laid down as a rule that the influence of a man over a woman to whom he is engaged to be married, is presumed to be so great, that the court will look with great vigilance at the circumstances and the situation of the parties, and will not only consider the influence which the intended husband, either by

soothing or violence, may have used, but require satisfactory evidence that it has not been used to sustain such a conveyance."

The above principles apply to releases executed at the time of marriage. See *Shea's Appeal*, 121 Pa. St. 319, where a woman had released on the day of her marriage all her expectant interest in the estate of her husband. On his death she brought a bill against his estate claiming dower. Her bill was sustained on the ground that she had previously very positively refused to execute such a contract, and that it was not shown that she had changed her mind at the time. The burden of proof of the free execution of the release being on those setting it up, the court held that from the relation of the parties the ordinary inference of consent did not arise. Consent was not affirmatively shown, and the plaintiff's claim was sustained. The court, by Green, J., said, that the law "will require, when the husband claims a benefit arising from any such dealings, that it be shown affirmatively that he acted in perfect good faith and took no advantage of his influence or knowledge, and that whatever contracts he made were fair, adequate, and equitable." See also MARRIAGE SETTLEMENTS, vol. 14, p. 546.

2. *Perry on Trusts* (4th ed), § 210; *Bivins v. Jarnigan*, 3 Baxt. (Tenn.) 282; *Muller v. Buvck*, 12 Mont. 354. It has been held that in the case of gifts by a man to his mistress, there is a presumption against validity which the donee must overcome by proving affirmatively that the donation was not the result of undue influence. *Hanna v. Wilcox*, 53 Iowa 547.

A man, whose mind and body were



against validity arise and are rebuttable by the same evidence; the transactions are regarded as voidable until affirmative proof of free agency, full knowledge, and good faith is produced.<sup>1</sup> This is the general doctrine of the English courts,<sup>2</sup> and is supported by high authority in the *United States*.

Many courts and text-writers of the highest position, however, decline to extend the principle thus far, considering that, while the influence is naturally great, it is not so controlling in its nature as that existing in the case of parties to the marriage relation, and that there is at least a probability in any given case that the

weak by dissipation, gave all his property to a prostitute with whom he had been living. The court held that in such a case the transaction should be viewed with such suspicion by a court of equity as to cast on the donee the burden of proving that the donation was the result of free volition, and was not induced by fraud or undue influence, and in this case the deed was set aside. *Shipman v. Furniss*, 69 Ala. 555; 44 Am. Rep. 528.

1. Pomeroy on Eq. Jur. (2d ed.), § 962; Beach on Modern Eq. Jur., § 120; *Archer v. Hudson*, 7 Beav. 560; *Wright v. Ver Plank*, 8 De G. M. & G. 137, which held that a gift for life from a daughter to her father of three fifths of her property in possession, made a few months after majority, will be set aside, even if reasonable under all the circumstances, and if the solicitor acted properly, and no fraud or deceit be shown, and there be no mistake, incapacity, or failure to understand the effect of the act and the value of the gift. The court, by Knight Bruce, L. J., said: "Upon the ground of the close attention, the strictness, and the jealousy with which, upon principles of natural justice and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and, if I may borrow an old expression weighs in golden scales, every transaction between guardian and his ward or between a parent and his child, which, including or consisting of a gift from the younger to the elder, takes place soon after the termination of the legal authority, as that the ward or child may, in consequence, probably be—not in the largest and amplest sense of the term; not in mind as well as person—an entirely free agent."

In *Davis v. Strange*, 86 Va. 808, it was held that a reconveyance by a natural daughter to her father would be avoided in a case where he had de-

liberately conveyed to her the property in question as a gift, and after becoming feeble in body and mind, was induced by other members of his family to ask her for a reconveyance, which she gave without reflection, consultation, or advice, through sympathy for his distress, and urged by the family lawyer, who had told her that it would be best for her to do so, although he knew the fact, unknown to her, that her father's latest will had omitted all provisions for her which former wills contained. The court, by Fauntleroy, J., said, *quoting* from Bigelow on Fraud: "In respect of bounties by children in favor of their parents, it is for the parent—father or mother—to show that no advantage was taken of his or her influence or knowledge, and that the transaction was fair and conscionable. And the same is true of those standing in affection and influence *in loco parentis*."

In *Whitridge v. Whitridge*, 76 Md. 54, it was held that a deed of trust made by a girl of twenty-one, granting half of her estate to her father, if she should die without issue and he should survive her, and appointing him and another trustees under the deed, is *prima facie* void, and if assailed by the grantor, must be shown by the trustees to have been her free, voluntary and unbiased act; and if new trustees have been appointed, the same duty falls upon them or the deed will fall. *Berkmeyer v. Kellerman*, 32 Ohio St. 239; 30 Am. Rep. 577; *Noble v. Moses*, 81 Ala. 530; 60 Am. Rep. 175; *Ashton v. Thompson*, 32 Minn. 25; *Miller v. Simonds*, 72 Mo. 669. But see article on "Constructive Fraud," 17 Alb. L. J. 480, where the case below, among other decisions, is discussed and criticised. *Comstock v. Comstock*, 57 Barb. (N. Y.) 469.

2. See article on "Constructive Fraud," 17 Alb. L. J. 480, for a very interesting discussion on the subject.

ties of blood are strong and that no injustice is in fact done to the weaker party.<sup>1</sup> The cases taking this view state the law thus: that transactions between a parent and child will, in the interest of the latter, be closely and jealously scrutinized by the courts,<sup>2</sup> and will be avoided if slight circumstances of imposition appear, but that some positive evidence of undue influence is required. No presumptions of law against validity exist. Such is the doctrine of the Supreme Court of the *United States* and of many of the other American courts, as well as of a few of the English tribunals.<sup>3</sup> According to this view, the court will consider all the

1. *Jenkins v. Pye*, 12 Pet. (U. S.) 241.

2. *Bispham's Principles of Equity* (4th ed.), § 236; *Cocking v. Pratt*, 1 Ves. 401; *Bergen v. Udall*, 31 Barb. (N. Y.) 9 (a case of a conveyance to a father by a daughter just of age); *Miskey's Appeal*, 107 Pa. St. 630.

A father, having advanced to a child in his infancy, upon his coming of age, took a bond from him to a greater amount than the sums advanced and which the son was totally unable to pay. Lord Keeper Henly held that the bond was obtained by parental influence, and decreed that it should not stand as security for the sums advanced, but be set aside altogether. *Carpenter v. Herriot*, 1 Eden 338.

A daughter conveyed her real estate to her father immediately before her marriage, under a belief that she would be benefited by it, and that the property conveyed would become hers after the decease of her parents. She was influenced by the declarations and by the advice of her father, in whom she appears to have placed the most explicit confidence. The transaction was set aside, the court considering that a transaction attended by such circumstances would naturally excite the jealousy of a court of equity. *Slocum v. Marshall*, 2 Wash. (U. S.) 397; *Georgia Code* (1882), § 666.

3. In *Jenkins v. Pye*, 12 Pet. (U. S.) 241, an attempt was made to set aside the conveyance of property to a father by his daughter, for a nominal consideration. The daughter was twenty-three years of age. No undue influence was actually exerted. The bill was dismissed. The court, by Thompson, J., said: "But the grounds mainly relied upon to invalidate the deed were, that being from a daughter to her father, rendered it at least, *prima facie*, void. . . . The first ground of objection seeks to establish the broad principle that a deed from a child to a parent,

conveying the real estate of the child, ought, upon considerations of public policy, growing out of the relation of the parties, to be deemed void; and numerous cases in the English chancery have been referred to, which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient, showing undue influence exercised by the parent, operating upon the fears or hopes of the child, and sufficient to show reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child; and in some cases, although there may be circumstances tending in some small degree to show undue influence, yet if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed. It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed, *prima facie*, void. It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection, and acting on the presumption that a

circumstances of the case, the presence or absence of outside advice,<sup>1</sup> the adequacy of the consideration, if a contract, or the intention to confer a voluntary benefit, if a gift,<sup>2</sup> the age of the parties, the knowledge of the son or daughter, and draw from them inferences of fact.<sup>3</sup> A case of undue influence may be established by evidence that would be insufficient in a suit between parties who had dealt at arm's length.<sup>4</sup> Gifts made shortly after attaining majority are most strictly regarded.<sup>5</sup> The principle extends as well to dealings with illegitimate children as to those with the legitimate.<sup>6</sup>

(2) *Exerted Upon the Parent*.—As in the case of husband and wife, so in that of parent and child, transactions may also be avoided because of influence unduly exerted by the one who is more dependent upon the other.<sup>7</sup> No presumptions of such influence, however, arise from the existence of the relation. It is established as an inference of fact only. Most of the decisions which seem to hold contrary to this rule only apparently do so,

parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child; whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view, and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child, and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The *prima facie* presumption is that it was intended as an advancement to the child, and so not falling within the principle of a resulting trust. The natural and reasonable presumption in all transactions of this kind is that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected, by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it."

In *Taylor v. Taylor*, 8 How. (U. S.) 183, a deed from a young woman, just of age, made without consideration, to a third party in trust for her parents with whom she lived, was set aside. The court affirmed *Jenkins v. Pye*, 12 Pet. (U. S.) 241, but, putting especial stress upon the principle that slight evidence of imposition is sufficient, gave the relief sought, on the ground that from the recital of false statements in the conveyance, and misrepresentation

and pressure on the part of the parents, undue influence must be inferred.

The doctrine of these cases is ably criticised by Prof. Pomeroy on the following grounds: (1) the expressions are mainly *obiter*; (2) they are in conflict with the overwhelming weight of authority; (3) they are in conflict with principle; (4) the reasons supporting them are opposed to the common experience; (5) they have not been generally adopted by the American courts. 2 Pomeroy's Eq. Jur. (2d ed.), p. 1398 n. Story's Eq. Jur. (12th ed.), § 309; Bisham's Principles of Equity (4th ed.), § 235; Perry on Trusts (4th ed.), § 201; Darlington on Personal Prop., p. 73; *Tenbrook v. Brown*, 17 Ind. 410; *Pusey v. Gardner*, 21 W. Va. 469 *Powers v. Powers*, 48 How. Pr. (N. Y. Super Ct.) 395.

1. *Weller v. Weller*, 44 Hun (N. Y.) 176; *affirmed* 112 N. Y. 655.

2. An agreement to support the parent has been repeatedly held to be a sufficient consideration. *Leedy v. Crumbaker*, 13 Ind. 523.

3. *Knox v. Singmaster*, 75 Iowa 64.

4. *Sears v. Shaffer*, 6 N. Y. 268; *Williams v. Williams*, 63 Md. 371.

5. Schouler on Domestic Relations (3d ed.), § 270; Benjamin's Principles of Contracts (3d ed.), p. 84; White and Tudor's Lead. Cas. Eq., note to *Huguenin v. Baseley*, vol. 2, p. 430; and cases cited in PARENT AND CHILD, vol. 17, p. 334.

6. *Davis v. Strange*, 86 Va. 793.

7. Schouler on Domestic Relations (3d ed.), § 270. See *supra*, this title, *Husband and Wife*.

the presumption arising from other circumstances, and the parental relation being only accidental.<sup>1</sup> Thus, while there are *dicta* and some cases to the contrary,<sup>2</sup> it may be taken as the generally accepted doctrine, that affirmative proof is necessary to set aside contracts between parent and child operating to the benefit of the latter, and gifts from the former to the latter.<sup>3</sup> The courts generally regard such dealings as rather to be favored than condemned, as being one means of performing a parental duty.<sup>4</sup> On the other hand, the courts will eagerly seize upon any circumstances tending to show imposition when proved, and will give them due weight. Such a circumstance would be the great age of the parent, or his failing health.<sup>5</sup> In such cases presumptions of invalidity often exist upon other grounds,<sup>6</sup> or if they do not,

1. See *supra*, this title, *Upon Persons of Weak Mind*. See also *infra*, this title, *Principal and Agent*.

2. *Hemphill v. Holford*, 88 Mich. 293, held that where a son and daughter enjoying the income of the estate of an aged father, in consideration of his support, which income is ample compensation, have the burden of showing entirely clean hands in an absolute transfer to them of all his property, especially when no reservation or provision for his support is made.

In *Parker v. Parker*, 45 N. J. Eq. 224, it was held that the burden of proof was upon a son, who enjoyed the confidence of his aged mother, and had great control over her, to show that she voluntarily and intentionally gave him property which he seeks to hold. *Highberger v. Stiffer*, 21 Md. 338; 83 Am. Dec. 593.

3. *Pomeroy on Eq. Jur.* (2d ed.), § 962; *Beauland v. Bradley*, 2 Sm. & Gif. 339; article on "Constructive Fraud," 17 Alb. L. J. 480; *Howe v. Howe*, 99 Mass. 88; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537; *Millican v. Millican*, 24 Tex. 446. See PARENT AND CHILD, vol. 17, p. 335.

In *Sanfley v. Jackson*, 16 Tex. 584, the court, by Lipscomb, J., after conceding the general rule of the burden of proof in case of fiduciary relations, said: "But it is clear that this rule was never applied, either qualified or unqualified, to a deed or gift from a parent to a child; and the reverse of such a principle has always been sustained; and there is not believed to be a single exception to the principle that a deed from a parent to a child is always regarded with a favorable eye, and every presumption is in favor of its validity.

. . . A settlement made by a parent

on a child, so far from being regarded with jealousy will always be presumed to be free from suspicion; because it is the natural course for property to take. One of the main objects of the acquisition of property by the parent is to give it to his child; and that child in turn will give it to his, and in this way the debt of gratitude we owe to our parent is paid to our children."

4. *Jenkins v. Pye*, 12 Pet. (U. S.) 241.

5. *Giles v. Hodge*, 74 Wis. 360, held that a deed obtained by children from an aged and infirm parent of failing mind, of property worth \$5,000 for a consideration of \$10, and a vague promise to support him, one of the means of inducement being the representing to him that his other children were about to have a guardian appointed over him, which was the case, will be set aside.

6. See *supra*, this title, *Upon Persons of Weak Mind*; *Martin v. Martin*, 1 Heisk. (Tenn.) 644; *Jacox v. Jacox*, 40 Mich. 473; 29 Am. Rep. 547; *Weller v. Weller*, 44 Hun (N. Y.) 176; *affirmed* 112 N. Y. 655.

In *Brice v. Brice*, 5 Barb. (N. Y.) 533, where a father conveyed all his real estate to his son without any consideration, except a personal covenant to support him and his wife during their lives, it appearing that for several years the son had exercised a controlling influence over the father, and, as his agent, transacted most of his business, the father being old and feeble, and trusting the son implicitly, he executed the deed at his bare request, the court held that the relation of the parties was such that the son could not hold the land without showing that he had not abused the confidence reposed in him. Failing to do this, a bill in

the facts are material as assisting in the drawing of proper inferences of fact.<sup>1</sup> If no such circumstances occur, they will regard the transactions as in the nature of family settlements, and will endeavor to uphold them.<sup>2</sup>

(3) *Parties Within the Relation.*—Not only does the rule in question extend to cases of parent and child, but it reaches also to those relations which are similar to it, and where the influence would naturally be the same, embracing the case of grandfather and grandson,<sup>3</sup> uncle and nephew or niece,<sup>4</sup> step-mother and step-son or step-daughter,<sup>5</sup> older and younger brothers and sisters,<sup>6</sup> more distant relatives,<sup>7</sup> and, in short, all cases where one, in fact,

equity to set aside the conveyance was sustained.

1. *McDaniel v. McCoy*, 68 Mich. 332.

2. Story on Eq. Jur. (12th ed.), § 309 a; *Pomeroy's Eq. Jur.* (2d ed.), § 962. And see PARENT AND CHILD, vol. 17, p. 335.

3. *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

4. *Tate v. Williamson*, L. R., 2 Ch. 55.

In *Archer v. Hudson*, 7 Beav. 551, a niece, two months after she became of age, and after her guardian had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up and who was considered by the court as *in loco parentis*. Lord Langdale, M. R., set aside the security, saying: "Nobody has ever asserted that there cannot be pecuniary transaction between a parent and child, the child being of age; but everybody will affirm in this court, that if there be a pecuniary transaction between parent and child just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation' without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child; and that is the business and duty of the party who endeavors to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear." The child must be "placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

*Hall v. Perkins*, 3 Wend. (N. Y.) 626, held that where a person induced his nephew, an ignorant young man, to receive a lot of land worth little more than one third of the amount due him

and to give a discharge of the debt, fraud would be presumed. The conveyance was set aside, and an account was decreed. *Hansen v. Berthelsen*, 19 Neb. 433.

5. *Bickerstaff v. Marlin*, 60 Miss. 509; 45 Am. Rep. 418.

6. In *Harvey v. Mount*, 8 Beav. 439, where a younger sister conveyed all her property to the intended husband of an elder sister, who had obtained a great ascendancy over her, on account principally of the perplexity which she felt as to what course to pursue after her sister's marriage, the conveyance being in consideration of her support, the deed was set aside, and it was held immaterial that there was no actual fraud. *Todd v. Grove*, 33 Md. 188; *Thornton v. Ogden*, 32 N. J. Eq. 723; *Boney v. Hollingsworth*, 23 Ala. 690.

In *Sears v. Shafer*, 6 N. Y. 268, where a sister holding a remainder interest in certain property held by her brothers, who were also the executors of their father's will, under which the property was held, and her ordinary advisers, released the same, under a belief that she was thereby carrying into effect her father's intention, there being proof of very slight actual undue influence, the release was set aside.

7. *Perry on Trusts* (4th ed.), § 201.

**Mother-in-Law and Son-in-Law.**—But the relation of mother-in-law and son-in-law does not come within the rule. *Fish v. Cleland*, 33 Ill. 238.

In *Cleland v. Fish*, 43 Ill. 282, where a son-in-law purchased his mother-in-law's interest in certain land, little intercourse having existed between their families, and it did not appear that he had ever been her advisor or agent in business matters, or that he had agreed to ascertain the value of her interest; or that she had at any time told him that she relied on him, owing to the

sustains to another a relation *in loco parentis*, as it is ordinarily understood and defined.<sup>1</sup>

The age of the child is material, but youth is not essential to the continuance of the relation recognized by the doctrine in question.<sup>2</sup>

The influence is greatest before or soon after majority, but is presumed to last until affirmative proof is introduced to show that the dominion of the parent is no more.<sup>3</sup>

i. GUARDIAN AND WARD—(See GIFTS, vol. 8, p. 1308; GUARDIAN AND WARD, vol. 9, p. 85).—Dealings between guardian and ward, taking place about the time of the attaining of majority by the latter, are the objects of the close scrutiny of courts of equity. The relation gives to the party in the position of power much of the authority and opportunity for the exercise of influence possessed by both trustee and parent, without the guaranty of fairness which the nearness of relation, in the latter case, does much to afford.<sup>4</sup>

The law, therefore, is, that gifts from a ward to a guardian and contracts between them are presumed to be voidable on the ground of undue influence, if they took place while the influence and dominion lasted.<sup>5</sup> The length of time during which this dominion lasts is generally considered a question of fact dependent upon the circumstances of the special case.<sup>6</sup> It has been held,

relationship, to disclose all the facts, and that she only sold in consequence of such confidence reposed in him, it was held that there was no such fiduciary relation between them; that the sale was invalidated by the son-in-law's failure to disclose to her all material facts within his knowledge as to the value of her interest.

But see *Hamilton v. Mohun*, 1 P. Wms. 121, where an agreement on the part of a man about to marry, that he would release his fiancée's mother, who was also her guardian, of all accounts for the *mesne* profits of her estate, was set aside.

**Father-in-Law and Son-in-Law.**—A conveyance of a farm worth \$2,200, by a man seventy-seven years old, and weak in body and mind, to his son-in-law, in consideration of a promise, afterward fulfilled, on the part of the latter to take care of the grantor as long as he lived, and to bury him, will not, in the absence of positive proof of fraud or duress, upon the grantor's death within a year after conveyance, be set aside at the instance of the heirs. *Travis v. Lowry* (Pa. 1887), 7 Cent. Rep. 553. But where there is great weakness of mind, the burden is shifted. *Smith v. Smith*, 60 Wis. 329.

1. Benjamin on Principles of Con-

tract (3d ed.), p. 82; *Story's Eq. Jur.* (12th ed.), § 309; *Perry on Trusts* (4th ed.), § 201; *Worrall's Appeal*, 110 Pa. St. 349.

2. *Beach on Modern Eq. Jur.*, § 115.

3. See *supra*, this title, *Parent and Child*.

4. *Pomeroy's Eq. Jur.* (2d ed.), § 961; *Beach on Modern Eq. Jur.*, § 119; *Perry on Trusts* (4th ed.), § 200; *Georgia Code* (1882), § 2666.

5. *Beach on Modern Eq. Jur.*, § 119; *Cooley on Torts* (2d ed.) \*525; *Perry on Trusts* (4th ed.), § 200; *Field on Infants, Parent and Child, and Guardian and Ward*, § 128; *Hylton v. Hylton*, 2 Ves. 547; *Dawson v. Massey*, 1 Ball & B. 232; *Hatch v. Hatch*, 9 Ves. 296; *Waller v. Armistead*, 2 Leigh (Va.) 11; 21 Am. Dec. 594; *Richardson v. Linney*, 7 B. Mon. (Ky.) 573; *Andrews v. Jones*, 10 Ala. 419; *Say v. Barnes*, 4 S. & R. (Pa.) 112; 8 Am. Dec. 679; *Fish v. Miller*, 1 Hoff. Ch. (N. Y.) 267; *Garvin v. Williams*, 44 Mo. 470.

But the transaction is not absolutely void. *Haydel v. Roussel*, 1 La. Ann. 35.

In *Louisiana*, agreements and gifts before accounts are rendered are, unless the gifts are to relatives, absolutely void. *Voorhees' Louisiana Rev. Code* (1889), arts. 361, 1470, 1479.

6. *Stanley's Appeal*, 8 Pa. St. 431, which held that dominion lasted for

however, that in the absence of evidence it will be presumed to continue a year.<sup>1</sup> It will last until the ward has had full and free opportunity to examine the accounts and is in a position to act independently and intelligently.<sup>2</sup> The presumption of influence is rebuttable by affirmative evidence of fairness and a full disclosure on the part of the guardian and thorough understanding and free agency on that of the ward.<sup>3</sup> It is a strong one, however, and requires clear and convincing proof to overcome it.<sup>4</sup>

The rule embraces gifts from a ward to a guardian,<sup>5</sup> sales between them,<sup>6</sup> releases,<sup>7</sup> settlements,<sup>8</sup> receipts,<sup>9</sup> leases,<sup>10</sup> and contracts generally.

The guardian need not have been legally appointed. It is sufficient if he be guardian in fact.<sup>11</sup> As in the case of other parties to voidable contracts, the ward after emancipation may ratify his previous acts, either expressly or by conduct from which such ratification may be inferred.<sup>12</sup>

J. MISCELLANEOUS CONFIDENTIAL RELATIONS.—The domain of actual undue influence is, as has been pointed out, unlimited.

more than four months in the case at bar. *Sherry v. Sansberry*, 3 Ind. 324.

1. *Smith v. Kay*, 7 H. L. Cas. 772.

2. *Bispham's Principles of Equity* (4th ed.), § 234; *Stanley's Appeal*, 8 Pa. St. 431; *Hawkins' Appeal*, 32 Pa. St. 263; *Garvin v. Williams*, 44 Mo. 470.

3. *Pomeroy's Eq. Jur.* (2d ed.), § 961; *Ashton v. Thompson*, 32 Minn. 25; *Garvin v. Williams*, 50 Mo. 206; *Meek v. Perry*, 36 Miss. 190; *Gregory v. Orr*, 61 Miss. 307; *Ferguson v. Lowery*, 54 Ala. 510; 25 Am. Rep. 718; *Ralston v. Turpin*, 25 Fed. Rep. 7, 18; *Wade v. Pulsifer*, 54 Vt. 45; *Willey v. Tindal*, 5 Del. Ch. 194; *McConkey v. Cockey*, 69 Md. 286; *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587. See *Georgia Code* (1882), § 1847.

4. *Bispham's Principles of Equity* (4th ed.), § 234; *Hylton v. Hylton*, 2 Ves. 549; *Hatch v. Hatch*, 9 Ves. 295.

5. *Hylton v. Hylton*, 2 Ves. 547, where an uncle, who was a trustee and acted as guardian to his nephew, upon coming to an account and delivering up the estate to his nephew, who was then about twenty-two, took from him a general release and written discharge, and also a voluntary grant of an annuity of £60. Lord Hardwicke set the annuity aside, upon a bill filed by the nephew.

In *Hatch v. Hatch*, 9 Ves. 292, where a gift from a ward, lately of age, of an advowson to her guardian, was set aside. *Wade v. Pulsifer*, 54 Vt. 45.

6. *Sherry v. Sansberry*, 3 Ind. 320.

7. *Hylton v. Hylton*, 2 Ves. 547;

*Fish v. Miller*, 1 Hoffm. Ch. (N. Y.) 267; *Carter v. Tice*, 120 Ill. 277; *Hall v. Cone*, 5 Day (Conn.) 543; *Will's Appeal*, 22 Pa. St. 332; *Ferguson v. Lowery*, 54 Ala. 510; 25 Am. Rep. 718. But see *contra*, *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 249, where a simple release given by a ward to her guardian, six months after coming of age, was held *prima facie* valid.

8. *Elliott v. Elliott*, 5 Binn. (Pa.) 8. In *Georgia*, a settlement is *prima facie* voidable, and so remains for four years. *Georgia Code* (1882), § 1847.

9. *Witman's Appeal*, 28 Pa. St. 376, which held that a receipt is inoperative, if for too large a sum, except for the amount actually received.

*Say v. Barnes*, 4 S. & R. (Pa.) 112; 8 Am. Dec. 679, which held that a receipt, in full, given by a ward of full age to his guardian, in order to obtain possession of the papers of his estate, does not exempt the guardian from accounting anew before the orphans' court of *Pennsylvania*.

10. *Dawson v. Massey*, 1 Ball & B. 219; *Aylward v. Kearney*, 2 Ball & B. 463.

11. *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362; 43 Am. Dec. 132; *Worrall's Appeal*, 110 Pa. St. 349; *Brown v. Burbank*, 64 Cal. 99.

12. *Field on Infants, Parent and Child, and Guardian and Ward*, § 130.

As by delay to sue or conduct inconsistent with his claim of a right to rescind. *Voltz v. Voltz*, 75 Ala. 555.

It may affect all kinds of transactions between persons of all classes and conditions.

It is difficult to define the limits of presumptive undue influence. No classification can be complete, and the kinds that have been enumerated are but examples. It has been said that relief will be afforded upon this ground in case of all transactions where "influence is acquired and abused, where confidence has been reposed and betrayed."<sup>1</sup> Other courts and jurists have stated that the principle is a universal one, applying to men in all circumstances, wherever one occupies toward another a position of trust and confidence.<sup>2</sup>

It is obvious, however, from what has gone before, that such statements are rather suggestive than strictly accurate. As in all other matters of equity jurisdiction, the rules applied by the courts are flexible, and the limits of the doctrine shift from time to time, as conditions and ideas change. It may be safely said, however, that in the case of persons in the relations already enumerated, a presumption of undue influence exists, and that this presumption is extended to cover similar cases. The question of just what those cases are, depends not so much on principle, as upon the precedents of the courts.

Thus, the rules have been extended to cover transactions between partners,<sup>3</sup> the directors and promoters of corporations,<sup>4</sup> contracts between a sheriff and a debtor, against whom he had an execution,<sup>5</sup> between mortgagor and mortgagee,<sup>6</sup> agreements with very illiterate persons,<sup>7</sup> dealings between persons, one of whom is accustomed to repose great confidence in the other, although there is no technical fiduciary relationship between them.<sup>8</sup>

1. *Smith v. Cay*, 7 H. L. Cas. 750, 779, *per Lord Kingsdowne*.

2. *Billage v. Southee*, 9 Hare 534; *Garvin v. Williams*, 44 Mo. 470.

3. *Bowman v. Patrick*, 36 Fed. Rep. 138; *Colton v. Stanford*, 82 Cal. 351; 16 Am. St. Rep. 137. See also PARTNERSHIP, vol. 17, p. 1061; *Georgia Code* (1882), § 3177, which is a declaratory provision; *Ralston v. Turpin*, 129 U. S. 663.

4. *Beach on Modern Eq. Jur.*, §§ 128-136. But see *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581, where it is held that the rule does not extend to sales of stock to a stockholder, by a director. Directors are not technical trustees. *Sperings' Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Watt's Appeal*, 78 Pa. St. 392.

5. *Gist v. Frazier*, 2 Litt. (Ky.) 118.

6. In *Ford v. Olden*, L. R., 3 Eq. 461; 36 L. J. Ch. 651, where a mortgagor in embarrassed circumstances, and owing a long arrear of interest to the mort-

gagee, conveyed his equity of redemption to the mortgagee for an amount considerably less than its value, the conveyance was set aside.

There is a conclusive presumption against an agreement waiving the equity of redemption made at the time of the mortgage. MORTGAGES, vol. 15, p. 827.

7. *Pomeroy's Eq. Jur.* (2d ed.), § 948; *Fry v. Lane*, 40 Ch. Div. 312.

8. *Tate v. Williamson*, L. R., 2 Ch. 55; *Nichols v. McCarthy*, 53 Conn. 299; 53 Am. Rep. 105.

In *Potters' Appeal from Probate*, 56 Conn. 1; 7 Am. St. Rep. 272, an executor of an estate advised a legatee—the widow of the testator—who had had no business experience, but relied entirely on him, to invest, both for herself and as guardian of her son, another legatee, in certain stock and certain farm mortgages about which he had no knowledge, and for the sale of which he was agent, which fact he did not tell the widow, and which was un-



5. **Remedies.**—While the law affords an adequate relief in some cases of undue influence, the usual remedies sought are those to be had in courts of equity. They do not differ materially from the remedies granted in case of fraud.<sup>1</sup> The relief often granted is by raising a constructive trust in favor of the person injured.<sup>2</sup> In granting redress the courts will try to do complete justice, and in setting aside conveyances they will often decree that the subject-matter stand as security for the property or price that actually passed to the complainant.<sup>3</sup>

6. **Pleading and Evidence.**—The undue influence must be clearly set up in the pleadings, not in general terms merely, but by stating, in substance, the facts which show the domination of the will of the one influencing.<sup>4</sup>

The burden of proving undue influence is ordinarily on the one alleging it.<sup>5</sup> There are many exceptions in the form of presumptions of law to this rule, as already seen. Direct proof can seldom be had. The influence may be inferred, however, from the circumstances of the case, as shown in evidence, and by the influence of the dominant party in other matters.<sup>6</sup>

7. **Laches**—(See LACHES, vol. 12, p. 533).—The doctrine of

known to her. He thereupon purchased the stock, and handed the certificates to her. It was held, although there was no actual fraud, that fraud was presumed, that the transaction could not be allowed to stand, and that the stock and mortgage being tendered by the widow to the executor, together with accumulations, the executor should not be allowed the amount so expended on his administration account. It was held also no defense, that the widow did not take steps to repudiate the transaction until the expiration of three years, it appearing that she did so, as soon as she knew the circumstances.

See *Georgia Code* (1882), § 3177, declaring what relations shall be deemed confidential, as construed in *Ralston v. Turpin*, 129 U. S. 674.

1. See FRAUD, vol. 8, p. 650.

2. *Perry on Trusts* (4th ed.), § 166. See also IMPLIED TRUSTS, vol. 10, pp. 69, 73. So in *California* by statute, *Deering's Code*, vol. 2, § 2224; and in *Georgia*, *Georgia Code* (1882), § 2316.

3. *Dun v. Chambers*, 4 Barb. (N. Y.) 376; *Boyd v. Dunlap*, 1 Johns. Ch. (N. Y.) 478.

**Remedy in Probate Court.**—In *Potter's Appeal*, 56 Conn. 16, it was held that in a case where an executor, upon whom a widow without experience relied, had improperly purchased property on her account, for

her own use, as legatee, and for her to hold as guardian of an infant legatee, being induced to allow him to do so by his advice, which was not disinterested, as he was to receive a commission, which fact he did not communicate, the *Connecticut* court of probate, though not properly a court of equity, had full power to apply equitable principles, and might refuse to allow the amounts so spent on the executor's administration account. The question before such a probate court was held precisely the same as if it had been brought before a court of equity by a direct proceeding.

4. In *Jackson v. Rowell*, 87 Ala. 685, a bill seeking to set aside a deed on the ground of undue influence, and alleging only that "complainants show that, on the 6th day of April, 1887, and a short time before he died, and when the said William H. Rowell (deceased) was very feeble both in mind and body, he was persuaded and induced, through some undue and improper influence unknown to complainants, to execute the instrument, of which exhibit B [the deed] is a copy," was held insufficient.

5. *Ireland v. Geraghty*, 15 Fed. Rep. 35.

6. *Drake's Appeal*, 45 Conn. 9; *Woodbury v. Woodbury*, 141 Mass. 329; 55 Am. Rep. 479.

laches as applied to this subject has no striking peculiarities. Some illustrations are given in the notes.<sup>1</sup>

**IV. IN WILLS—1. In General—*a*. INTRODUCTORY.**—The subject of undue influence in wills is an exceedingly important division of the general topic. Much of the discussion that has gone before is applicable to undue influence of all kinds, whatever may be the precise nature of the transaction affected. The subject, as applied to wills, has, however, many peculiarities. The term in this connection has a broader meaning, covering much of what in other transactions is included in duress.<sup>2</sup>

***b*. DEFINITION.**—As used in the law of wills, undue influence has been defined as “that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist.”<sup>3</sup>

As in all cases of undue influence, the underlying idea is that the will of another is substituted for that of the person nominally acting, whose act is but the expression of the volition of the former.<sup>4</sup>

**1. Time Constituting Laches in Certain Cases—Three Years.**—Where a gift is made by a woman to a physician, there being no actual fraud or undue influence, and she, at the time, having no independent advice, it cannot be rescinded after the death of the giver, if she took no steps herself to set it aside, during a period of between three and four years which elapsed between the time when the beneficiary ceased to be her physician, and the time of her death, and it is immaterial that she did not know that the gift was voidable. *Mitchell v. Homfray*, 8 Q. B. Div. 587.

**Two Years.**—Where a suit is brought to set aside a purchase for an inadequate consideration, by a solicitor from his client—the plaintiff being the devisee of the client, and the defendant, the successor in interest of the solicitor—it was held that the suit being brought two years after the plaintiff attained his majority, was not barred by laches, although the bill was filed eighteen years after the client's death, and two years after the solicitor's death, no active acquiescence being shown. *Gresley v. Mousley*, 4 De G. & J. 78.

**Five Years.**—Where the representatives of a deceased grantor filed a bill to set aside the conveyance as fraudulent, five years after the death of the grantor, three years after her will was probated, and five years after the deed was recorded, it not appearing when actual notice was received, it was held there had been no laches. Courts of equity never refuse relief “at the thresh-

old of a suit, in a case where (as here) there is no analogous statute of bar, unless it is clear, on the face of the bill, that the complainant has delayed suing for so long a time, after his cause of action arose, as to deprive the court of the power of ascertaining, with reasonable certainty, what the truth is respecting the matter on which he rests his right to a decree, or that he has by his delay placed himself in a position, where he has gained an unfair advantage over his adversary. Nothing of that kind appears in this case.” *Per Van Fleet, V. C.*, in *Le Gendre v. Byrnes*, 44 N. J. Eq. 372.

2. See *supra*, this title, *In Transactions Inter Vivos*; also Schouler on Wills (2d ed.), § 228.

3. Schouler on Wills (2d ed.), § 227.

The above definition is substantially that given by Goldwaite, J., delivering the opinion of the court in *Gilbert v. Gilbert*, 22 Ala. 532. See also *Turner v. Cheesman*, 15 N. J. Eq. 265; *Gardiner v. Gardiner*, 34 N. Y. 155; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Davis v. Calvert*, 5 Gill & J. (Md.) 269; 25 Am. Dec. 282; *Wittman v. Goodhand*, 26 Md. 95; *O'Neill v. Farr*, 1 Rich. (S. Car.) 80; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Pool v. Pool*, 35 Ala. 12; *Hall v. Hall*, 38 Ala. 131; *Turley v. Johnson*, 1 Bush (Ky.) 116.

4. Schouler on Wills (2d ed.), § 228; *Hall v. Hall*, 17 L. T. 152; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236.

It has been held that such influence as suppresses the independent volition

There is a destruction of free agency.<sup>1</sup> The influence necessary to thus destroy free agency and substitute the will of another depends upon the strength of the will of the testator.<sup>2</sup> Each case will differ from every other one. As has been said, it is "a relative thing, always to be taken in the concrete."<sup>3</sup> The question in each instance is, Was the influence exerted sufficient under the circumstances to overcome the will of the particular testator, whose will is before the court?<sup>4</sup> This principle is subject, of course, to the qualification that the law has established certain general rules in the way of presumptions, which take the place of proof of particular facts. The influence, to be material, must be operative; it must, in fact, produce the effect claimed. Otherwise its mere presence is irrelevant.<sup>5</sup> Likewise it is never inferred from mere

of the testator, and constrains him to give expression to the will of another, instead of his own, is undue. *Matter of Blair's Will*, 16 Daly (N. Y.) 540.

Where there was reason to suppose that the father of the beneficiary exerted some influence over the testatrix, but it did not appear that it was such as to take away the free exercise of her will at the time, it was held not such undue influence as would render the will void. *Hazard v. Hefford*, 2 Hun (N. Y.) 445.

The undue influence which will destroy a will, must be nothing less than such as subjugates the mind of the testator to the will of the person operating upon it, so as to make it the act of the latter person instead of the testator. *Tawney v. Long*, 76 Pa. St. 114.

**Instructions to Jury.**—But an instruction which defines undue influence merely as "the substitution of the will of another for that of the testator" is error, as being too general to be of use. *Jones v. Roberts*, 37 Mo. App. 179.

1. *Rollwagen v. Rollwagen*, 63 N. Y. 520; *Thompson v. Kyner*, 65 Pa. St. 379; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526; 34 Am. Dec. 513; *Lewis' Estate*, 140 Pa. St. 182; *McMahon v. Ryan*, 20 Pa. St. 329; *Rabb v. Graham*, 43 Ind. 1; *Rutherford v. Morris*, 77 Ill. 397; *Allmon v. Pigg*, 82 Ill. 149; 25 Am. Rep. 303; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Wise v. Foote*, 81 Ky. 10; *Layman v. Conrey*, 60 Md. 286; *Lyons v. Campbell*, 88 Ala. 462; *Jackson v. Rowell*, 87 Ala. 685.

There must be moral coercion, *Brick v. Brick*, 66 N. Y. 144; *Barnes v. Barnes*, 66 Me. 297; or constraint. *Sutton v. Sutton*, 5 Harr. (Del.) 459.

"Mere passion and prejudice, the influence of peculiar religious or secular

training, of personal associations, of opinions, right or wrong, imbibed in the natural course of one's experience and contact with society, cannot be set up as undue to defeat a will." *Schouler on Wills* (2d ed.), § 227; *Georgia Code* (1882), § 2401.

2. *Rollwagen v. Rollwagen*, 63 N. Y. 519. It has been held error to refuse to instruct the jury that it requires less undue influence and less fraud to influence a testator of weak and impaired intellect, than one in full mental vigor. *Reichenbach v. Ruddach*, 127 Pa. St. 590. *Contra*, *St. Leger's Appeal*, 34 Conn. 449.

3. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 66.

4. *Schouler on Wills* (2d ed.), § 228; *Shailer v. Bumstead*, 99 Mass. 121; *Griffith v. Diffenderfer*, 50 Md. 480; *Mooney v. Olsen*, 22 Kan. 75.

5. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 68; *Sunderland v. Hood*, 84 Mo. 293; *Brinkman v. Rueggesick*, 71 Mo. 553.

To invalidate a will undue influence must so have overpowered the testator's volition as to cause him to make disposition of the property which he would not have made were it not for its existence. *Marx v. McGlynn*, 88 N. Y. 357; *Leverett v. Carlisle*, 19 Ala. 80; *Marshall v. Finn*, 4 Jones (N. Car.) 199.

If the jury are satisfied from the evidence taken as a whole, the will would not have been executed but for the influence exercised, they must find that the will was procured by undue influence, and is void. *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491.

In *Dale's Appeal*, 57 Conn. 133, the judges sustained the decision of the lower court, and approved the 'por-

opportunity or interest, but must arise either from proof or presumption of law.<sup>1</sup>

Undue influence is a force coming from without the testator. The term does not include mere prejudices, animosities, or predilections, not directly traceable to some outside pressure.<sup>2</sup>

Hence, a disposition of property, induced by gratitude for past kindness, affection, or esteem, is not the result of undue influence.<sup>3</sup>

It is immaterial that a provision in a will was suggested by another, if adopted by the testator of his own free accord.<sup>4</sup>

c. ITS RELATION TO TESTAMENTARY CAPACITY.—Undue influence is quite distinct from testamentary capacity. The former presupposes the existence of the latter.<sup>5</sup>

Capacity is the power to act.<sup>6</sup> It depends solely upon the mental soundness of the actor. It exists whether the act stands in law or not. Undue influence affects the will of one having testamentary capacity, and invalidates what would otherwise be operative. Were there no capacity, there could be no will, and the question of whether or not there was influence would be an idle one.<sup>7</sup>

tion of the charge of Fenn, J., on the subject of undue influence. "What constitutes undue or improper influence, which would defeat the probate of the will, is again a question of law, and upon this point I instruct you that the degree of influence necessary to be exerted over the mind of the testatrix to render it improper, must from some cause or by some means be such as to induce her to act contrary to her wishes, to make a different will and disposition of her property from what she would have done if left entirely to her discretion and judgment; that her free agency and independence must be overcome, and that she must, by some domination or control exercised over her mind, have been constrained to do what was against her will, and what she was unable to refuse, or too weak to resist."

**Instructions to Jury.**—Where the evidence tends but slightly to show undue influence, it is insufficient to tell the jury that undue influence is improper influence exerted to induce the testator to dispose of his property otherwise than he would have done had it not been exercised, and in determining whether such influence existed, all the circumstances should be considered. Such instruction is too general, and is not clear and free from doubt. *Myers v. Hanger*, 98 Mo. 433. The undue influence to affect a will must be connected directly with its execution, and specially directed in favor of certain

persons. *Rutherford v. Morris*, 77 Ill. 397; *McCulloch v. Campbell*, 49 Ark. 267.

1. *Turnure v. Turnure*, 35 N. J. Eq. 437; *Severance v. Severance*, 90 Mich. 417; *Hubbard v. Hubbard*, 7 Oregon 42; *Seguine v. Seguine*, 4 Abb. App. Dec. (N. Y.) 191; *Brown v. Mitchell*, 75 Tex. 9. *In re Hess' Will*, 48 Minn. 504. But opportunity may be shown and may be material in connection with other facts. *Dale's Appeal*, 57 Conn. 143.

2. *In re Mitchell's Estate*, 43 Minn. 73; *Carter v. Dixon*, 69 Ga. 82. Influence arising from social relations, must be allowed to have its natural effect upon wills; and there can be no presumption of its unlawful exercise, merely from the fact that it may be known to have existed, and to have affected the testator's mind. *Sechrest v. Edwards*, 4 Metc. (Ky.) 163.

3. *Seguine v. Seguine*, 4 Abb. App. Dec. (N. Y.) 191; *Marx v. McGlynn*, 88 N. Y. 370; *Rollwagen v. Rollwagen*, 63 N. Y. 521; *Barnes v. Barnes*, 66 Me. 297.

4. *Schouler on Wills* (2d ed.), § 233. *Davis v. Calvert*, 5 Gill & J. (Md.) 311; 25 Am. Dec. 282, which holds that the question is to be determined by the jury on all the circumstances.

5. *Thompson v. Kyner*, 65 Pa. St. 379. See TESTAMENTARY CAPACITY, vol. 25, p. 970.

6. CAPACITY, vol. 2, p. 722.

7. *Hannigan's Estate*, Myr. Prob. Rep. (Cal.) 135.

Undue influence and weakness of mind are frequently found together, but they have no necessary connection with each other. They should not be confused; neither should influence and total incapacity be confounded.<sup>1</sup>

*d. COERCION A NECESSARY ELEMENT.*—Undue influence is not only something from without, but it is a force which operates upon the will, and is not an appeal to the judgment.<sup>2</sup> It has been said that there is in it an element of wrong,<sup>3</sup> although no fraud need be present.<sup>4</sup> It has been held, however, that there must be either fraud or "contrivance;"<sup>5</sup> that is, there must exist, either actually, or in presumption of law, something more than the unconscious, involuntary influence which one may exert upon another who respects or loves him. Mere acts of genuine kindness or attention are not undue influence, whatever their effect may be.<sup>6</sup>

*e. WHAT INFLUENCE NOT UNDUE.*—Suggestion and advice addressed to the understanding and judgment never constitute undue influence,<sup>7</sup> neither does solicitation,<sup>8</sup> unless the testator be worn out with the importunities so that his will at last gives way.<sup>9</sup> Even earnest entreaty,<sup>10</sup> importunity and persuasion<sup>11</sup> may be employed, as well as appeals to remember past kindnesses or to relieve

1. Bigelow's Jarman on Wills (6th Am. ed.), p. 66; Schouler on Wills (2d ed.), § 251 a; Tobin v. Jenkins, 29 Ark. 151; Dexter v. Codman, 148 Mass. 421.

They may be considered together, however. Wilson's Appeal, 99 Pa. St. 545.

2. Schouler on Wills (2d ed.), § 229.

3. Schouler on Wills (2d ed.), § 227; Harrison's Will, 1 B. Mon. (Ky.) 351; Tucker v. Field, 5 Redf. (N. Y.) 180.

4. Stewart v. Elliott, 2 Mackey (D. C.) 307; Davis v. Calvert, 5 Gill & J. (Md.) 301; 25 Am. Dec. 282.

5. Lowe v. Williamson, 2 N. J. Eq. 88.

6. Earl of Sefton v. Hopwood, 1 F. & F. 578; Chaplin on Wills 101; Kerr v. Lunsford, 31 W. Va. 659; Matter of Gleespin, 26 N. J. Eq. 523; Bush v. Lisle, 89 Ky. 393; Chaplin on Wills 103. But if the apparent acts of kindness are shown to be part of a crafty arrangement to procure the will, they will constitute undue influence. Tawney v. Long, 76 Pa. St. 106.

7. Tunison v. Tunison, 4 Bradf. (N. Y.) 138; Newhouse v. Godwin, 17 Barb. (N. Y.) 236; Rabb v. Graham, 43 Ind. 1; Yoe v. McCord, 74 Ill. 33; Lucas v. Cannon, 13 Bush (Ky.) 650; Wise v. Foote, 81 Ky. 10.

Considerations addressed to a testator's good feeling, and simply influenc-

ing his better judgment, are not undue influence. Tucker v. Field, 5 Redf. (N. Y.) 139. Where the court below, on the trial of an issue to establish a will, instructed the jury that, if induced by fair argument or kind offices, it might be valid, it was held no error. Rogers v. Diamond, 13 Ark. 474.

The mere suggestion to a testator that an indicated testamentary provision would be productive of justice between the natural objects of his bounty, is not undue influence. Elkin-ton v. Brick, 44 N. J. Eq. 154.

8. Wait v. Breeze, 18 Hun (N. Y.) 403; McDaniel v. Crosby, 19 Ark. 533; Sutton v. Sutton, 5 Harr. (Del.) 459.

9. Schouler on Wills (2d ed.), § 231; Davis v. Calvert, 5 Gill & J. (Md.) 302; 25 Am. Dec. 282.

10. Robinson v. Stuart, 73 Tex. 267.

11. Williams' Estate, 13 Phila. (Pa.) 302; Gilreath v. Gilreath, 4 Jones Eq. (N. Car.) 142; Schofield v. Walker, 58 Mich. 96; McCoon v. Allen, 45 N. J. Eq. 708.

The mere fact that the mind of a testator has been influenced by the arguments or persuasions of the person to be principally benefited by the will, however indecorous, indelicate, or improper they may be, will not, ordinarily, in the absence of fraud, vitiate a will. But it must be the will of a testa-

distress.<sup>1</sup> The amount of pressure allowable in each case will depend largely upon the relations of the parties.<sup>2</sup> The criterion in every case is, Is the influence irresistible? If it is, the will is not the instrument of the testator, and it cannot stand. If it is not, the influence is not undue, and its existence is immaterial, even though the testator did in fact yield to it, and executed his will in accordance with its dictates.<sup>3</sup>

Thus, flattery may be undue influence or not, according to its effect upon free agency.<sup>4</sup>

On the other hand, physical violence, and threats of such violence—if sufficient in amount and actually operative—are always undue influence.<sup>5</sup>

The fact that one passively encouraged the testator's resentment towards another does not establish undue influence.<sup>6</sup> It is said to be immaterial whether or not the influence was consciously exercised by the person influencing.<sup>7</sup>

*f.* WHEN EXERTED.—The influence exerted, to be legally operative, must be in existence and effect at the time of the making of the will; otherwise it is unimportant.<sup>8</sup> By this is meant,

tor, however induced. *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Tawney v. Long*, 76 Pa. St. 106.

1. *Jones v. Roberts*, 37 Mo. App. 163.

2. See *supra*, this title, *Husband and Wife; Parent and Child*, etc.

3. *Leeper v. Taylor*, 47 Ala. 221; *Dunlap v. Robinson*, 28 Ala. 100; *Tyson v. Tyson*, 37 Md. 567.

The testator must be constrained to do that which was against his actual will, but which he was unable to refuse, or too weak to resist. *Brick v. Brick*, 66 N. Y. 144; *Barnes v. Barnes*, 66 Me. 286.

In *Hall v. Hall*, 37 L. J. P. & M. 40; L. R., 1 P. & M. 481, the court, by Wilde, J., said: "To make a good will a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like. These are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overcome the volition without convincing the judgment, is a species of restraint, under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist; moral command asserted, and yielded to for the sake of peace or quiet, or of escaping from distress of mind or social discomfort—these, if

carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition, and not that of another."

In *Dale's Appeal*, 57 Conn. 143, the court below, in charging the jury, said—the charge being approved by the supreme court: "A moderate and reasonable solicitation, entreaty, or persuasion, though yielded to, if done intelligently, without constraint, and from a sense of duty, would not vitiate a will, in other respects valid."

4. 2 *Greenleaf on Evidence* (15th ed.), § 688, and note; *McDaniel v. Crosby*, 19 Ark. 551; *Schouler on Wills* (2d ed.), § 230; *Calvert v. Davis*, 5 Gill & J. (Md.) 301.

5. *Schouler on Wills* (2d ed.), § 228; *Boyse v. Rossborough*, 6 H. L. Cas. 2; 3 Jur. N. S. 373; *Denslow v. Moore*, 2 Day (Conn.) 21; *Moore v. Blauvelt*, 15 N. J. Eq. 367; *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385; *Layman v. Conrey*, 60 Md. 286.

6. *Woodward v. James*, 3 Strobbh. (S. Car.) 552.

7. *Schouler on Wills* (2d ed.), § 231. *Contra*, *Martin v. Teague*, 2 Spears (S. Car.) 260; *Small v. Small*, 4 Me. 220; 16 Am. Dec. 253.

8. *Schouler on Wills* (2d ed.), § 232; *Eckert v. Flowry*, 43 Pa. St. 46; *In*

not that the act giving rise to the influence must be done at that time, nor that the relation from which it is presumed or inferred be then in existence, but that the effect of that act or relation must still remain.<sup>1</sup> It must be a present influence, operating upon the testator's mind at the time he makes the will. Hence, acts and relations of a time quite remote from the date of the will are admissible, if they naturally give rise to an inference that the influence remained up to the time of the execution.<sup>2</sup> What time will be too remote will depend upon all the circumstances of each particular case.<sup>3</sup>

*g. EFFECT.*—Undue influence has the effect of vitiating a will induced by it,<sup>4</sup> not only as to the beneficiary in whose favor it was exercised, but as to all others.<sup>5</sup> If the will as a whole was not the result of undue influence, but only certain portions, which are separable from the remainder of the will, those portions alone will be affected, while the rest will stand.<sup>6</sup> Thus, where undue influence is used in procuring one only of several legacies, it alone is void, the rest being untainted.<sup>7</sup> It is of course immaterial by

*re Shaw's Will*, 11 Phila. (Pa.) 51; *McMahon v. Ryan*, 20 Pa. St. 329; *Wainwright's Appeal*, 89 Pa. St. 220; *Rutherford v. Morris*, 77 Ill. 397; *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186.

1. *Davis v. Calvert*, 5 Gill & J. (Md.) 269; 25 Am. Dec. 282; *Thompson v. Kyner*, 65 Pa. St. 379.

2. The evidence that the testator's mind was failing at a certain time, and that the son, who is alleged to have unduly influenced the testator, then had great influence over him, is not objectionable, because the time was remote from the date of the will. *Staser v. Hogan*, 120 Ind. 217.

Mere bad treatment of children on the part of the wife of the testator many years previous to the making of a will disinheriting them, does not furnish a reason for impeaching its validity. It should be followed up by proof showing that undue influence was acquired by the wife in consequence, and that the influence continued down to the time when the will was executed. *Tingley v. Cowgill*, 48 Mo. 291.

3. On the question of whether a wife unduly influenced her husband to make a will, evidence of their relations eight years before the will was made was held to have been properly excluded. *Batchelder v. Batchelder*, 139 Mass. 1.

In a suit to set aside a will executed in 1866 on the ground of undue influence, evidence was offered, showing

the existence of such influence in 1855, but not showing that it continued. It was held that it was too remote. *Ketchum v. Stearns*, 76 Mo. 396.

4. *Schouler on Wills* (2d ed.), § 226; *St. Leger's Appeal*, 34 Conn. 449; 91 Am. Dec. 135; *Deering's California Code*, vol. 2, § 1272; *Georgia Code* (1882), §§ 2399, 2405; *Starr & C. Illinois Annot. Stats.*, ch. 148, par. 2; *Montana Comp. Stats.* (1887), Prob. Pr. Act, § 434; *New York Rev. Stat.* (7th ed.), vol. 4, § 2623; *Ohio Rev. Stat.* (1886), §§ 5914, 5929.

5. *Schouler on Wills* (2d ed.), § 234; *Davis v. Calvert*, 5 Gill & J. (Md.) 269; 25 Am. Dec. 282.

Where improper influence is used to procure a will to be made, though to the injury of parties who do not complain, it ought not to be established. *Brown v. Moore*, 6 Yerg. (Tenn.) 272.

6. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 49; *Schouler on Wills* (2d ed.), § 248; *Trimbletown v. D'Alton*, 1 D. & C. 85; *Hippesley v. Homer*, T. & R. 48, n; *Guillamore v. O'Grady*, 2 J. & L. 210; *Allen v. M'Pherson*, 1 H. L. Cas. 208; 11 Jur. 785; *Rockwell's Appeal*, 54 Conn. 119; *Baker's Will*, 2 Redf. (N. Y.) 179; *Eastis v. Montgomery*, 93 Ala. 299; *Florey v. Florey*, 24 Ala. 241. So provided in *Georgia*, by statute. *Georgia Code* (1882), § 2400.

7. *Harrison's Appeal*, 48 Conn. 204; *Matter of Welsh*, 1 Redf. (N. Y.) 230.

whom the influence was exerted, whether by a beneficiary or an outsider.<sup>1</sup>

**2. How Established.**—Undue influence in wills is either established by proof, or arises out of presumptions of law. The latter—presumptive undue influence—will be considered hereafter. In studying the former, we must first determine upon whom rests the burden of proof.

**a. BURDEN OF PROOF.**—However it may be on principle,<sup>2</sup> it is held by the cases, almost if not quite universally, that the burden of proving undue influence is in ordinary cases upon him who alleges it.<sup>3</sup>

The one contesting the will upon this ground must set up the undue influence in his pleading,<sup>4</sup> and must prove it by a fair preponderance of evidence.<sup>5</sup>

**b. NATURE OF THE PROOF.**—Direct proof of undue influence is never required.<sup>6</sup> It may be inferred from other facts proven.<sup>7</sup>

1. *In re Cahill*, 74 Cal. 52; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Randolph v. Lampkin*, 90 Ky. 551.

2. "The objection of undue influence may seem at first of the nature of a defense, of confession, and avoidance in common-law pleading; it virtually admits the testator's competency (though not his entire soundness of body or mind) and the due execution of the instrument, but seeks to avoid the effect thereof. But in reality it denies that the supposed will is the will of the supposed testator. That is, instead of confessing and avoiding, it traverses; and as it is for the one who offers an instrument for probate (an instrument by which the rights of widow, heirs and next of kin under the law are disturbed) to prove it to be the true will of the alleged testator, it should follow in principle that the burden of proof, as well in regard to undue influence as in regard to capacity, should rest upon him." *Bigelow's Jarman on Wills* (6th Am. ed.), p. 68.

3. *Schouler on Wills* (2d ed.), § 239; *Bigelow's Jarman on Wills* (6th Am. ed.), p. 68; *Boyse v. Rossborough*, 6 H. L. Cas. 2; 3 Jur. N. S. 373; *Chaplin on Wills* 115; *Dunlap v. Robinson*, 28 Ala. 100; *Rockwell's Appeal*, 54 Conn. 119; *Saunders' Appeal*, 54 Conn. 109; *Dale's Appeal*, 57 Conn. 143; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85; *Webber v. Sullivan*, 58 Iowa 260; *Blood v. Pragoff*, 79 Ky. 612; *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697; *Davis v. Davis*, 123 Mass. 590; *Potter's Appeal*, 53 Mich. 106; *Jones v. Roberts*, 37 Mo. App.

163; *Seebrook v. Fedawa*, 30 Neb. 442; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 581; *Ewen v. Perrine*, 5 Redf. (N. Y.) 640; *Tyler v. Gardiner*, 35 N. Y. 594; *Cudney v. Cudney*, 68 N. Y. 148; *Matter of Martin*, 98 N. Y. 193; *Greenwood v. Cline*, 7 Oregon 17; *Wilson's Appeal*, 99 Pa. St. 545; *McMechen v. McMechen*, 17 W. Va. 683; 41 Am. Rep. 682; *Coffman v. Hedrick*, 32 W. Va. 119; *Armstrong v. Armstrong*, 63 Wis. 162.

4. *Coffman v. Hedrick*, 32 W. Va. 119.

5. *Seebrook v. Fedawa*, 30 Neb. 442; *Gay v. Gillilan*, 92 Mo. 250; *Chaplin on Wills* 115; *Boyse v. Rossborough*, 6 H. L. Cas. 2; 3 Jur. N. S. 373. In this last case the Lord Chancellor said: "In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis." To the same effect is *Whelpley v. Loder*, 1 Dem. (N. Y.) 368. But see *Gay v. Gillilan*, 92 Mo. 250.

6. *Saunders' Appeal*, 54 Conn. 116; *Dale's Appeal*, 57 Conn. 143; *Matter of Blair*, 16 Daly (N. Y.) 547; *In re Jackman*, 26 Wis. 104; *Fritz v. Turner*, 46 N. J. Eq. 518.

7. *Marvin v. Marvin*, 3 Abb. App. Dec. (N. Y.) 192; *In re Jackman*, 26 Wis. 104.

Where it appeared that a prior will dividing the property of the testatrix equally among her children, two sons and two daughters, had been revoked,



The court or the jury, as the case may be, are to draw the inference from the evidence submitted.<sup>1</sup> There are certain facts and circumstances, however, which go far toward establishing it. Thus the internal evidence of the will itself is always to be considered.<sup>2</sup> If it appears that its provisions are just,<sup>3</sup> natural,<sup>4</sup> and reasona-

that at that time and subsequently she was on good terms with at least one of the daughters, that afterward she went to live with her sons, and refused to see the daughters, that she then made another will in favor of the sons who were present at the time, which will gave the unfilial conduct of the daughters as the only reason for disinheriting them, although this fact was clearly disproved; it was held that the above facts, being unexplained, should cause the will to be rejected, and the decree of the surrogate admitting it to probate should be reversed. *Matter of Bernsee's Will*, 17 N. Y. Supp. 669; 63 Hun (N. Y.) 628; *Chaplin on Wills* 100.

1. *Farr v. Thompson*, 1 Spears (S. Car.) 193; *O'Neil v. Murray*, 4 Bradf. (N. Y.) 311. It is not error to charge the jury that facts and circumstances, not the opinions of witnesses, are the primary evidence, in deciding whether a testator is competent on the ground of influence or incapacity. *Browne v. Molliston*, 3 Whart. (Pa.) 129.

When the court has properly explained to the jury, in a will case, what would amount to undue influence, and has called their attention to the different classes of testimony tending to show it, there is no error in refusing to tell the jury that undue influence might be inferred from certain facts, some conceded and some disputed, which are isolated from other facts in the case which would affect their force. *Thornton v. Thornton*, 39 Vt. 122.

2. *Myers v. Hanger*, 98 Mo. 438. In this connection, the frame of the will and the nature of the testamentary dispositions are in themselves important evidence. *Mitchell v. Mitchell*, 43 Minn. 73.

In cases where want of testamentary capacity or undue influence is alleged, it is the duty of the court to scan the provisions of the will to see whether or not they furnish any evidence of the truth of the charges made against its validity. Standing alone, they are insufficient to support a judgment against the validity of the will, but are evidence in determining whether or not the will is the free expression of

the testator's mind. *Middleditch v. Williams*, 45 N. J. Eq. 726.

3. *Middleditch v. Williams*, 45 N. J. Eq. 726, in which Van Fleet, V. C., while holding to the principle stated in the text, thus pointed out its limitations: "A will may be contrary to the principles of justice and humanity; its provisions may be shockingly unnatural and extremely unjust; nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it. The courts must so treat papers of this kind in order to maintain that great principle which confers upon every citizen of full age and sound mind the right to do with his own as he pleases, so long as he does not attempt to apply his property to an immoral or unlawful purpose." To same effect is *Kitchell v. Beach*, 35 N. J. Eq. 446; *Webber v. Sullivan*, 58 Iowa 260.

While unjust provisions in a will may be considered in connection with evidence tending to show undue influence, such provisions alone will not be regarded as such evidence. *Hubbard v. Hubbard*, 7 Oregon 42.

Evidence that the distribution of the property is grossly unequal is inadmissible, even if offered in connection with evidence of impaired intellect, unless there be evidence of actual undue influence. *Storer's Will*, 28 Minn. 9.

4. *Fountain v. Brown*, 38 Ala. 72; *Cornwell v. Riker*, 2 Dem. (N. Y.) 354; *Cramer v. Crumbaugh*, 3 Md. 491. If the provisions of the will are unnatural or unjust, there is an indication of undue influence. *Matter of Blair*, 16 Daly (N. Y.) 540.

Where a testator's will was made in favor of his relations, when he was in full health, and he afterward, through the influence of a friend, made another will in favor of such friend, when very old and out of health, it was held that sufficient ground was shown for an issue to determine the question of undue influence. *Wilson's Appeal*, 99 Pa. St. 545.

On an issue of undue influence, the

ble,<sup>1</sup> these facts will do much to show that it was the proper will of the testator. They are of course not controlling,<sup>2</sup> and are not of themselves sufficient to outweigh more direct proof of influence, but they are often important evidence. For the same reason, the statements in the will as to why certain natural objects of bounty were omitted are considered.<sup>3</sup>

The relation of the testator to one who is alleged to have exerted influence, may be shown, including the degree of affection which the testator apparently felt towards him, and the confidence which he reposed in him.<sup>4</sup>

A discrepancy between the testator's declared intention and the terms of the will is always a suspicious circumstance.<sup>5</sup>

jury were instructed that, "If, under all the circumstances of the case, they find that this will was unnatural in its provisions, and inconsistent with the duties and obligations of the testator to the different members of his family, it imposes upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity, or perversion." This was held correct. *Matter of Budlong*, 18 Civ. Pro. Rep. (N. Y. Supreme Ct.) 18. To the same effect is *Gay v. Gillilan*, 92 Mo. 250; *Harrel v. Harrel*, 1 Duv. (Ky.) 203.

It appeared that a testatrix had executed a will making her sister her beneficiary; that afterward, while abroad, she executed another will, leaving property, part to her sister-in-law, with whom she was stopping, part to a niece, part to a cousin, a bequest to the poor, and the residue to her husband. The draughtsman of the latter will, who was also a witness, testified that no other person was present when he received her instructions and drew the will, and no other person except the other witness, when it was executed. The testatrix had not previously been on good terms with her sister-in-law, but it appeared that afterward, when she fell sick, she sent for her. The sister-in-law thereupon came and took the testatrix to her home, where she died. It was held that the evidence did not warrant any inference of undue influence. *McDonald's Estate*, 130 Pa. St. 480.

Where a testator's mind was very feeble, an unnatural and unreasonable disinheriting of one who would be expected to share the property, must be shown to have been freely and intelligently done, or the provision will not

be sustained. *Esterbrook v. Gardner*, 2 Dem. (N. Y.) 543.

1. But if a testator is legally competent to make a will, and acts freely, his will cannot be impeached, because unreasonable, imprudent, or unaccountable. *Nicholas v. Kershner*, 20 W. Va. 251; *Coffman v. Hedrick*, 32 W. Va. 132.

The harmony of the will with the testator's habitual disposition and affection is worthy of much consideration. *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 378.

2. *Salisbury v. Aldrich*, 118 Ill. 199.

3. A declaration by a testator in his will, that one of his children—a contestant—has been amply provided for otherwise, must have great weight in determining whether the will bears internal evidence that it was his free and voluntary act, and not procured by undue influence, it appearing that he was of sound mind. *King v. Holmes*, 84 Me. 219.

4. *Marx v. McGlynn*, 88 N. Y. 374. Evidence of estrangement between the testator and a devisee is admissible. *Mooney v. Olsen*, 22 Kan. 78.

On the contest of a will, upon the ground of undue influence, evidence is admissible that the testator always treated the stepmother of his grandchildren, who were disinherited, in a friendly manner. *Staser v. Hogan*, 120 Ind. 216.

In *Canada's Appeal*, 47 Conn. 450, it was held that the feeling—whether kindly or not—of the testator toward the legatee might be shown, and that for this purpose the files and records of a suit brought in chancery between the parties to set aside a conveyance as fraudulent, is admissible.

5. *Matter of Blair*, 16 Daly (N. Y.) 540.

The intention, however, is of importance only when it exists at, or near the time of, the execution of the will. A mere change of intention, taken by itself, is never evidence of undue influence. It is only when found in connection with other suspicious circumstances that it is important.<sup>1</sup>

But more important than any other single consideration, upon the question of undue influence, is the condition of the mind of the testator himself. While the issue of undue influence is quite distinct from that of testamentary capacity, the two are commonly found united, and must be considered together. Some authorities regard a partial incapacity as a prerequisite to the existence of undue influence.<sup>2</sup> Whether this is the case or not, the strength or weakness of the testator's mind will often determine whether a set of circumstances, ambiguous in their nature, amount to undue influence or not. Hence, the mental and bodily health of the testator, the peculiarities of his mind, his beliefs and prejudices, will all go to assist in the determination of the question of whether or not he acted as a free agent.<sup>3</sup> In the same connection the age of the testator is an important circumstance.<sup>4</sup>

Some cases may have seemed to go even further, and to regard the burden of proof as shifted, by the mere fact of the weakness of the testator's mind. Closely examined, however, they will generally be found to say merely that a presumption of fact may arise from proof of weakness of mind, which should be rebutted.<sup>5</sup> In some instances, also, the burden of proof may have been confused with the weight of evidence.<sup>6</sup> Some of the apparent conflict may be explained on the ground that testamentary capacity and undue influence are often considered on the same issue.<sup>7</sup>

While it is generally not necessary to show that a testator of

1. The fact that a will was made about six weeks after the testator had drawn a totally different one, in accordance with a draft made by his father, is no evidence that the latter will was the result of undue influence. *Mason v. Williams*, 53 Hun (N. Y.) 402.

In determining questions of undue influence, the importance of a change of testamentary intention depends upon its connection with other facts. If made upon a reason satisfactory to the testator, although not so to the court, it furnishes no ground for setting aside the will. The only question is, was the will the free act of a competent testator—not whether its provisions were inequitable. *Horn v. Pullman*, 72 N. Y. 269.

2. Schouler on Wills (2d ed.), § 226; Article on "Some Views of Insanity," by Hon. Geo. M. Curtis, 2 Yale Law Journal 187.

3. *Myers v. Hanger*, 98 Mo. 433; 240.

*Shailer v. Bumstead*, 99 Mass. 121; *Griffith v. Diffenderffer*, 50 Md. 480; *Haydock v. Haydock*, 33 N. J. Eq. 494; 38 Am. Rep. 385; *In re Hess' Will*, 48 Minn. 504; *Coleman v. Robertson*, 17 Ala. 84.

4. The execution of a will by one of advanced age, impaired sight and hearing, should be scrutinized for traces of undue influence. *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42.

5. Where the testator is of weak judgment, and the amount of the legacy great, a strong presumption of undue influence will arise. Such presumption can be rebutted only by evidence showing the will to be such as a person of average mind, morals, and family love might be willing to make. *Walker v. Hunter*, 17 Ga. 413.

6. See BURDEN OF PROOF, vol. 2, p. 655.

7. Schouler on Wills (2d ed.), §

full testamentary capacity understood his will, or that it was read over by or to him—a person being presumed to know fully the contents of an instrument which he has signed<sup>1</sup>—it has been held otherwise in case of the wills of aged persons and those of feeble mind, and proponents have been required to produce affirmative proof of these facts.<sup>2</sup>

(1) *Declarations of Testator*.—Questions as to the admissibility of the declarations of a testator, as evidence to prove undue influence, have been often before the courts. While there is on some points a lack of uniformity in the decisions, the true rule, and the one generally accepted, seems to be that they are admissible for the purpose of proving the condition of the testator's mind,<sup>3</sup> whether that condition be permanent or temporary,<sup>4</sup> his intention,<sup>5</sup> his idiosyncrasies, ideas, and beliefs,<sup>6</sup> and his relations with, and

1. Bigelow's Jarman on Wills (2d ed.), p. 70.

On a question of undue influence, the trial judge rejected certain clauses, on the ground that, "The court finds there is no sufficient proof to show that the same were made a part of the will by the direction or with the knowledge of the testator; and so the court finds the words above recited are not a part of the will." This was held error, as the presumption is that a man knows the contents of the instrument which he signs, and the burden of proof is on the contestant. *Rockwell's Appeal*, 54 Conn. 119.

It is not enough to justify a court in denying probate to a will, that it does not appear affirmatively that it was read over by or to the testator, it not appearing that it was not read over to or by him, and it appearing that he could have read it and understood its contents. *Kahl v. Schober*, 35 N. J. Eq. 461. See also *Pettes v. Bingham*, 10 N. H. 514.

2. *Day v. Day*, 3 N. J. Eq. 549. But proof of instructions for making the will, or reading it over, is not indispensable. Its place may be supplied by other proof of knowledge or assent. *McNinch v. Charles*, 2 Rich. (S. Car.) 229; *Worthington v. Klemm*, 144 Mass. 167.

3. Bigelow's Jarman on Wills (6th Am. ed.), p. 71; *Jones v. Roberts*, 37 Mo. App. 163; *Bush v. Bush*, 87 Mo. 480; *Canada's Appeal*, 47 Conn. 463; *May v. Bradlee*, 127 Mass. 414; *Waterman v. Whitney*, 11 N. Y. 137; *Robinson v. Hutchinson*, 26 Vt. 46; *Herster v. Herster*, 122 Pa. St. 239; *Griffith v. Diffenderffer*, 50 Md. 466.

4. *Shailer v. Bumstead*, 99 Mass. 112.

5. *Gardner v. Frieze*, 16 R. I. 640; *Matter of Blair*, 16 Daly (N. Y.) 540; *Neel v. Potter*, 40 Pa. St. 483.

Thus statements made by the testator a considerable time previous to the execution of the will, that he intended to make a disposition of his property similar to that in the will are admissible. *Dye v. Young*, 55 Iowa 433. But see *In re Storer's Will*, 28 Minn. 9. But not subsequent statements of a contrary intention. *Muir v. Miller*, 72 Iowa 585. But it has even been held that declarations made three weeks after the execution of a will, expressing dissatisfaction with it, are admissible. *Parsons v. Parsons*, 66 Iowa 754.

The mere circumstance that a will differs in its tenor from the testator's previously expressed intentions is, by itself, of no importance as showing undue influence; although in connection with other facts, it may become significant. *Wood v. Bishop*, 1 Dem. (N. Y.) 512. But mere expressions of wishes and desires, not tending to establish undue influence, are inadmissible. *Ryman v. Crawford*, 86 Ind. 262.

6. *Shailer v. Bumstead*, 99 Mass. 112.

Evidence is admissible of a testator's statements as to his ideas on the subject of making wills, and his opinion that all children should share alike, such declarations having reference to his own plans. *Staser v. Hogan*, 120 Ind. 207.

But the fact that a testator, previous to making his will, had expressed satisfaction with the disposition which the law made of intestate property, does not show undue influence, where the will was reasonable, deliberately executed,

feelings toward his beneficiaries, natural objects of his bounty,<sup>1</sup> and those said to have improperly influenced him.<sup>2</sup> They may thus be shown to establish everything pertaining to the testator himself, as distinguished from matters which go to show the act of influence.<sup>3</sup> These must be shown by evidence other than declarations, which are not admissible to prove the facts stated, unless part of the *res gestæ*.<sup>4</sup>

The cases seem to establish this distinction, and generally have been decided in accordance with the principle above. Departures from it are given in the notes. It has been said, that the influence

and remained unrevoked for a considerable period preceding his death. *Kaul v. Brown*, 17 R. I. 14.

1. In *Canada's Appeal*, 47 Conn. 463, declarations of the testator were admitted, tending to show unkindly and suspicious feeling toward his beneficiary the declarations being made several days before and after the execution of the will. Some of the declarations being as to the alleged unkind treatment of the testator by the beneficiary, it was held that the falsity of the charges might be shown to the jury, as it would tend to prove that the alleged statements were not made at all, or if made, that they afforded no true index of the testator's mind. As to the latter point, see *Mills' Appeal*, 44 Conn. 484, which follows the same rule.

Where declarations tending to show unkind feeling are admitted, evidence of pleasant relations may be shown in reply. *Vester v. Collins*, 101 N. Car. 114.

In *Denison's Appeal*, 29 Conn. 399, it was held that declarations made a considerable time before, should be allowed to go to the jury, who would take the time that had elapsed into account, in determining their weight. Statements by a testator made some time prior to the execution of the will, that some of his children did not treat him rightly, were held admissible on the question of undue influence. *Stephenson v. Stephenson*, 62 Iowa 163.

Statements of estrangement between the testator and a devisee are admissible. *Mooney v. Olsen*, 22 Kan. 69.

The letters of a testatrix, written before making a will, showing unkind feelings toward a beneficiary, are admissible. *Robinson v. Stuart*, 73 Tex. 267. See also *Potter v. Baldwin*, 133 Mass. 427.

2. *Beaubien v. Cicotte*, 12 Mich. 459. It is proper to show that the testator, at different times before the will was made, said that while in the presence

of a certain person, charged with having exerted undue influence, he could not resist her, and also that shortly before his death, he said he did not know but that he had been deceived in disinheriting his son. *Potter v. Baldwin*, 133 Mass. 427. But the evidence must be of declarations made near enough to the time of the will, to furnish a reasonable ground of inference of undue influence. If made six years before, they are inadmissible. *Bunyard v. McElroy*, 21 Ala. 316.

3. *Middleditch v. Williams*, 45 N. J. Eq. 726.

4. *Schailer v. Bumstead*, 99 Mass. 112; *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254; 20 Am. Dec. 100; *Gibson v. Gibson*, 24 Mo. 227; *Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71; *Griffith v. Diffenderfer*, 50 Md. 466; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Moritz v. Brough*, 16 S. & R. (Pa.) 403; *Herster v. Herster*, 122 Pa. St. 239; *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Smith v. Fenner*, 1 Gall. (U. S.) 170.

Declarations by the testator that he was unduly influenced, are not enough of themselves to warrant setting aside a will; there must be some independent proof of effort to influence him. *Cudney v. Cudney*, 68 N. Y. 148.

In *Herster v. Herster*, 122 Pa. St. 258, it was held that declarations of the testator are admissible to show the condition of his mind, but that the failure of the trial court to instruct the jury that the declarations of the testator were not evidence at all, as to the fact of undue influence, is reversible error. But see *Stephenson v. Stephenson*, 62 Iowa 163, where statements after making a will, "I don't know anything about it; they got around me and confuddled me. It is to be done over again," were held admissible, to show undue influence. See also *In re Hollingsworth's Will*, 58 Iowa 526.

must be proved by evidence other than declarations, but that they are competent to prove the effect of the influence.<sup>1</sup>

Evidence of declarations made before the execution of the will is more readily admitted than is evidence of declarations made after execution, but there seems to be no difference in principle.<sup>2</sup> Of course the value of the declarations as evidence, depends largely upon the nearness of the time when they are made, to the date of the execution of the will.<sup>3</sup>

(2) *Declarations of Beneficiary*.—The declarations of one taking beneficially under a will are often admissible under the rules governing admissions against interest, or as part of the *res gestæ*. If offered on the former ground, they may be proved, unless the rights of those who are not parties to the proceeding would be affected by them,<sup>4</sup> in which case they are excluded.<sup>5</sup>

(3) *Surrounding Circumstances*.—The evidence admissible upon issues of undue influence covers a much wider field than usual in judicial contests. It does not differ in the main from that allowed in the trial of questions of capacity, and it may be said that all the surrounding circumstances may be shown,<sup>6</sup>

Evidence of an exclamation made by a testator shortly after executing his will: "I have not made my will as I wanted to; I know I did wrong, but I could not help it," was held admissible to show actual undue influence, and that he was in a condition to be easily influenced. *Dennis v. Weekes*, 51 Ga. 24. See also *Howell v. Barden*, 3 Dev. (N. Car.) 442; *Ray v. Ray*, 98 N. Car. 566.

1. *Stephenson v. Stephenson*, 62 Iowa 163; 1 *Redfield on Wills* (3d ed.) \* 555.

2. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 71; *Shailer v. Bumstead*, 99 Mass. 112.

3. *Schouler on Wills* (2d ed.), § 243; *Shailer v. Bumstead*, 99 Mass. 112.

4. *Matter of Budlong*, 18 Civ. Pro. Rep. (N. Y. Supreme Ct.) 22; *Lewis v. Mason*, 109 Mass. 169; *Jackson v. Jackson*, 32 Ga. 325; *Crocker v. Chase*, 57 Vt. 413.

On the trial of the question of undue influence, the fact that a statement was made by a legatee that he and another legatee "had got the will fixed as they wanted it . . . that they had got it fixed now with a man put in as executor, who was not afraid of John Saunders [the contestant]," is admissible for two purposes, as an admission of a fact in issue, and as affecting the credibility of the legatee as a witness, and it is in the discretion of the court to allow the evidence to be put in before the legatee goes on the stand. *Saunders' Appeal*, 54 Conn. 108.

5. *Dye v. Young*, 55 Iowa 433; *Shailer v. Bumstead*, 99 Mass. 112; *Blackwell v. Blackwell*, 33 Ala. 61; 70 Am. Dec. 556. They are not admissible if made by legatees not parties to the proceeding, *Carpenter v. Hatch*, 64 N. H. 573; nor if made before the execution of the will. *In re Ames' Will*, 51 Iowa 596. But if they are the statements of the executor and principal legatee, they are admissible to affect his own interest, even though he is not a party to the record. *Morris v. Stokes*, 21 Ga. 552.

6. In *Mooney v. Olsen*, 22 Kan. 77, the court, by Brewer, J., said: "The question of undue influence is one of peculiar character. . . . Was the mind strong or weak? Clear of comprehension or only feebly grasping the facts suggested? Was the will resolute and firm or enfeebled by disease and bodily weakness? What prompted the making of the will? Was it the thought of the testatrix, or the suggestion of interested parties? What influences were brought to bear to secure its execution or the disposition of any specific property? These are inquiries always difficult of solution, made more so by the fact that the parties most competent to give information are the ones most interested to withhold it. To fully inform the jury they should know the condition of the testatrix's mind at the time of the execution, the circumstances attending the execution, the relations and affections of the testatrix and such

including the relation of the testator to those about him,<sup>1</sup> when and in whose presence the will was made,<sup>2</sup> and whether or not the will was secretly made or kept secret—always a suspicious circumstance.<sup>3</sup> The jury are to draw their inferences from such circumstances, and if there be no confidential relationship between the testator and the one alleged to have exerted influence, it is the duty of the court to charge them in general terms, leaving it for them to draw conclusions from the facts proven.<sup>4</sup>

**3. Effect of Confidential Relationship—The General Rule.**—The effect of confidential relationship on undue influence in wills has already been cursorily noticed.<sup>5</sup> We are now to trace the rules in detail, and note their application to the various kinds of fiduciary relations.

While the doctrine of presumptive undue influence is generally recognized in the case of transactions *inter vivos*, no uniformity of opinion exists in the case of wills. In spite of the confusion caused by loose statements of the principles, it is possible to trace three distinct doctrines, each supported by authority. The first is that no presumption of law arises from the existence of a fiduciary relation, but that undue influence is to be inferred, if at all, from the facts of the case.<sup>6</sup> At the same time, the fact of relationship

other matters as tend to show what disposition, if in health and strength and uninfluenced, she would probably have made of her property. This opens a broad field of inquiry and gives to such a contest over a will a wider scope of investigation than exists in ordinary litigation."

Where it is shown that a testator in sound mind, though in feeble health, was alone with the scrivener when he gave the instructions for the will; that he was not under any restraint; and that for three years previously he had intended to make a disposition of his property like that of the will, it was held to justify probate, though the beneficiaries had notice and opportunity to exert undue influence. *Ewen v. Perrine*, 5 Redf. (N. Y.) 640.

The fact that a testator has been induced to make a new will, by false representations as to the contents of an existing will, is a proper element in the consideration of the question of undue influence, although the new will may not materially vary from the former one in respect to the subject-matter of the false representations. *Moore v. Blauvelt*, 15 N. J. Eq. 367. See also *Greenwood v. Cline*, 7 Oregon 17.

1. The manner in which the testator and his family lived together, may be shown, as well as the fact that his son conducted his business, and that this

son was not on friendly terms with his sister, one of the contestants. *Staser v. Hogan*, 120 Ind. 207.

2. *Ewen v. Perrine*, 5 Redf. (N. Y.) 640.

3. *Matter of Blair*, 16 Daly (N. Y.) 540.

The facts that a will was written by one who took immediate charge thereof, did not read it to subscribing witnesses, and told the children of the testator, when the latter afterward called for his will, not to mind him, as he was crazy, were held admissible to show fraud or undue influence. *In re Hollingsworth's Will*, 58 Iowa 526.

But where the proponent satisfactorily accounted for the secrecy maintained as to the execution and existence of a will, not unreasonable in its provisions, it was held that any presumption of undue influence that might arise was overcome. *Brick v. Brick*, 43 N. J. Eq. 167. See also *Schouler on Wills* (2d ed.), § 231; *Children's Aid. Soc. v. Loveridge*, 70 N. Y. 387; *Harrington v. Stees*, 82 Ill. 50; 25 Am. Rep. 290; *Almon v. Pigg*, 82 Ill. 149; 25 Am. Rep. 303; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235.

4. *Dale's Appeal*, 57 Conn. 143.

5. See *supra*, this title, *Kinds of Undue Influence*.

6. *Schouler on Wills* (2d ed.), § 246; *Perry on Trusts* (4th ed.), § 202; *Bige-*

will cause the court to scrutinize the instrument with great care.<sup>1</sup> This will be so even though the will be not in favor of the one alleged to have influenced the testator.<sup>2</sup> The second doctrine places wills and transactions *inter vivos* upon the same footing in this regard, and makes the former subject to the rules already laid down as applying to the latter.<sup>3</sup> The presumption, however, which the law raises may be rebutted by the proof described under the head of the third doctrine. The third view—and the one perhaps having on its side the weight of reason and authority—is that the fact of fiduciary relationship alone, does not give rise to a presumption of undue influence, but that, if combined with other circumstances tending to show imposition, such a presumption does exist.<sup>4</sup> Such circumstances would be the fact that the one in confidential relationship drew the will, or caused it to be drawn, in his own favor,<sup>5</sup> that the testator was of weak

low's Jarman on Wills (6th Am. ed.), p. 69; Bispham's Principles of Equity (4th ed.), §§ 231, 236; Parfitt v. Lawless, L. R., 2 P. & M. 462; Hudson v. Weatherill, 5 De G. M. & G. 301; Horah v. Knox, 87 N. Car. 483; Lee v. Lee, 71 N. Car. 139; Wright v. Howe, 7 Jones (N. Car.) 412; Herster v. Herster, 116 Pa. St. 612.

1. Schouler on Wills (2d ed.), § 246.

2. Matter of Welsh, 1 Redf. (N. Y.) 238.

3. Note by Wayland E. Benjamin, to Thompson v. Hawks, 14 Fed. Rep. 903; Garvin v. Williams, 44 Mo. 476; Bridewell v. Swank, 84 Mo. 455; Ranta v. Willets, 6 Dem. (N. Y.) 84; Meek v. Perry, 36 Miss. 190.

4. Chaplin on Wills 96; Bancroft v. Otis, 91 Ala. 279; 24 Am. St. Rep. 904, overruling Moore v. Spier, 80 Ala. 129; Eastis v. Montgomery, 93 Ala. 293; Wheeler v. Whipple, 44 N. J. Eq. 141; Marx v. McGlynn, 88 N. Y. 371; Matter of Smith, 95 N. Y. 516; Richmond's Appeal, 59 Conn. 226; 21 Am. St. Rep. 85.

In Dale's Appeal, 57 Conn. 143, the court said: "In certain cases where the natural objects of the testator's bounty are excluded from participation in his estate, where strangers supplant children, and the will is in favor of his attending physician or of the lawyer drawing and advising as to its provisions, or of the guardian having charge of his person or estate, or of his spiritual adviser attending him *in extremis*, the law requires the legatee at the outset to assume the burden of proving that his influence did not overcome the free agency and independence of the testator; that he did

not exercise such domination or control over his mind as to constrain him to do what was against his will." In this case the charge of the court below was held a correct statement of the law: "If a paper is executed with the requisite formalities of a will and the person signing it is shown to have sufficient capacity to make a will, the presumption is that it was executed fairly and without mistake or fraud until the contrary appears, and the burden of proof is therefore upon the person alleging undue influence. That burden may, however, be satisfied, shifted or discharged, whenever the business relations existing between the testator and the person specially benefited by a will or having been shown to have had part in procuring it to be drawn, is such as denotes special confidence and gives to the party so benefited a controlling influence over the testator. In such cases, the jury should be fully satisfied that the relation had no undue or improper influence over the mind of the testator, and did not induce a different disposition from what would have otherwise been made."

5. Dale's Appeal, 57 Conn. 133. In Richmond's Appeal, 59 Conn. 226; 21 Am. St. Rep. 85, the court said: "Whenever a legacy is given to an attorney, confidential adviser, guardian, or other person sustaining a relation of special confidence to a testator, or whenever the individual who prepares the instrument or conducts its execution, not being a relative who would in the absence of a will be an heir, derives a benefit from its provisions, in either instance the surrounding circumstances may be such that a presump-



mind,<sup>1</sup> that persons other than the one influencing and the necessary witnesses were excluded from the room at the time the will was made,<sup>2</sup> or that the person in the position of power made active personal efforts to procure the will in his own favor.<sup>3</sup> To rebut the presumption thus raised, the proponent must show that the will was intelligently and freely made.<sup>4</sup>

In order that a relation be confidential within the meaning of the rule, it must be such as to give one a real power over the testator. If there exists no superiority of knowledge or will power, the principle does not apply.<sup>5</sup> The existence of a confidential relationship and the extent of the confidence reposed is to be inferred from all the circumstances.<sup>6</sup> Many illustrations of the views stated above will be found in the pages which follow this, in which are considered the various relations, both those subject to the rule and those to which it does not apply.

a. ATTORNEY AND CLIENT.—The doctrines above stated are well illustrated by legacies and devises made by clients to their

tion, similar in character in each case, would naturally arise against the volition or knowledge of the testator; and if, in this regard, the rules of law are to correspond with those of reason, such presumption, in the absence of rebutting proof or explanations, should justify the finding of a jury that undue influence existed." The court also said: "The mere existence of a confidential relation would not, indeed, in all cases, and necessarily, raise such a presumption, especially when it appeared that the opportunity of familiar and secret communication and intercourse between the testator and the beneficiary, at a time proximate to the execution of the will, was wanting." See also *Riddell v. Johnson*, 26 Gratt. (Va.) 152.

But this presumption does not require, as part of the evidence to rebut it, the independent advice of an outside party. *St. Leger's Appeal*, 34 Conn. 450; 91 Am. Dec. 735. But see *contra*, *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689.

Where the circumstances of the great age of the testator, and that the draughtsman, her attorney and trusted friend, was made a residuary legatee, concur, the burden of disproving undue influence is on the proponent to show that a codicil radically changing the residuary provisions of the will was executed understandingly. *Matter of Soule*, 22 Abb. N. Cas. (N. Y. Surr. Ct.) 236.

A woman made a will, leaving all her money to the family with which she had lived for twenty-nine years. The property consisted of wages due

for her services during this time. On application for probate, it appeared that the woman had expressed an intention to leave her property to her niece, to whom she was attached, and that the family in question had taken an active part in the preparation of the will. It was held that it should not be admitted to probate. *Banta v. Willets*, 6 Dem. (N. Y.) 84.

1. *Matter of Soule*, 1 Conn. (N. Y.) 40; *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218; *Wilson v. Mitchell*, 101 Pa. St. 495.

2. *Wheeler v. Whipple*, 44 N. J. Eq. 141.

3. *Bancroft v. Otis*, 91 Ala. 286.

4. *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491; *Purdy v. Hall*, 134 Ill. 298; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Meek v. Perry*, 36 Miss. 190.

5. *Brooks' Estate*, 54 Cal. 471.

6. Upon the question as to whether or not a confidential relation existed between a testatrix and a beneficiary under a will, the facts and circumstances surrounding the relations of the parties are admissible. If the testatrix had intrusted property to the beneficiary, its amount, situation, and character, and the knowledge of the testatrix as to it, are material, and it is error to rule out questions as to the value of the property. Such questions would show the amount of the confidence reposed, and the reasonableness of the bequest. For the same reason the inventory and distribution of an estate from which the testatrix received a part of her property, and the testatrix's assess-

attorneys. They will be closely scrutinized.<sup>1</sup> If the attorneys draw the wills, it has been held by some courts—but contrariwise by others—that they are *prima facie* invalid as being induced by undue influence.<sup>2</sup> The advice of an outside party, however, is not a necessary part of the evidence required to sustain them.<sup>3</sup> Whether the mere fact of the professional relation raises a presumption against them is, as above indicated, a mooted point.<sup>4</sup> Whenever a presumption arises, lapse of time and the absence of any attempt at revocation, are material circumstances tending to rebut it.<sup>5</sup>

b. PHYSICIAN AND PATIENT.—Similar principles are applied where the will is made by a patient in favor of his physician. The law is especially strict where the physician draws the will, or is instrumental in procuring it.<sup>6</sup>

c. CLERGYMAN AND PARISHIONER.—Wills are often attacked on the ground of the alleged undue influence of priests or ministers. The principles governing this class of cases are not different from those already enunciated. The same jealousy of fraud and imposition is manifested by the courts, and the same diversity of view as to when, if ever, undue influence is presumed, is observed.<sup>7</sup> It is immaterial whether the influence

ment tests should have been admitted. *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85.

1. *Wilson v. Moran*, 3 Bradf. (N. Y.) 172.

2. See cases cited *supra*, this title, *Effect of Confidential Relationship*.

3. *St. Leger's Appeal*, 34 Conn. 450; 91 Am. Dec. 735.

4. See *supra*, this title, *Effect of Confidential Relationship*.

5. *Wilson v. Moran*, 3 Bradf. (N. Y.) 172.

6. See *supra*, this title, *Effect of Confidential Relationship*.

In *Ashwell v. Lomi*, L. R., 2 P. & M. 477, where one Dr. Ashwell, who took an interest of at least £10,000 by a will, was the medical attendant of the testatrix, who had long been suffering from a severe malady in a very aggravated form, and was very weak, the court held that although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favorable circumstance for one in such a confidential position, with respect to a patient laboring under a severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding, and in such a case the onus will lie very heavily upon

the party benefited to maintain the validity of the will.

The will of an unmarried woman, who left relatives, gave everything to her physician. There was evidence tending to show that she was not of sound mind, and the physician appeared to have been instrumental in procuring the execution of the will. The suspicious circumstances were not explained away by proof. It was held that the will should be refused admission to probate. *Peck v. Belden*, 6 Dem. (N. Y.) 299.

Where a will was drawn by the physician and confidential adviser of the testatrix, devising him property of considerable value, it was held that the burden of proof was on the proponent to satisfy the court, that the instrument was the product of a free and capable mind. *Crisfell v. Dubois*, 4 Barb. (N. Y.) 393.

7. See *supra*, this title, *Effect of Confidential Relationship*.

Undue influence was held not to be presumed from the relationship alone in *Figueira v. Taafe*, 6 Dem. (N. Y.) 166; *Marx v. McGlynn*, 88 N. Y. 358. *Parfitt v. Lawless*, L. R., 2 P. & M. 462; 41 L. J. P. & M. 68; 27 L. T. N. S. 215, where the plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband for many years as chaplain, and for a part of the

is exerted in favor of the clergyman himself, or of some outside party or object.<sup>1</sup> The case of the contestant is much strengthened, of course, if it can be shown that the will was written, dictated, or procured by the clergyman.<sup>2</sup>

Exhortations and appeals to duty are not undue influence.<sup>3</sup>

If presumptions are regarded by the court to have arisen, they are rebutted by proof of fairness and free agency.

Closely allied to the influence of a clergyman is that of a spiritualist over his disciples. Its effect is much the same, so far as the questions in hand are concerned.<sup>4</sup>

d. GUARDIAN AND WARD.—Wills made by wards in favor of their guardians, or those lately their guardians, are closely scrutinized, and according to some decisions, *prima facie* invalid.<sup>5</sup> This, however, is disputed, and represents only one of the three views on this subject already noted.<sup>6</sup> It has been held that the fact of guardianship is *prima facie* evidence of incapacity.<sup>7</sup>

e. HUSBAND AND WIFE.—The matter of undue influence in wills made by a husband or wife in favor of the other is beset by peculiar difficulties. It is, on the one hand, impolitic to allow inquiry into the particular relation of the parties, and, on the other, hard to follow out such inquiry,<sup>8</sup> but the general princi-

time as confessor, which position he occupied at the time the will in dispute was made. There was no evidence that he had interfered in the making of such will, or had exercised coercion over the testatrix, nor was it shown in the common affairs of life, in business or in anything else, that the testatrix was under the plaintiff's control or dominion. It was held that there was no evidence to go to a jury on an issue of undue influence. Natural influence, exerted by one who possesses it, to obtain a benefit for himself, is undue in transactions *inter vivos*, so that gifts and contracts between certain parties will be set aside, unless the party benefited can show affirmatively that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules, therefore, of courts of equity in relation to gifts *inter vivos*, are not applicable to the making of wills.

1. Matter of Welsh, 1 Redf. (N. Y.) 238; Redf. Am. Cas. Wills 506; Muller v. St. Louis Hospital Assoc., 5 Mo. App. 390.

2. Matter of Welsh, 1 Redf. (N. Y.) 238; Redf. Am. Cas. Wills 506, where the testatrix attended the church of which one Cox was pastor. He visited her daily, and was her religious guide.

In her will, which he dictated, she left him a certain sum of money. The court held that in such cases, where the will is dictated by an interested party, sustaining toward the testatrix the relation of spiritual adviser, and where large bequests are made to religious objects, there arises a presumption of fraud and undue influence, and it becomes necessary, in order to establish the will, to rebut the presumption.

3. Merrill v. Rolston, 5 Redf. (N. Y.) 220; Schofield v. Walker, 58 Mich. 96.

4. Robinson v. Adams, 62 Me. 369; 16 Am. Rep. 473; Greenwood v. Cline, 7 Oregon 7.

A testator embraced spiritualism so that it dominated his life. The man who influenced him to embrace it, also induced him, through his belief, to become alienated from his wife and child, and make a will in favor of his adviser. It was held that the will should be set aside. Thompson v. Hawks, 14 Fed. Rep. 902.

5. Garvin v. Williams, 44 Mo. 465; 100 Am. Dec. 314; Meek v. Perry, 36 Miss. 190; Seiter v. Straub, 1 Dem. (N. Y.) 264.

6. See *supra*, this title, *Effect of Confidential Relationship*.

7. Breed v. Pratt, 18 Pick. (Mass.) 115.

8. Boyse v. Rossborough, 6 H. L. Cas. 2; 3 Jur. N. S. 373. While this is

ples prevail.<sup>1</sup> It is established, however, that there are no presumptions arising from the relation.<sup>2</sup> It is both natural and just that the husband or wife should make generous provision for the other, whose labor or economy may have contributed much to accumulate the property left by the will. The undue influence must, therefore, be alleged and established as a fact by the contestant.<sup>3</sup>

The facts that a man is attached to his wife, that she guides or even dominates him in the ordinary affairs of life,<sup>4</sup> or has acquired an ascendancy over him, do not render his will, if made in her favor, invalid.<sup>5</sup> It is her right and, in certain cases, her duty to use persuasion and importunity to procure a proper provision for herself.<sup>6</sup> So far from an influence being presumed from her relation to him, she may lawfully go much farther than an outsider, and make appeals and exert influence which, coming from another, would be undue.<sup>7</sup> It is only when, as a matter of

true as a general principle, reasonable and proper inquiry into the relation of the parties will be made. *Pierce v. Pierce*, 38 Mich. 412; *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15.

Thus, where a man just divorced married a woman of wealth, who died in a few weeks, leaving him all her property, it was held that, on the issue of undue influence, a broad latitude was proper in the introduction of evidence of their relations before and after marriage. *Potter's Appeal*, 53 Mich. 106.

1. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 67.

2. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 69; *Mason v. Williams*, 53 Hun (N. Y.) 398; *Rankin v. Rankin*, 61 Mo. 295; *Small v. Small*, 4 Me. 220; 16 Am. Dec. 253; *Pierce v. Pierce*, 38 Mich. 412.

3. This is a matter for the jury, and they may find that there was no undue influence, even if the provisions of the will be unnatural. *Meeker v. Meeker*, 75 Ill. 260; *Farr v. Thompson*, 1 Spear (S. Car.) 93.

It is competent to show that natural objects of bounty, as the children of a former wife, were excluded without apparent reason. *Mullen v. Helderman*, 87 N. Car. 471.

Where a will was contested on the ground of undue influence by a second wife, to whom the testator gave most of his property, it was held that evidence which afforded an insight into the private history of the family, the relations of the testator with the second wife, and the means employed by her to alienate his affections from his children by

a former wife, was admissible. *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15.

That a wife asks her husband to appoint her an executor of his will, is not evidence of undue influence; neither is the fact that the wife's sisters, one of whom the testator was visiting, summoned the lawyer of one of them to assist the testator's counsel in drawing the will. *Black v. Foljambe*, 39 N. J. Eq. 234.

4. *Schouler on Wills* (2d ed.), § 236; *Small v. Small*, 4 Me. 220; 16 Am. Dec. 253; *Storer's Will*, 28 Minn. 9; *Hughes v. Murtha*, 32 N. J. Eq. 288.

The rule is the same where the husband is dependent on his wife, because of his enfeebled physical condition. *Meeker v. Meeker*, 75 Ill. 260.

5. If a wife, by her virtues, has gained such an ascendancy over her husband, that her pleasure is the law of his conduct, such influence is no reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. *Small v. Small*, 4 Me. 220; 16 Am. Dec. 253.

6. *Lide v. Lide*, 2 Brev. (S. Car.) 403. Thus, mere proof that a testator's wife urged upon him the propriety of leaving his property to her, does not establish undue influence. *Hughes v. Murtha*, 32 N. J. Eq. 288.

7. A will will not be set aside on account of any persuasions or representations of the testator's wife, while the testator is at the point of death, to induce him to make her a more liberal provision than he is disposed to make, although it should appear that such

fact, his free agency is gone, and her will substituted for his, that the instrument is void.<sup>1</sup>

The same considerations apply in the case of influence alleged to be exerted by the husband over the wife, except that it will be more readily inferred.<sup>2</sup>

*f. MAN AND MISTRESS.*—Undue influence is much more readily inferred in case of a will made in favor of a mistress, than of one in favor of a wife.<sup>3</sup> The relation of the parties may always be shown,<sup>4</sup> and it is error for the court to charge that it is immaterial whether the parties were lawfully married or not.<sup>5</sup>

While, therefore, the fact of adulterous relations between a testator and another, is admissible, and, taken in connection with the internal evidence of the will or other circumstances, may be sufficient to justify a verdict against the instrument,<sup>6</sup> there is, according to the general opinion, no presumption from the mere fact of the relation.<sup>7</sup> Some of the authorities, however, have considered that this relation is subject to the rules as to fiduciary

persuasions had prevailed on him to comply with her wishes, provided it shall appear that the testator was of sound mind, and was not imposed on by false representations, and that the provision made for the wife is not greatly disproportionate and unreasonable. *Lide v. Lide*, 2 Brev. (S. Car.) 403.

As illustrating the latitude allowed by some of the cases, see *Storey's Will*, 20 Ill. App. 183, where a will was admitted to probate, though there was evidence that the testator believed himself to be directed by a spirit which he called "Little Squaw;" that when he signed the will he was slightly intoxicated; that only his attorney and his wife were present, the witnesses attesting some days later; and that she, on handing him the will to be signed, said: "You know what the Little Squaw has said about making provision for those you love best, and you know I love you and you know you love me best."

1. *Boyse v. Rossborough*, 6 H. L. Cas. 2; 3 Jur. N. S. 373; *Hacker v. Newborn*, Styles 427; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526; 34 Am. Dec. 340; *Pierce v. Pierce*, 38 Mich. 412.

2. *Schouler on Wills* (2d ed.), § 237; *Armstrong v. Armstrong*, 63 Wis. 162.

3. *Bigelow's Jarman on Wills* (6th Am. ed.), p. 68; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28.

Influence, which, when exercised by the wife of the testator, might be law-

ful, may be undue and illegitimate if exercised by a woman occupying merely an adulterous relation to him. *Kessinger v. Kessinger*, 37 Ind. 341.

The influence of a lawful relation over testamentary dispositions is not prohibited by law, except when unduly exerted over the very act of devising; but that of an illegal relation, is naturally and ordinarily unlawful, in so far as it respects testamentary dispositions favorable to the unlawful relation, and unfavorable to the lawful heirs. *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620.

4. *Reichenbach v. Ruddach*, 127 Pa. St. 364.

5. *McClure v. McClure*, 86 Tenn. 173.

6. *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620.

7. *Dunlap v. Robinson*, 28 Ala. 106; *Dickie v. Carter*, 42 Ill. 376; *Porschet v. Porschet*, 82 Ky. 93; *Sunderland v. Hood*, 13 Mo. App. 232; *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620; *Main v. Ryder*, 84 Pa. St. 217; *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238; *Wainwrights' Appeal*, 89 Pa. St. 220; *Heilbruns' Estate*, 9 Pa. Co. Ct. Rep. 350.

A will legally executed will not be set aside on the mere ground that its provisions are in favor of a mulatto woman with whom the testator had lived in disgraceful intimacy, who had great domestic influence over him, and of whom he had sometimes appeared to be in personal fear. *Farr v. Thompson*, *Cheves* (S. Car.) 37.

relations proper, and that when it concurs with other suspicious circumstances a presumption against validity arises.<sup>1</sup>

*g.* PARENT AND CHILD.—That the testator and the one alleged to have influenced him stood to each other in the relation of parent and child, is a fact to be considered and weighed by the jury in connection with other circumstances.<sup>2</sup> It gives rise to no presumption, however.<sup>3</sup> This is the case whether the testator be the parent of the other or whether the relation be reversed.<sup>4</sup> The influence is to be inferred, if at all, as a fact proved from other facts.<sup>5</sup>

Inequalities in the amounts given by a parent to the various children constitute evidence, but are not conclusive against the will.<sup>6</sup> As to the husband or wife, so to the parent or child, a wide latitude is allowed. Persuasion, entreaty, and urgency may be lawfully carried far, so long as the will remains supreme.<sup>7</sup>

The same considerations apply in wills between brothers and sisters,<sup>8</sup> and other relatives and inmates of the same household.<sup>9</sup>

*h.* TESTATOR AND DRAUGHTSMAN OF WILL.—While there is to be found considerable authority to the contrary,<sup>10</sup> the rule, as generally adopted and followed, is probably that there is no

1. Chaplin on Wills 97; Dean v. Negley, 41 Pa. St. 318; 80 Am. Dec. 620.

2. Gaither v. Gaither, 20 Ga. 721.

3. Matter of Martin, 98 N. Y. 193; Elliot's Will, 2 J. J. Marsh. (Ky.) 340; Dale's Appeal, 57 Conn. 144.

Nor does a presumption arise when the fact of relationship is combined with the circumstances that the testator was on his death-bed and surrounded only by his principal beneficiaries, the contestant being absent. Bundy v. McKnight, 48 Ind. 502.

But where the testatrix was in feeble health both of mind and body, and was prevented by a son, who was the principal beneficiary under her will, from seeing her other sons, it was held that the will should not be probated. Dale v. Dale, 38 N. J. Eq. 274.

4. Gaither v. Gaither, 20 Ga. 709; Moore v. Blauvelt, 15 N. J. Eq. 367. Where a testatrix made her mother sole legatee and executrix, having been forced to leave her husband because of his cruelty, it was held that a charge of undue influence had not been sustained. Re Andrews, 33 N. J. Eq. 514.

5. Dale's Appeal, 57 Conn. 144.

6. Kise v. Heath, 33 N. J. Eq. 239; Myers v. Hanger, 98 Mo. 433; Kerr v. Lunsford, 31 W. Va. 659. Children may be disinherited without causing any presumption against the will. Hagan v. Yates, 1 Dem. (N. Y.) 584.

7. Schouler on Wills (2d ed.), § 235; Harrison's Will, 1 B. Mon. (Ky.) 351; Hartman v. Strickler, 82 Va. 225; Woodward v. James, 39 Strobh. (S. Car.) 552; Wood's Estate, 13 Phila. (Pa.) 236; Gilreath v. Gilreath, 4 Jones Eq. (N. Car.) 142. But threats may constitute undue influence. Moore v. Blauvelt, 15 N. J. Eq. 367.

8. *In re* McDevitt, 95 Cal. 17, where it was held that a testamentary provision of a man of strong will in favor of a brother with whom he had lived for ten years without paying board, the will cutting off the children of two other brothers, but made without any suggestion or even knowledge on the part of the beneficiary, should be admitted to probate.

9. Herster v. Herster, 116 Pa. St. 612; Wood's Estate, 13 Phila. (Pa.) 236; Mowry v. Silber, 2 Bradf. (N. Y.) 133; Demmert v. Schnell, 4 Redf. (N. Y.) 409; Phipps v. Van Kleeck, 22 Hun (N. Y.) 541; Van Kleeck v. Phipps, 4 Redf. (N. Y.) 99.

10. Baker v. Batt, 2 Moo. P. C. 317; Hughes v. Meredith, 24 Ga. 325; 71 Am. Dec. 327; Adair v. Adair, 30 Ga. 102 (but see Carty v. Dixon, 69 Ga. 82); Blume v. Hartman, 115 Pa. St. 32; 2 Am. St. Rep. 525; Drake's Appeal, 45 Conn. 9; Nexsen v. Nexsen, 3 Abb. App. Dec. (N. Y.) 364 (but see Post v. Mason, 91 N. Y. 539); Tompkins v. Tompkins, 1 Bailey (S. Car.) 92.

presumption of law against a will written by one who is a beneficiary under it.<sup>1</sup> The fact may, however, go to the jury as a part of the evidence.<sup>2</sup> The rule seems to be the same even where the testator is of great age or *in extremis*, if of sound mind.<sup>3</sup> The fact that a beneficiary drew the will may, however, according to some authorities, combine with that of confidential relationship to raise a presumption of undue influence.<sup>4</sup>

i. PERSONS IN OTHER CONFIDENTIAL RELATIONS.—There is no presumption of undue influence raised by the fact that a will is made in favor of the testator's partner or his business adviser.<sup>5</sup>

4. Undue Influence in Revocation of Wills.—As the revocation, as well as the making of a will, must be an intelligent and voluntary act, it follows that an apparent revocation, induced by undue influence, is void. The same considerations apply here, as in the case of such influence operating to induce the making of a will.<sup>6</sup>

5. Validation of Wills Induced by Undue Influence.—While a contract into which one has entered through the undue influence of another is voidable only and may be ratified, such is not the case with a will. It is void if so induced, and can only be validated by a re-execution with all the formalities which would have been required originally to make a valid will.<sup>7</sup>

1. Bigelow's Jarman on Wills (6th Am. ed.), p. 70; Schouler on Wills (2d ed.), § 245; Carter v. Dixon, 69 Ga. 82; Post v. Mason, 91 N. Y. 539; 43 Am. Rep. 689; Montague v. Allan, 78 Va. 592; 49 Am. Rep. 384; Rusling v. Rusling, 36 N. J. Eq. 603; Waddington v. Buzby, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; Byrne's Estate, Myr. Prob. (Cal.) 1; Cramer v. Crumbaugh, 3 Md. 491; Downey v. Murphey, 1 Dev. & B. (N. Car.) 82.

2. Chaplin on Wills 97; Drake's Appeal, 45 Conn. 9.

Where a beneficiary drafted a will, it was held that the fact was itself ground of suspicion, and the circumstances of the execution of the will should have close scrutiny. Byrne's Estate, Myr. Prob. (Cal.) 1.

To same effect are Lyons v. Campbell, 88 Ala. 462; Cramer v. Crumbaugh, 3 Md. 491; Duffield v. Robeson, 2 Harr. (Del.) 384; McDaniel v. Crosby, 19 Ark. 550.

But it is error for the court to instruct the jury that the fact that the will was drawn by one taking a benefit under it is a suspicious circumstance, such language being apt to mislead. Stirling v. Stirling, 64 Md. 138.

3. Downey v. Murphey, 1 Dev. & B. (N. Car.) 82; Stein v. Wilzinski, 4 Redf. (N. Y.) 441. But the rule is

otherwise if the testator is unable to read. Kelly v. Settegast, 68 Tex. 13.

4. See *supra*, this title, *Effect of Confidential Relationship*.

A housekeeper may occupy such a relation. See Byard v. Conover, 39 N. J. Eq. 244, where a bachelor, over seventy years of age, in a moribund condition, executed at the instance of his housekeeper, a will which she had prepared four years before, giving her all of his property, of which will his relatives had no knowledge. It was held that the will was invalid.

5. Brooks' Estate, 54 Cal. 471; Carpenter v. Baily, 94 Cal. 406; Waddington v. Buzby, 43 N. J. Eq. 154; 14 Am. St. Rep. 706.

6. Schouler on Wills (2d ed.), §§ 384, 427 a; Rich v. Gilkey, 73 Me. 595; Batton v. Watson, 13 Ga. 63; 58 Am. Dec. 504; O'Neill v. Farr, 1 Rich. (S. Car.) 80; Laughton v. Atkins, 1 Pick. (Mass.) 547. But the exercise of undue influence in preventing a testator from revoking his will, will not be sufficient ground for setting aside the will. Floyd v. Floyd, 3 Strobb. (S. Car.) 44; 49 Am. Dec. 626.

7. Chaddick v. Haley, 81 Tex. 617; Lamb v. Girtman, 26 Ga. 625.

Authorities.—Among the works principally consulted in the preparation of this article, are the following: Beach's

**UNFAIRLY.**—See note 1.

**UNFINISHED.**—See note 2.

**UNFIT.**—See note 3.

**UNION DEPOTS.**—For convenience in the reception and discharge of passengers, the railroads centering in most large cities have perfected arrangements whereby one depot, commonly called a union depot, is used by them in common for all purposes of passenger traffic. The depot may be built by contributions from the railways using it, or by a private corporation, which charges the roads using it a rental.<sup>4</sup>

The legislature may require railway companies centering in a city

Modern Equity Jurisprudence, Bigelow on Fraud, Bispham's Principles of Equity, Chaplin on Wills, Darlington on Personal Property, Jarman on Wills (Bigelow's 6th Am. ed.), Lewin on Trusts, Perry on Trusts, Pomeroy's Equity Jurisprudence, Redfield on Wills, Schouler on Wills, Story's Equity Jurisprudence, Weeks on Attorneys at Law, Williams on Executors.

1. **Unfairly Computed.**—The words "unfairly computed," applied to the action of a cashier, were held not necessarily to imply moral obliquity in an action for libel. *Kerr v. Force*, 3 Cranch (C. C.) 8.

2. **Unfinished Business.**—Upon the abolition of certain courts it was provided that their "unfinished business" should be transferred to other courts. It was held that a verdict upon which judgment had not been entered was "unfinished business." *Foster v. Daniels*, 39 Ga. 39.

3. **Unfit Instrument.**—See CRIMINAL LAW, vol. 4, p. 666.

**Unfit synonymous with Improper.**—See IMPROPER, vol. 10, p. 240.

**Unfitness.**—As to the meaning of this word in a law prescribing qualifications of liquor dealers, see INTOXICATING LIQUORS, vol. 11, p. 611.

4. The St. Paul Union Depot Company is a domestic corporation, the general object of the organization of which may be said to have been to secure and afford necessary depot and terminal facilities for railroads running into the city of St. Paul by means of a combination of all such railroads for that purpose. Its stockholders are various railroad corporations operating lines of railroad running into that city. It was held in *St. Paul Union Depot Co. v. Minnesota, etc.*, R. Co., 47 Minn. 154; 50 Am. & Eng. R. Cas. 55, that,

in view of the organization of the depot company, and construing the provisions of its charter, railroad companies entering the city since the corporate organization, were entitled, for the purpose of becoming members of the corporation and sharing in and contributing to the benefits of the organization, to subscribe for and purchase a proper proportion of its stock at its par value; and that, if necessary for its purpose and for a proper apportionment of the stock, the existing members might be required to surrender or sell a part of the stock held by them.

In *St. Paul, etc., R. Co. v. St. Paul Union Depot Co.*, 44 Minn. 325, a conveyance and lease from the depot company to the railroad company were considered and construed with reference to the right to the exclusive use and occupation by the railroad company of certain specified railway tracks and adjoining platforms in the train-house or annexed to the depot building.

In *State v. St. Paul Union Depot Co.*, 42 Minn. 142; 41 Am. & Eng. R. Cas. 636, questions of taxation were involved.

In *Chicago, etc., R. Co. v. St. Paul Union Depot Co.*, 54 Minn. 411, questions analogous to those raised in *St. Paul Union Depot Co. v. Minnesota, etc.*, R. Co., 47 Minn. 154; 50 Am. & Eng. R. Cas. 55, were involved.

**Contract.**—In *Union Depot Co. v. Chicago, etc., R. Co.*, 113 Mo. 213; 56 Am. & Eng. R. Cas. 245, it appeared that in 1876, there were six railroad companies whose roads terminated at Kansas City. Besides these one other road extended its line through Kansas City. The depot company and these seven railroad companies entered into a written contract, by the terms of which



to unite in a passenger station at a point to be determined by the commissioners appointed by court, and to extend their tracks in the city to that station; and a statute to that effect is constitutional.<sup>1</sup> If the articles of incorporation of an intended company declare that the purpose of the company is to locate, build, own, and maintain a union depot for railroads, and to locate, build, own, and maintain as many different lines of railroad from said depot as may be necessary for the use and accommodation of different railway companies, the articles will not be held to create a regular railroad company.<sup>2</sup> The legislature may authorize union depot

each road agreed to use the depot and to pay to the Union Depot Company for such use, an annual rental amounting to ten per cent. interest on the total ascertained outlay for actual cost of said depot, including grounds, buildings, etc., and in addition thereto, the expenses of maintaining and operating the same, and all repairs and taxes. The rent to be paid by any one company was not to exceed a designated amount yearly, and the total outlay was not to exceed a named sum, except with the written consent of the several companies. It was further provided that all rents for the use of the said depot derived from railroad companies not parties to the contract, and all rents and receipts derived from any source whatever "shall be applied as a credit upon and in reduction of the amount to be paid as rent by the several companies." Subsequently three other companies were admitted as parties to the contract, thus making ten parties of the second part. It was held that these ten companies all had the same rights and the only effect of admitting the three additional ones was to lessen the rent to be paid by each company from one-seventh to one-tenth of the whole rent. It was further held that, upon the extension by one of the companies of its line through Kansas City, by purchasing the line of another company that had been paying rent to the depot company, the former was entitled to use the said depot for its purchased as well as for its original line, upon payment only of the rent imposed by the contract. In this case the evidence was examined, and it was held that, under the agreement between the depot company and the purchased line, the latter had only a temporary right to use the depot and not a lease from year to year.

1. In *Worcester v. Norwich, etc.*, R. Co., 109 Mass. 103, Chapman, C. J., said: "In chartering a railroad corpo-

ration, and conferring upon it the power to exercise the right of eminent domain, a power is granted which is carefully guarded by the constitution. Property must be taken for public uses. If the power were granted by the legislature for private uses only, the grant would be unconstitutional and void. The public use for which it is granted to a railroad corporation, is as a way for public travel and the transportation of property. One of the most obvious reasons for reserving to the legislature the right to alter, amend, or repeal such charters is to enable it to compel an unwilling corporation to perfect and extend its connections with other railroads, as the convenience of the public may from time to time require. The Boston and Albany Railroad Company must of necessity have a passenger station in Worcester, and it is obviously important for the public that all the other railroads named shall be connected with it. At any rate, the legislature was the exclusive judge as to that matter, and an amendment of the several charters, so as to secure such an object, was a reasonable exercise of their reserved right. It is no valid objection to such amendments that they require corporations to extend their tracks and to exercise the right of eminent domain for this purpose, and to incur additional expense."

2. In *People v. Cheeseman*, 7 Colo. 376; 16 Am. & Eng. R. Cas. 400, Helm, J., said: "Does this language indicate an attempt to create an ordinary railroad company under our laws? We think not. The primary and principal design evidently was to build and maintain a union depot. The various lines of railroad extended to the city; they came in from different directions and discharged freight and passengers at different points; to successfully 'maintain' a union depot and thereby accomplish the purpose of the enter-

companies to exercise the power of eminent domain in order to procure land, both for the depot and for the tracks necessary to make connections with the various railroads which it is intended to connect.<sup>1</sup> Where, under a statute, a union depot company is

prise, it was of course necessary to connect the same with the several *termini* of the roads within the city. Incidental, therefore, to the main adventure, was the construction and keeping in repair of lines of track to make these connections. Had the articles of incorporation announced a purpose to build and maintain a union depot and connect the same by lines of track with the different railroads centering in Denver the same intention would, in our judgment, have been expressed, and the same end attained."

That provision of the *Michigan Union Depot Act* which authorizes companies organized thereunder to run local trains, is warranted by the provision in the title of such act authorizing the construction of depots, "with the necessary tracks and management of the same." *Fort St. Union Depot Co. v. Morton*, 83 Mich. 265.

1. The *Michigan Union Depot Act*, authorizing the formation of union depot companies, and conferring upon them the power of eminent domain, so stamps the property to be taken with a public character, and imposes a trust upon it for that use, as to make the grant of the power of eminent domain perfectly constitutional. *Fort St. Union Depot Co. v. Morton*, 83 Mich. 265.

If a *Union Depot Act* is entitled "An act to authorize the incorporation of companies for the construction of union railroad stations and depots, with the necessary tracks and management of the same," the title is sufficient to warrant the conferring of the power of eminent domain upon such corporations. *Fort St. Union Depot Co. v. Morton*, 83 Mich. 265.

The payment, by a *Union Depot Company*, organized under the *Michigan* statute, of the award of damages made by the jury in condemnation proceedings instituted by the company, upon the order of the court on confirming such award, cannot affect the right of the company to appeal from such award, and to have the question of damages retried by another jury. *Union Depot Co. v. Backus*, 92 Mich. 33.

The provision of the *Missouri* Constitution that the fee of land taken for "railroad tracks" without the consent

of the owner thereof shall remain in such owner, subject to the use for which it is taken, even though it may be held to apply to land condemned for union depot purposes, does not invalidate the statutory provision authorizing the condemnation of land for depot purposes, and land when so condemned, and any interest therein, belong to the condemning corporation as owner, since merely an easement at law would pass in case of condemnation under the statute. *Union Depot Co. v. Frederick* (Mo. App.), 67 Am. & Eng. R. Cas. 656.

Where a portion of a street in a city of the first class is vacated pursuant to *Kansas* Gen. St. of 1889, § 582, and a lot abutting thereon condemned, and the perpetual use thereof acquired by a union depot railroad company for the maintenance of a union depot, the portion of the vacated street in front of the lot so condemned becomes, as it were, an accretion or appurtenant to the lot, and passes with the same to the company. *Challiss v. Atchison Union Depot & R. Co.*, 45 Kan. 398.

**Condemnation of Track of one Road by Another, in Entering Depot.**—Under the *Massachusetts* Stat. of 1871, ch. 343, providing for the establishment of a union passenger station in the city of Worcester for the use of the several railroad corporations entering the city, authorizing them to extend their tracks to the station, and giving the board of railroad commissioners power to order such changes in the locations and arrangement of tracks in the vicinity of the station as the safety and convenience of the public might require, the board has the power, in authorizing one railroad corporation to take a portion of the location of another railroad corporation, to do so on condition that the latter shall have the right to use a track of the former, subject to reasonable regulations to be established by the board. *Providence, etc., R. Co. v. Norwich, etc., R. Co.*, 138 Mass. 227; 22 Am. & Eng. R. Cas. 493.

**Reservation in Grant.**—Where a railroad company conveyed to a union depot company a site for its passenger station, and the deed of conveyance contained a provision that the railroad

allowed to lay its tracks and erect buildings on streets, with the consent of the proper authorities of the city, the phrase "proper authorities," refers only to those properly so called, and does not include the county court.<sup>1</sup>

The delivery by a railway company of baggage to a union depot company, to be cared for and delivered to passengers on the presentation of their checks, makes the depot company the agent of the railway company, and the railway company is liable as a common carrier for the loss of baggage while in the depot company's custody, if the loss occurs before a reasonable time for delivery has elapsed.<sup>2</sup>

A union depot company has power to prescribe reasonable rules, requiring passengers to exhibit their tickets before entering the cars, and for preventing their getting on moving trains, and may enforce such rules with that amount of force made necessary by the exigencies of the occasion.<sup>3</sup>

**UNIONS.**—See **TRADE UNIONS**, vol. 26, p. 526.

company should have the perpetual and exclusive use and control of the three most northerly tracks in the said depot for its own business, and the business of such other railroad companies as it was then, or should at any time thereafter be under obligation to furnish or provide with passenger depot accommodations, the railroad company was entitled to the use of three tracks, not merely for the business of those companies to whom it was at the time of the execution of the deed under obligation to furnish depot accommodations, but also for that of any other companies with which it might thereafter contract to furnish such accommodations, and the reservation covered not only the right to run trains in and out of the depot, but also the right to general depot accommodations; such construction of the grant being neither repugnant, nor in conflict with public policy, nor prejudicial to the interests of the union depot company. *St. Paul Union Depot Co. v. St. Paul, etc., R. Co.*, 35 Minn. 320; 26 Am. & Eng. R. Cas. 567.

1. The county court is in no sense "an authority of the city," and it is fairly inferable that it was the intention of the legislature to permit the use of the streets of a city by union depot companies provided the consent of the city authorities only should be obtained. *Union Depot Co. v. St. Louis*, 76 Mo. 393.

2. *Jacobs v. Tutt*, 33 Fed. Rep. 412.

3. In *Linn v. Terre Haute, etc., R. Co.*, 10 Mo. App. 125, *Thompson, J.*,

said: "If it delivered the baggage to an intermediate corporation for the purpose of effecting this delivery, then the corporation became in law its agent for the purpose of making such delivery." In *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433; 45 Am. & Eng. R. Cas. 596, the company had a rule requiring persons passing through its gates, for the purpose of taking trains, to exhibit their tickets to the gatekeeper and have them punched by him; and, also, one providing that no passenger should be allowed to board any train while in motion. It was held that these rules were reasonable and all persons intending to take trains and knowing of, and having a reasonable opportunity to do so, were bound to comply with them, and that the company had a right to enforce them or prevent violation of them, and to employ such force as might be necessary for that purpose, and might seize, hold, or detain passengers so far as necessary to prevent them from boarding trains in motion.

**Assault by Employé.**—An allegation in a complaint that the plaintiff had purchased a ticket at a union depot, where several railroad lines received and discharged passengers, and while passing from the depot to his train, was assaulted at the gate, through which he had to pass in order to take his train, by the gateman, who was an employé of the depot company, states a good cause of action. *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202.

**UNITED STATES.**—(See also ALIEN, vol. 1, p. 456; CITIZENSHIP, vol. 3, p. 242; CONSTITUTIONAL LAW, vol. 3, p. 670; MAIL, vol. 13, p. 1200; POLICE POWER, vol. 18, p. 739; PRESIDENT OF THE UNITED STATES, vol. 19, p. 32; POSTAL LAWS, vol. 18, p. 843; STATES, vol. 23, p. 72; TREATIES, vol. 26, p. 539; UNITED STATES COURTS, vol. 27.)

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**I. DEFINITION.**—In America, the *United States* is the political entity or entirety founded by the adoption of the constitution; also the whole territory or country subject thereto. Used adjectively, that which emanates from, pertains, or belongs to, the general or national government.<sup>1</sup>

**II. CONTRACTS**—1. *Power to Make.*—The *United States* in its political capacity may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the departments to which these powers are intrusted, enter into contracts not prohibited by law and appropriate to the just exercise

1. Anderson's Law Dict.

There is an inconvenient ambiguity in the phrase "*United States*;" sometimes it designates the states composing the American Union, separately considered, as in the expression "one of the *United States*;" more often, the national government, the political entirety, as in the phrases, "*United States* bonds," "*United States* currency," "*United States* marshal." Sometimes it means the whole country subject to the state and federal governments. Abbott's Law Dict.

The term "*United States*" designates the whole American empire. It is the name given to our great republic, composed of states and territories; "constituent parts of one great empire," *Cohens v. Virginia*, 6 Wheat. (U. S.) 414, "who have formed a confederated government," *Ogden v. Saunders*, 12 Wheat. (U. S.) 334; *Buckner v. Finley*, 2 Pet. (U. S.) 591; by the act of the people of the "great empire," the "great republic," the "American empire" the

"*United States.*" Baldwin's Origin and Nature of the Const. and Govt. of the *United States*, p. 14.

**A Body Corporate.**—The *United States* became a body corporate from the moment of the association of the states. *Respublica v. Sweers*, 1 Dall. (Pa.) 41. Although of limited powers, it is supreme within its sphere, and its laws are the supreme law of the land. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

**Domicile.**—The debts due the *United States* have no locality at the seat of government. The *United States* in their sovereign capacity have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the union, and the debts due by them are not to be treated like the debts of a private debtor which constitute local assets in his local domicile. *Mackey v. Cox*, 18 How. (U. S.) 100; *Vaughan v. Northup*, 15 Pet. (U. S.) 1; *Wyman v. Halstead*, 109 U. S. 654.

of these powers; no legislative authorization is required, such power being incident to the general right of sovereignty.<sup>1</sup>

2. *Liability*.—The *United States*, when it enters into a contract with an individual, relinquishes its sovereign character *quoad* that transaction, is subject to the rules of right and justice between man and man, and is controlled by the same laws that govern individuals with respect to such contract;<sup>2</sup> and all obli-

1. *Dugan v. U. S.*, 3 Wheat. (U. S.) 172; *U. S. v. Tingey*, 5 Pet. (U. S.) 114; *U. S. v. Bradley*, 10 Pet. (U. S.) 343; *U. S. v. Linn*, 15 Pet. (U. S.) 290; *Cotton v. U. S.*, 11 How. (U. S.) 229; *Neilson v. Lagow*, 12 How. (U. S.) 107; *U. S. v. Howell*, 4 Wash. (U. S.) 620; *U. S. v. Lane*, 3 McLean (U. S.) 365; *Dikes v. Miller*, 25 Tex. Supp. 281; 78 Am. Dec. 571; *Stearns v. U. S.*, 2 Paine (U. S.) 312; *Jessup v. U. S.*, 106 U. S. 147; *U. S. v. Noah*, 1 Paine (U. S.) 368; *Fowler v. U. S.*, 3 Ct. of Cl. 43; *Allen v. U. S.*, 3 Ct. of Cl. 91.

Being a body corporate and politic, the *United States* has within its constitutional limitations, all the properties, faculties, and powers of a government, and the right to exercise them freely for the accomplishment of the objects of its creation, and among them the power to enter into contracts. *U. S. v. Maurice*, 2 Brock. (U. S.) 96.

The *United States* is a corporation capable of contracting, and a bond payable to the "*United States of America*" is a valid bond at common law. *Dixon v. U. S.*, 1 Brock. (U. S.) 177.

To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers brought into operation by express legislative adoption. A doctrine to such an extent is not known to this court as ever having been sanctioned by any judicial tribunal. *U. S. v. Tingey*, 5 Pet. (U. S.) 114.

When the form of contract is prescribed by law, a mere departure therefrom will not make it invalid, but the contract will be good at common law. *Jessup v. U. S.*, 106 U. S. 147.

In *Brown v. U. S.*, 5 Pet. (U. S.) 373, a bond taken under an act of Congress wholly omitted one of the clauses required by statute to be inserted in the condition. In *U. S. v. Bradley*, 10 Pet. (U. S.) 362, Story, J., commenting upon this case, said: "The court there entertained no doubt as to the validity of the bond, and only expressed a doubt,

whether a breach which was within the direct terms of the omitted clause, and yet which fell within the general words of the inserted clause, could be assigned as a good breach under the latter. But if the bond, being a statute bond, was totally void, because the condition did not conform to all the requirements of the act, it would have been wholly useless to discuss the other questions arising in the cause. Upon the whole, upon this point we are of the opinion that there is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants, or grants not *malum in se*, but illegal at common law, and those containing conditions, covenants, or grants, illegal by the express prohibition of statutes. In each case the bond or other deeds are void as to such conditions, covenants, or grants, which are illegal, and are good as to all others which are legal and unexceptionable in their purport." But if the bond be wholly different from what the statute requires for the omission of necessary conditions or for other causes, and is not voluntarily given, it seems that the bond is wholly void. See *U. S. v. Morgan*, 3 Wash. (U. S.) 10; *Dixon v. U. S.*, 1 Brock. (U. S.) 178; *U. S. v. Gordon*, 1 Brock. (U. S.) 190.

A statutory bond which super-adds a condition not authorized is vitiated by the surplus matter, and the court will reject the surplusage as a mere nullity. *U. S. v. —*, 1 Brock. (U. S.) 195.

In *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, it was held that the *United States* was judicially authorized to make contracts for harbor improvement under the various acts of Congress appropriating money for such improvement.

2. *Clark v. U. S.*, 6 Wall. (U. S.) 546; *U. S. v. Smoot*, 15 Wall. (U. S.) 47; *Amoskeag Mfg. Co. v. U. S.*, 17 Wall. (U. S.) 592; *U. S. v. Bostwick*, 94 U. S. 53, 66; *U. S. v. Smith*, 94 U. S. 214; *Mann v. U. S.*, 3 Ct. of Cl. 404; *Chicago, etc., R. Co. v. U. S.*, 104 U. S. 680.

In *Curtis v. U. S.*, 2 Ct. of Cl. 144, it is held that the liability of the government on a contract, express or implied, is identical with that of an individual—neither greater nor less. The government is to be regarded as a principal, and its officers as agents.

"The *United States* is as much bound by its contracts as individuals. If it repudiates its obligations, it is as much repudiation with all the wrong and reproach the term implies, as it would be if the repudiator had been a state, or a municipality, or a citizen." Waite, C. J., in the *Sinking Fund Cases*, 99 U. S. 719.

In *U. S. v. Smith*, 94 U. S. 214, the contract, in effect, bound Smith to furnish certain materials and erect certain buildings, the labor being performed by the soldiers at the fort, except to the extent that skilled workmen were necessary. There was no time specified within which the work must be done, neither was there any power reserved by the *United States* to direct its suspension. Under such circumstances, the law implied that the work should be done within a reasonable time, and that the *United States* would not unnecessarily interfere to prevent this. The work was stopped by order of the *United States*. Smith asked to be released from his contract unless he could proceed, but this was refused until the expiration of sixty days, when he was allowed to resume. It was held that as between individuals, this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension, and that the *United States* must answer according to the same rule.

The *United States* is as much bound by a contract, duly made by its authorized officers in its behalf, or by an election between alternatives offered them under a contract, when once exercised, as is any private person. *Fowler v. U. S.*, 3 Ct. of Cl. 43; *Allen v. U. S.*, 3 Ct. of Cl. 91.

When the *United States* becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. *Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 904; *Bank of U. S. v. McKenzie*, 2 Brock. (U. S.) 393.

**Ratification of Unauthorized Acts of Agents.**—The rules of common law relative to the ratification of the unauthorized

acts of agents, are as applicable to the obligations of the government, as to those of individuals. *Fremont v. U. S.*, 2 Ct. of Cl. 461.

**Implied Contract.**—To constitute an implied contract with the *United States* for the payment of money, upon which an action will lie in the court of claims, there must have been some consideration moving to the *United States*, or it must have received the money charged with a duty to pay it over, or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the *United States* arises with respect to money received into the treasury, as the proceeds of property forfeited and sold under a confiscation act. *Kuote v. U. S.*, 95 U. S. 149.

Where the owner of a vessel made a parol contract with an officer of the quarter-master's department to let the government use her for a trial trip, the government to pay a certain sum per day for her use, and to pay her value if lost, the contract being void, because not in writing, as required by statute, and the vessel was lost on the trip, it was held that the contract must be regarded as an implied one, such as arises on a simple bailment for hire, and that the loss of the vessel not being imputable to negligence, her owner must bear it; but that he was entitled, under the implied contract, to the value of her use up to the time of the loss, and that, in the absence of other evidence, that the value might be assumed fairly to be that stipulated in the parol contract. (*Miller, Field and Hunt, JJ., dissenting*, on the ground that the parol contract was not prohibited, and was therefore valid.) *Clark v. U. S.*, 95 U. S. 539.

Faithful performance by the contractor, and a benefit received by the government, will take the case out of the Act of June 2d, 1862 (12 Stat. 411; U. S. Rev. Stat. 3747), requiring the contract to be in writing, this being a case of an unwritten agreement in its nature executory, so far as to leave it within the equitable rule of implied contracts, the acts of the parties in such a case operating a legal ratification of the agreement. *Donald v. U. S.*, 5 Ct. of Cl. 65. See also *Burchiel v. U. S.*, 4 Ct. of Cl. 549.

**Government as Sovereign and Contracting Party Distinguished.**—There is a radical distinction between the acts

gations to be implied against an individual should be implied against it.<sup>1</sup>

Where property to which the *United States* asserts no title is

of the government as a sovereign, and as a contracting party. In assuming the latter character, it lays aside its sovereignty, and becomes liable as an individual. But it can never be liable in damages to the person injured for its acts as a sovereign, and where such acts amount to a breach of its undertaking as a contracting party, the contractor injured thereby is without remedy. The claimant entered into a contract with the government, engaging to deliver mules in the city of Washington by a specified day, and, in time to perform his contract, sent a part of the mules in charge of his servant, who, upon approaching the city, was turned back by the pickets acting under the orders of the military governor and provost-marshal, and not allowed to enter with the mules, and in consequence, some of the mules were captured by the enemy. The government insisted upon the delivery of the full quota of mules under the contract, with allowance for those that were captured, and the claimant complied therewith. In an action for the breach of contract it was held that claimant was not entitled to recover. *Wilson v. U. S.*, 11 Ct. of Cl. 513.

**Contract for Secret Services.**—A contract was entered into by President Lincoln and one Lloyd during the civil war, by which the latter was to go south, and procure such information concerning the confederate troops, plans of forts and fortifications, etc., as might be beneficial to the *United States* government, and report the same to the president; for which services he was to be paid \$200 per month. It appeared that Lloyd proceeded south, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the president; and that he was only reimbursed his expenses. In an action to recover compensation under the contract, it was said by Field, J., in delivering the opinion of the court: "The service stipulated by the contract was secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must

have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such nature an action against the government could be maintained in the court of claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." *Totten v. U. S.*, 92 U. S. 105. See also *Allen v. U. S.*, 27 Ct. of Cl. 89.

Where a military engineer was employed to go within the enemy's lines and make observations and procure information, his service was designated as secret service, and he gave receipts for accounts of secret service rendered. He was held to be a secret agent, and by the rule in *Totten's Case*, could not maintain an action in the court of claims. *De Arnaud v. U. S.*, 26 Ct. of Cl. 370.

1. Thus, where the government takes a lease of real property, it is subject to the same implied obligation not to commit waste as would be raised against an individual. *U. S. v. Bostwick*, 94 U. S. 56.

taken for public uses by its officers or agents duly authorized to do so, there is an implied contract to reimburse the owner;<sup>1</sup> but not where the property is taken under a claim of right.<sup>2</sup> The government is not liable upon contracts made by its officers, save when made within the scope of their official powers;<sup>3</sup> and the

So, where the Secretary of War issues an order to the quartermaster general, "to suspend the making of any new contracts," for certain articles, the latter will not be justified in an attempt to annul a contract for such articles already made, nor in refusing to receive them when offered under the contract. *Mann v. U. S.*, 3 Ct. of Cl. 404.

And where an individual, under an express contract with the government, which is void, delivers goods or performs services which are accepted, he is entitled to a recovery from the government on the implied contract in *quantum meruit*. *Heathfield v. U. S.*, 8 Ct. of Cl. 213.

1. *U. S. v. Russell*, 13 Wall. (U. S.) 623; *Brooke v. U. S.*, 2 Ct. of Cl. 180.

Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the owner's claim is one arising out of implied contract, within the meaning of the statute defining the jurisdiction of the court of claims, although there may have been no formal proceedings for the condemnation of the property to public use. *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645. And the value at the time of receiving the property should be allowed, and not its subsequent higher value at the time it was actually used. *U. S. v. Gill*, 20 Wall. (U. S.) 517.

Where a quartermaster general receives supplies for the government, and gives a receipt and vouches for the amount and the price, and the government uses as much of them as it wants, and suffers the remainder to decay by neglect and exposure, there is an implied contract to pay for such supplies. *Solomon v. U. S.*, 19 Wall. (U. S.) 17, reversing 7 Ct. of Cl. 482.

**Mails.**—Though no express contract for transporting the *United States* mails is proved, nevertheless, where a railroad company has been carrying them and receiving compensation therefor, such contract will be presumed. *Western Union R. Co. v. U. S.*, 101 U. S. 543.

**Privity—Sub-Contractor.**—Where a stone-cutter is employed by a government contractor, who under his con-

tract, is to cut, furnish, and deliver granite, furnish the men necessary for the work, be paid the full cost of the labor, plus fifteen per cent., and forfeit a certain sum for each day of default between him and the government, there is no privity, and hence he has no claim against the government. *U. S. v. Driscoll*, 96 U. S. 421.

**Impressment and not Implied Contract.**—Where, during the late war, a vessel transported a load of coal under a contract with the *United States*, and at the place of destination tendered delivery of same to a quartermaster, who was the consignee, but he refused to receive it, and ordered the master to proceed to another port, with which order the master refused to comply, upon the ground that the state of the tide would render a departure unsafe, whereupon the vessel was towed by a government tug, and was injured by striking on a bar, it was held to be a case of impressment and not of implied contract, and that the court of claims had jurisdiction of the claim under the contract, but not of the claim for the other voyage. *U. S. v. Kimball*, 13 Wall. (U. S.) 636. Compare *U. S. v. Russell*, 13 Wall. (U. S.) 623.

Where a vessel is taken from the owners and impressed into military service and suffers injuries while navigated by government officers, the owners may recover for her use and service; but if the injuries suffered are made good to the owners by the insurers, the owners have no right of action against the government. *Dozier v. U. S.*, 9 Ct. of Cl. 342.

2. *Langford v. U. S.*, 101 U. S. 341.

3. See **PUBLIC OFFICERS**, vol. 19, p. 510; *Hunter v. U. S.*, 5 Pet. (U. S.) 173; *Lee v. Munroe*, 7 Cranch (U. S.) 366.

Torts committed by officers in the service of the *United States*, do not render the government liable in *assumpsit*, even though the acts done are apparently for the public benefit. *Gibbons v. U. S.*, 8 Wall. (U. S.) 274.

An assistant special agent of the treasury department has no authority to bind the *United States* by a contract to repay the expense of transportation



extent of the powers of such officers is a matter of which courts, as well as individuals, must take notice.<sup>1</sup>

The *United States* is liable in damages for breach of contract to the same extent as an individual,<sup>2</sup> subject to the limitation that the government cannot be sued without its consent.<sup>3</sup>

A transfer or assignment of contracts with the *United States* is forbidden by a statute which invalidates the contract and bars an action by the assignee as well as the assignor.<sup>4</sup> No technical,

and repairing, etc., abandoned or captured cotton. *Whiteside v. U. S.*, 93 U. S. 247.

A quartermaster general not invested with power to bind the *United States* cannot make a lease for the government. *Filor v. U. S.*, 9 Wall. (U. S.) 45.

The Secretary of War has power to make a contract for the butchering and curing of meat for the government, and through a commissary general may authorize a contract for supplies to be made without resorting to the advertisement for bids and proposals directed by the Act of March 2d, 1861. 12 Stat. at Large, 120. See *U. S. v. Speed*, 8 Wall. (U. S.) 77.

A lease made by the Secretary of the Treasury of premises for a customhouse, at greatly exorbitant rates, on the recommendation of the collector of customs, who was interested as a joint owner of the premises, was held fraudulent and void in *Larkin v. U. S.*, 5 Ct. of Cl. 526.

1. *Whiteside v. U. S.*, 93 U. S. 247; *Filor v. U. S.*, 9 Wall. (U. S.) 45; *Hawkins v. U. S.*, 96 U. S. 689. See also *State v. Hays*, 52 Mo. 578; *State v. Missouri Bank*, 45 Mo. 528; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431; 35 Am. Dec. 634; *Baltimore v. Reynolds*, 20 Md. 1.

2. *Chicago, etc., R. Co. v. U. S.*, 104 U. S. 680. Compare *Eastern R. Co. v. U. S.*, 129 U. S. 396. Both are cases of contract for the transportation of the *United States* mails. In the former case the contract was for a period of four years, which had not expired, when the postmaster general, in pursuance of the Act July 12th, 1876 (19 Stat. at Law, 78 Ch. 179; Supp. R. S. 224), authorizing and directing him to readjust the compensation to be paid for the carriage of the mails, reduced the contract compensation. The company from time to time accepted the reduced compensation, but as it was bound to carry the mails during a cer-

tain period, such acceptance of less than it was entitled to demand, did not prejudice its rights to claim what was legally due under its contract. As was said by the court, the language of this statute may well be satisfied by confining it to cases when no time contracts for service were then in existence, and to contracts thereafter to be entered into; but it does not legitimately apply to contracts then existing, whose terms were unexpired, such as those in this case. In the latter case, however, the contract was subject to the provisions of the Act of March 3d, 1873 (17 Stat. at L. 558, Ct. 281; R. S., § 4002), which authorized the postmaster general to readjust the compensation to be paid for carrying the mails. The period covered by the contract had expired when the order for reduction was made, and the carriage was thereafter under an implied contract that the company should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress, and subject to a readjustment of rates as required by the Act of 1876. After that time the company was under legal obligation to carry the mails; and could have declined to accede to the readjustment of rates when they were made. But having received the reduced compensation without protest or objection, it must be held to have accepted it in full, and should not be permitted to recover the difference between the amount actually received and that which it would have received under the contract before the readjustment. Thus it will be seen that there is no inconsistency in the rulings in the two cases.

The government is liable for refusing to receive and pay for what it has agreed to purchase. *Gibbons v. U. S.*, 8 Wall. (U. S.) 269. The same construction will be applied to contracts entered into by the *United States* as to contracts between private persons. *U. S. v. Smoot*, 15 Wall. (U. S.) 36.

3. See *infra*, this title, *Actions*.

4. *United States Rev. Stat.*, § 3737.

formal, or written transfer of a contract is necessary to bring the case within the statute.<sup>1</sup>

**3. Dealings with Commercial Paper.**—The *United States*, in the fiscal operations of the government, may avail itself of commercial paper whenever it may be necessary, and when it becomes a party to such paper it enjoys all the rights, and incurs all the liabilities, of private persons in the same circumstances, and is bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper.<sup>2</sup> Where the *United States*, by its lawfully authorized agent, becomes the holder of commercial paper, it must exercise the same diligence, in order to charge parties liable, as an individual holder;<sup>3</sup>

See *St. Paul, etc., R. Co. v. U. S.*, 112 U. S. 733; *Wanless v. U. S.*, 6 Ct. of Cl. 123. Where there has been a delivery of goods under a contract duly accepted by the *United States*, an action may be maintained by the contractor for the use of the assignee in *quantum meruit*. Articles of partnership are within the policy or meaning of this statute. *Hobbs v. McLean*, 117 U. S. 577.

The act does not apply to the Chinese indemnity fund under the control of the department of state. *Hubbell v. U. S.*, 15 Ct. of Cl. 546.

A transfer of a legal title of real property by virtue of a decree of a court of equity carrying with it rents accrued, is not an assignment within the prohibition of the statute. *Mills v. U. S.*, 19 Ct. of Cl. 79.

1. *Francis v. U. S.*, 11 Ct. of Cl. 638. In this case, where a contractor made a power of attorney authorizing another to receive and collect vouchers and receive a receipt for payments, and the nominal agent performed, and subsequently procured an assignment of the nominal contractor's claim, with authority to bring and deliver in his own name, it was held that the contract was thereby annulled and no suit could be maintained on it.

2. *U. S. v. Barker*, 12 Wheat. (U. S.) 559; *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 377; *Bank of U. S. v. U. S.*, 2 How. (U. S.) 711; "The Floyd Acceptances," 7 Wall. (U. S.) 666; *Cooke v. U. S.*, 91 U. S. 389; 12 Blatchf. (U. S.) 43; *Beers v. U. S.*, Dev. Ct. of Cl. 28; *Wells v. U. S.*, 45 Fed. Rep. 337; *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666.

**Exceptions to General Rule—Practice of the Departments.**—To the general rule that when the *United States* be-

comes a party to commercial paper, it enjoys all the rights and assumes all the liabilities of other parties to such instruments, exceptions may be established by the practice of the departments. Thus, requisites of time or notice may be dispensed with, *e. g.*, where drafts of the treasury on various local depositories of the *United States* are returned unpaid; such drafts are always paid in Washington without regard to time or notice. Government Drafts, 8 Op. Atty. Gen'l 1.

**Treasury Notes.**—Treasury notes of the *United States* payable to the holder or bearer at a future time, are negotiable commercial paper and transferable subject to the commercial law as to other paper of that character. Treasury notes of the *United States* stolen from an express company, and sold for value after due, in the regular course of business, may be recovered from the purchaser by the express company which has succeeded to the right of the original owner. *Vermillie v. Adams Express Co.*, 21 Wall. (U. S.) 138.

Where a treasury note was assigned by the payee by indorsement in writing to A B when ordered, then transferred by a blank indorsement by A B, afterward indorsed in full by C D, into whose hands it had come regularly, to E F; this note, being afterwards stolen from the mail, coming by a series of indorsements into the hands of a *bona fide* assignee, may be recovered in an action of detinue brought by C D against the holder. *Myers v. Friend*, 1 Rand. (Va.) 12.

3. 8 Op. Atty. Gen'l 1; *U. S. v. Central Nat. Bank*, 6 Fed. Rep. 134; *U. S. v. Barker*, 12 Wheat. (U. S.) 559. In this last case the *United States* was the holder of certain bills of exchange, and

and is liable to damages on a protested bill of exchange drawn on it to the same extent as an individual.<sup>1</sup>

The authority to issue bills of exchange, not being expressly conferred by statute, is only incident to the exercise of some other power, and the purchaser of such paper purporting to bind the government must, at his peril, ascertain whether the officer executing it is duly authorized to bind the government.<sup>2</sup>

its agent in New York City was directed, by letter from the Secretary of the Treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and indorsers, residing in New York, and notice was given to them on the 12th of the same month, the mail which left Washington on the 8th having arrived at New York at 35 minutes past 10 o'clock A. M., on the 10th. It was held that the indorser was discharged by the negligence of the holders. And in another case in the *United States* Supreme Court, said: that the liability of parties to a bill of exchange or promissory note has been fixed on certain principles, which are essential to the credit and circulation of such papers. Those principles originated in the convenience of commercial transactions, and cannot now be departed from. From the daily and unavoidable use of commercial paper by the *United States*, it is as much interested as the community at large can be, in maintaining these principles. The rule, that upon an unconditional acceptance the acceptor is absolutely bound, no matter what equities exist between the drawer and acceptor, provided the holder is a *bona fide* purchaser without notice, applies to the *United States* as well as to private individuals. *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 377.

Where a pension check drawn by mistake for \$1,280.20 instead of \$18.00, is indorsed by the payee to a bank, and by that bank indorsed for collection to another, which indorses it to the assistant treasurer, who pays it, the money cannot be recovered from the collecting bank which has paid it over to the principal, the forwarding bank, and if the assistant treasurer retains the amount of the check out of money due the collecting bank from the *United States*, such bank may recover it from the *United States*. *Wells v. U. S.*, 45 Fed. Rep. 337.

**Obligation in Case of Forged Indorsement.**—The right of the *United States* to recover money paid on a check on

the treasury, under a forged indorsement, is conditional on the promptness of giving notice to the person by whom the check was paid. *U. S. v. Clinton Nat. Bank*, 28 Fed. Rep. 357.

No good reason can be assigned for relief for the *United States* when dealing with commercial paper from the observance of the usages of the commercial world. Where the *United States* failed to give notice of the forgery of an indorsement on a check on the treasury within a reasonable time after the payment of the check, it was held that it could not recover the money from a person to whom the check was paid. *Central Nat. Bank v. U. S.*, 6 Fed. Rep. 134.

In *U. S. v. Cooke*, 13 Int. Rev. Rec. 4, where the *United States* paid a draft drawn upon it, and it appeared subsequently to be a forgery, and the government delayed for six months to bring suit for the recovery of the money, it was held that such delay was fatal to the action.

1. *Bank of U. S. v. U. S.*, 2 How. (U. S.) 711; *Thorndike v. U. S.*, 2 Mason (U. S.) 1.

The *United States* is liable for exchange. Where the *United States* was a party to a bill of exchange both as drawer and drawee, its interests were in no way affected by the want of either protest or notice. *Beers v. U. S.*, Dev. Ct. of Cl. 27.

A written instrument in the form of a bill of exchange, but accompanied by other official documents, drawn by the *United States* on a foreign government, is not a bill of exchange within the law of merchants, and is not subject to protest for damages if dishonored. *U. S. v. Bank of U. S.*, 5 How. (U. S.) 382.

2. In *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 377, it was decided that when an officer of the government, authorized to do so, accepted a draft in behalf of the *United States* or one of the departments, the validity of the instrument could not be disputed in the

hands of an innocent holder. This proposition was the main, if not the only one controverted in this case, and an attentive examination of it will show that the authority of the officers to accept was not raised by counsel or considered by the court; and that it was impliedly held that such authority was a matter always open to inquiry when the draft was attempted to be enforced against the government.

Although it is true that when the *United States* enters the domain of commerce it submits itself to the same laws that govern individuals there, and, among these, to the rule that when one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment, still the government cannot be so charged by any action of its agents which fall short of an adoption of the paper by it. *Cooke v. U. S.*, 91 U. S. 389; 12 Blatchf. (U. S.) 43.

"*The Floyd Acceptances.*"—In this case it appeared that Russell & Co., drawers of the bills in question, had contracts for supplies and transportation, to be furnished to the army in *Utah*. That, by these contracts, they were to be paid, either by the quartermaster at St. Louis, or by his drafts on his assistant treasurer in New York. In all the contracts save one, these payments were to be made on the final delivery of the supplies in *Utah*, but in one contract there was an agreement that partial payments should be made when the trains were started. In all cases payments were to be made upon certificates of the proper quartermaster. The performance of these contracts required a very large outlay of money, and R. & Co., finding it difficult to advance this and wait for its return until they were entitled to receive payment under their contract, made an arrangement with the secretary of war by which they should draw time drafts on him, payable to their own order at the Bank of the Republic in New York, which should be accepted by the secretary. That on these drafts they could raise the money necessary to enable them to perform their contract, and as the money for the transportation and supplies became due, they should receive it and take up the acceptances of the secretary before or at maturity. Under this arrangement, the secretary accepted drafts to the amount of \$5,000,000, most of which were taken up by R. & Co., as agreed; but over \$1,000,

000 in amount remained unpaid. Certain of these drafts were purchased by the plaintiff before maturity for a valuable consideration, and, as he alleges, without notice of any defense to them. It was held that the purchaser of paper purporting to bind the government, must, at his peril, see that the officer had authority to bind the government; the use of bills of exchange, by the officers of government in cases authorized by law, cannot be established as a usage in cases not so authorized, there being no express statutory authority to bind the government by such paper; when it exists it must be by the incident of some other power; there being, under the existing laws no lawful occasion for any officer of the government to accept drafts, such acceptances are not binding on the government. Miller, J., in delivering the opinion of the court, observed: "We make the further observation in this connection, that while it is readily to be seen that the exigencies of the business of the departments may require drafts to be drawn by them, and may justify drafts being drawn on them, which they ought to and do pay when presented, there can be no occasion for an acceptance, by any department or officer, of a draft drawn on either of them. . . . The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance, is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has the right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, are always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government. It cannot be maintained that, because an officer can lawfully issue bills of

**4. Liability for Interest.**—The rule that “interest follows the principal, as the shadow the substance,” admits of an important qualification in the case of government contracts. In order to render the *United States* liable for interest, it must be either expressly stipulated for, or allowed by special statute.<sup>1</sup> An exception to this practice of the departments prevails where the *United*

exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual. . . . In accordance with these views, we are of opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government.” *Floyd Acceptances*, 7 Wall. (U. S.) 666.

1. *Gordon v. U. S.*, 7 Wall. (U. S.) 188; *Tillson v. U. S.*, 100 U. S. 43; *Harvey v. U. S.*, 113 U. S. 243; *White v. U. S.*, Dev. Ct. of Cl. 93.

Whenever interest is allowed, either by statute or the common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default on the part of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready and willing to discharge its obligations. *U. S. v. Sherman*, 98 U. S. 565.

The right is purely conventional in its origin, and where not sanctioned by law and usage, it cannot exist; as in case of a claim against the *United States*. *Todd v. U. S.*, Dev. Ct. of Cl. 93. See also 7 Op. Atty. Gen'l 523.

It has been established as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or tort, and whether they arise in the ordinary business of administration, or under private acts of relief passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages. *U. S. v. Bayard*, 127 U. S. 251. That this is the established rule appears also from a succession of opinions of the attorneys general of the *United States*, given by Attorneys General Wirt, Crittenden,

Lagare, Nelson, Johnson, Cushing and Black, and appearing in the following volumes and pages of those opinions as published: 1 Op. Atty. Gen'l 268, 550, 554; 3 Op. Atty. Gen'l 635; 4 Op. Atty. Gen'l 14, 136, 286; 5 Op. Atty. Gen'l 105; 7 Op. Atty. Gen'l 523; 9 Op. Atty. Gen'l 57, 449.

And in addition to the practice which has long prevailed in the department of not allowing interest on claims presented, unless it is in some way specially provided for, the statute under which the court of claims is organized, expressly declares, “that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the court of claims, unless upon a contract expressly stipulating for interest.” *R. S.*, § 1091; *Tillson v. U. S.*, 100 U. S. 43.

“An obligation to pay interest is not to be implied against the government as it is against a private party, from the mere fact that the principal was detained from the creditor after the right to receive it had accrued.” 9 Op. Atty. Gen'l 59. See also *White v. Arthur*, 10 Fed. Rep. 80.

Where acts of Congress direct the settlement of claims according to “equity,” or “equity and justice,” interest is not thereby authorized. 7 Op. Atty. Gen'l 105. But compare 2 Op. Atty. Gen'l 403.

**Interest Allowed.**—There are instances in which, from considerations of policy, interest has been allowed. Claim of the Heirs of Thomas Ewell, 5 Op. Atty. Gen'l 138. And where the State of *Virginia* contracted obligations for military supplies furnished during the War of the Revolution, which were assumed by the *United States*, upon receiving from that state the cession of the territory northwest of the Ohio river, and the said claims were referred by a special act to the court of claims, with directions to settle the same according to the rules and regulations theretofore adopted by the *United States* in settlement of similar cases, and without regard to the Statute of Limitations, it was held that, as the stat-

*States* assumes a claim against a state, for then such claim should be paid in full, interest and principal, as the state would have paid it.<sup>1</sup>

**III. POWER TO ACQUIRE PROPERTY.**—The *United States* may acquire and hold territory and other property in its corporate capacity.<sup>2</sup> The power to acquire territory, either by conquest or treaty, is clearly implied from the power conferred upon Congress to make wars, and to make treaties.<sup>3</sup>

It is provided by an act of Congress that the *United States* cannot acquire land by purchase, except under a law authorizing such purchase.<sup>4</sup> This act, however, does not prevent the taking of property, real and personal, as security for debts due or to become due the *United States*.<sup>5</sup>

utes would have been within the purview of an earlier act, which allowed interest on similar claims, but for their being within the bar of a *proviso* not in any wise affecting their merits, interest should be allowed, although such allowance was not according to the established practice of the treasury department, when not authorized by special legislation. (Clifford and Hunt, JJ., *dissenting*.) *U. S. v. McKee*, 91 U. S. 442.

1. *U. S. v. McKee*, 91 U. S. 442.

2. *Pollard v. Hagan*, 3 How. (U. S.) 212.

The *United States*, as an incident to its sovereignty, may accept of a conveyance of lands in discharge of an indebtedness to it, and may sell such lands upon credit, and maintain an action for the purchase-money. *U. S. v. Lane*, 3 McLean (U. S.) 365; *U. S. v. Hudson*, 3 McLean (U. S.) 156.

The constitution confers on Congress power "to make all needful rules and regulations respecting the territory and other cleared property in the *United States*." U. S. Const., art. 1, § 8.

**The United States Cannot Acquire Property by Devise When Forbidden by State Law.**—So in *New York* where a devise of land can be made only to a natural person, or such corporations as are created under the laws of the state authorized to take by devise, the devise of lands to the government of the *United States* is void. *U. S. v. Fox*, 94 U. S. 315. So is a bequest to the *United States* to be administered as a charity, when forbidden by the state in which it is made. *Levy v. Levy*, 33 N. Y. 97.

**As Proprietor Within a State Subject to State Laws.**—Where the *United*

*States* owns lands situated within the limits of a particular state, and over which it has no cession of jurisdiction, for objects either special or general, little doubt exists that the rights and remedies in relation to it are usually such as apply to other landowners within the state. *U. S. v. Ames*, 1 Woodb. & M. (U. S.) 76; *U. S. v. Crosby*, 7 Cranch (U. S.) 115; *New Orleans v. U. S.*, 10 Pet. (U. S.) 662.

3. *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511; *Nelson v. U. S.*, 30 Fed. Rep. 112. See also *TREATIES*, vol. 26, p. 539.

But the *United States* cannot acquire territory to be held as a colony, and to be governed at its will and pleasure, although it may acquire territory, which at the time has not the population that fits it to become a state, and may govern it as a territory until it has a population which, in the judgment of Congress, entitles it to be admitted as a state of the Union. *Scott v. Sanford*, 19 How. (U. S.) 393. See also *TERRITORIES*, vol. 25, p. 953.

4. U. S. Stat. at L. 568; Act of Congress, May 1st, 1820.

5. This act does not prohibit conveying lands to trustees for the purpose of paying a debt due to the *United States*, or even conveying directly to the *United States* for the purpose of securing the debt. *Neilson v. Lagow*, 12 How. (U. S.) 98.

In *U. S. v. Hodge*, 6 How. (U. S.) 279, a postmaster had made a mortgage of property, real and personal, to the post office department, to secure the amount due on a settlement to be made six months from the time of the mortgage, including debts due and to become due.

The power of the *United States* to take property for public use is fully treated in another article.<sup>1</sup>

The government cannot appropriate and use a patented invention without compensation to the owner.<sup>2</sup>

**IV. ACTIONS.—1. By the United States.**—The *United States* is entitled to the same remedies for the protection of its legal rights as private parties, its civil rights being in no wise affected by the restraints of the constitution upon its sovereign powers; the power of suing on its part is necessary for the collection of the public revenue, the support of the government, and the payment of public debts.<sup>3</sup> When, however, the *United States* appears as a suitor, it voluntarily submits to the law, places itself upon the same footing with other litigants, and is not entitled to remedies which cannot be granted to individuals.<sup>4</sup> So, when a

1. See *EMINENT DOMAIN*, vol. 6, p. 509.

2. *Cammeyer v. Newton*, 94 U. S. 225; *James v. Campbell*, 104 U. S. 356; *Hollister v. Benedict*, 113 U. S. 59.

3. The courts are open to the *United States* as to private parties, to secure protection for their legal rights and interests by regular proceedings. *In re Pacific Railway Commission*, 32 Fed. Rep. 241; 31 Am. & Eng. R. Cas. 598.

It would be strange to deny them a right which is secured to every citizen of the *United States*. It would present a strange anomaly, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. *Cotton v. U. S.*, 11 How. (U. S.) 229.

The right to sue in its own courts, having once attached, becomes a prerogative right; and Congress will not be presumed to intend to deprive the government of such right, unless the intention appears in plain and unambiguous terms. *U. S. v. Shaw*, 39 Fed. Rep. 433.

The *United States* may sue in its own name in all cases of contract in which the law provides no other remedy. *Dugan v. U. S.*, 3 Wheat. (U. S.) 172. The *United States* may sue on a chose in action assigned to an officer, *U. S. v. Buford*, 3 Pet. (U. S.) 12; *U. S. v. White*, 2 Hill (N. Y.) 59, or upon a bill of exchange indorsed by the treasurer of the *United States*. *Dugan v. U. S.*, 3 Wheat. (U. S.) 172.

It has the power to maintain an action of trespass for entering and cutting trees on public lands, *Cotton v. U. S.*, 11 How. (U. S.) 229; or replevin

for timber cut and carried away. *U. S. v. Cook*, 19 Wall. (U. S.) 591.

**Bill in Equity.**—If the *United States* is defrauded into issuing a patent for land, it can, like any other proprietor, maintain a bill in equity to set it aside. *U. S. v. Hughes*, 11 How. (U. S.) 552; *U. S. v. Minor*, 114 U. S. 233.

**Delegation of Power to Institute Suits.**—As a general rule, the federal government, in its own court and those of the states, can act only through its offices and officers established by law. The delegation of power to institute suits by an executive officer to an individual having no official character or responsibility, and the sub-delegation of the same power, without any warrant of law for either, are in conflict with the theory of our institutions and ought not to be sanctioned. *U. S. v. Smith*, 7 La. Ann. 185.

**4. No Special Privileges.**—The *United States* as plaintiff occupies no better position than a citizen. *U. S. v. Dantzler*, 3 Wood (U. S.) 719; *U. S. v. Barker*, 12 Wheat. (U. S.) 559; *Mitchell v. U. S.*, 9 Pet. (U. S.) 743; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 615; *U. S. v. Beebe*, 17 Fed. Rep. 40; *U. S. v. Ingate*, 48 Fed. Rep. 251.

Where the *United States* sues on a contract, it has no privileges or rights beyond those of a private person; hence, it must prove the contract the same as an individual, and any interference would be as fatal in one case as in the other. *U. S. v. Parmele*, 1 Paine (U. S.) 252.

The government cannot have a relief which it would be accountable to grant against an individual. *U. S. v. Flint*, 4 Sawy. (U. S.) 42; *Fendall v. U. S.*, 14 Ct. of Cl. 247.

petitioner in a court of equity, it is subject to the same equitable principles to the same extent as other suitors.<sup>1</sup> The general rule, however, is subject to this exception, that the Statute of Limitations cannot be pleaded against the *United States*.<sup>2</sup>

The *United States* may maintain *assumpsit* for money had and received,<sup>3</sup> as for money which has been wrongfully paid.<sup>4</sup>

**2. Against the United States.**—On the other hand, it is well established that the *United States* cannot lawfully be sued in any case, without its consent ;<sup>5</sup> the exemption, however, is limited to

The *United States* is not entitled to a writ of error or appeal, if such remedy would not be granted to a private person under like circumstances. *U. S. v. Union Pac. R. Co.*, 105 U. S. 263; *U. S. v. Thompson*, 93 U. S. 586.

The *United States*, as a creditor, has the same remedy as a private creditor, and no other, to compel payment of any moneys due it from a debtor corporation, or to prevent it from wasting its assets before the debt matures, and that remedy must be by a regular judicial proceeding in due course of law. *In re Pacific R. Commission*, 32 Fed. Rep. 241; 31 Am. & Eng. R. Cas. 598.

When the *United States* brings an action to recover back money paid by its assistant treasurer by mistake, it is bound by the same equitable release as any other plaintiff in such an action, and cannot recover, if, through its failure to give notice of the mistake, the defendant has lost his remedy through the action. *U. S. v. Union Nat. Bank*, 10 Ben. (U. S.) 408.

The act of July 2d, 1864, admitting parties as witnesses, applies to trials in which the *United States* is a party, as well as to those between private persons. *Green v. U. S.*, 9 Wall. (U. S.) 655.

1. The *United States* is not exempt from the fundamental rule, that he who asks equity must do equity. *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596.

The Statute of Limitations does not run against the government, yet it may be taken into consideration in equity in determining whether the government's claim is stale. *U. S. v. White*, 17 Fed. Rep. 561.

2. See LIMITATIONS OF ACTIONS, vol. 13, p. 667.

3. *U. S. v. Buford*, 3 Pet. (U. S.) 12; *U. S. v. Clark*, 1 Paine (U. S.) 629; *U. S. v. Mechanics' Bank*, Gilp. (U. S.) 51.

4. *U. S. v. Ferreira*, 13 How. (U. S.) 40; *U. S. v. Waterborough*, 2 Ware (U. S.) 154. Where money has been

paid as a bounty to those not entitled to it, it may be recovered in an action for money received. *U. S. v. Bartlett*, 2 Ware (U. S.) 9. And an action lies against an officer to recover compensation to which he is not entitled, and which has been paid him by mistake. *McElrath v. U. S.*, 12 Ct. of Cl. 201.

5. *U. S. v. McLemore*, 4 How. (U. S.) 286; *Hill v. U. S.*, 9 How. (U. S.) 386; *U. S. v. Clarke*, 8 Pet. (U. S.) 444; *De Groot v. U. S.*, 5 Wall. (U. S.) 419; *U. S. v. Eckford*, 6 Wall. (U. S.) 484; *Case v. Ferrill*, 11 Wall. (U. S.) 199; *Elliott v. Van Voorst*, 3 Wall. Jr. (U. S.) 301; *Carr v. U. S.*, 98 U. S. 437; *U. S. v. Lee*, 106 U. S. 204; *U. S. v. Barney*, 3 Hughes (U. S.) 545; *U. S. v. Wells*, 2 Wash. (U. S.) 161; *Nock v. U. S.*, 2 Ct. of Cl. 451; 2 Op. U. S. Atty. Gen'l 967; *U. S. v. Ames*, 1 Woodb. & M. (U. S.) 76.

"The *United States* have the same civil remedies as plaintiffs that individuals have. But they are not subject to the process of the courts, as defendants, as individuals are. It is a fundamental maxim that a sovereign can never be made amenable, even in its own judicial tribunals, unless its consent to respond and subject itself to adjudication has been expressly declared." 4 Minor's Institutes, pt. 1 (2d ed.), 252 (top page).

A bill will not lie to enjoin the *United States* from proceeding on a judgment, *Hill v. U. S.*, 9 How. (U. S.) 386; but a court of law may on motion inquire as to the form of payment, and order an entry of satisfaction. *U. S. v. McLemore*, 4 How. (U. S.) 286.

Where money has been improperly distributed to several parties, one of whom is the *United States*, the supreme court, in ordering the other parties to refund, has no authority to make such order against the *United States*. *Ex p. Morris*, 9 Wall. (U. S.) 605.

Liens upon property of the *United States* are incapable of being enforced,



suits against the *United States* directly and by name, and cannot be successfully pleaded in favor of its officers and agents, when they are sued by private persons, the property being in the possession of such officers and agents.<sup>1</sup>

except when such property becomes subject to the control of the courts. *The Siren*, 7 Wall. (U. S.) 152.

The property of the *United States* on board a vessel may be subject to a lien for salvage, but the lien must be enforced in a proceeding which does not necessitate a process against the *United States*, or require that the property should be taken out of its possession. The possession of the master of a vessel, to whom goods have been intrusted to be delivered to an agent of the *United States*, is not the possession of the *United States*. *U. S. v. Douglas*, 10 Wall. (U. S.) 15.

**Partition Proceedings.**—Where it is alleged and proven in partition proceedings that the *United States* has an interest in the land, there can be no partition, unless the *United States* consents to become a party. *Terris v. Montgomery Land Imp. Co.*, 94 Ala. 557.

**Audita querela** is a regular suit in which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the *United States*. *Avery v. U. S.*, 12 Wall. (U. S.) 304.

1. "It has been well settled by the highest courts that a citizen may vindicate his rights by ordinary action against the government officers in possession of property claimed." *In re Miller*, 5 Mackey (D. C.) 507; *Brown v. Huger*, 21 How. (U. S.) 308; *Stanley v. Schwalby*, 85 Tex. 348. But where the pleadings, or proofs of an action by the officer or agent of the government, disclose that the possession of the *United States* is assailed, the jurisdiction of the court ought to cease. *Carr v. U. S.*, 98 U. S. 433.

**The "Arlington Case."**—(*U. S. v. Lee*, 106 U. S. 196). An action of ejectment was instituted by George W. P. C. Lee, against Kaufman and Strong in a court of the State of *Virginia*, to recover possession of a tract of land known as "Arlington," of which the plaintiff alleged that he was seised in fee. The land was occupied by the *United States*, through agents and officers, as a military station. The title relied on by the defendants was a certificate of sale of the lands to the *United States* by the commissioners under an act of Con-

gress for the collection of direct taxes, which certificate was impeached because of the refusal of the commissioners to permit the owner to pay the tax, with interests and costs, before the day of sale, by an agent, or in any other way than by payment in person. The case was removed to the circuit court of the *United States* by writ of *certiorari*, where all the subsequent proceedings took place. The jury rendered a verdict upon which judgment was entered, that the plaintiff recovered possession of the premises partly against Kaufman and partly against Strong. The case was then carried to the Supreme Court of the *United States* on writ of error. Miller, C. J., in delivering the opinion of the court, observed: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without process of law, and without any compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the mon-

The consent of the *United States* to be sued must be shown by some act of Congress; an officer of the *United States* cannot waive its privilege, and lawfully consent to the prosecution of a suit against it.<sup>1</sup> Where, however, the *United States* seeks its rights from the hands of a court, as where the *United States* resorts to a prize court to procure condemnation and judicial administration, equity requires that the rights of all parties should be adjudicated, and the court may proceed to the final determina-

archies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'Stop here, I hold by order of the President, and the progress of justice must be stayed.' That, though the nature of the controversy is one peculiarly appropriated to the judicial function, though the *United States* is no party to the suit, though one of the three great branches of the government, to which by the constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer has no more authority to make than the humblest private citizen. The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations. . . . Another consideration is, that since the *United States* cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, . . . the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an

illustration, the *United States* may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the *United States* as plaintiff, and the present plaintiff as defendant, the title of the *United States* could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the constitution." *U. S. v. Lee*, 106 U. S. 96. See also *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446. Gray, J., in delivering the dissenting opinion, said: "The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued."

**Mandamus Against Officer, Not Suit Against the United States.**—A writ of *mandamus* to compel the delivery of a draft by the Secretary of the Treasury is not a suit against the *United States*. *Redfield v. Windham*, 18 Wash. L. Rep. 287.

1. *Carr v. U. S.*, 98 U. S. 433; *Case v. Terrell*, 11 Wall. (U. S.) 199.

A *United States* district attorney has

tion of all questions legitimately involved.<sup>1</sup> When the *United States* waives its prerogative of sovereignty, it may prescribe the terms and conditions upon which it may be sued, and the manner in which the suit may be conducted.<sup>2</sup>

In a suit by or against the *United States*, as a general rule, no court can make a direct judgment or decree against the *United States* for costs and expenses.<sup>3</sup>

**3. In State Courts.**—Suits against the *United States* cannot be sustained in the courts of a state.<sup>4</sup> This exemption is not a

no power under direction of the attorney general to submit the government to the jurisdiction of a state court, and thereby clothe that court with a jurisdiction to render a judgment binding upon the *United States*, in the absence of an act of Congress authorizing it. *Stanley v. Schwalby*, 85 Tex. 348.

1. *Nuestra Senora de Regla*, 108 U. S. 92; *The Siren*, 7 Wall. (U. S.) 154; *Carr v. U. S.*, 98 U. S. 433.

2. *McElrath v. U. S.*, 102 U. S. 426. See also *STATES*, vol. 23, p. 85.

3. *U. S. v. Hooe*, 3 Cranch (U. S.) 73; *U. S. v. Barker*, 2 Wheat. (U. S.) 395; *The Antelope*, 12 Wheat. (U. S.) 546; *U. S. v. McLemore*, 4 How. (U. S.) 287; *Henry v. U. S.*, 15 Ct. of Cl. 162.

But the *United States* is liable for its own costs, and where a suit is brought by it to recover money in the hands of a party who has a claim against it for costs, such claim may be set off against its demand. *U. S. v. Ringgold*, 8 Pet. (U. S.) 150.

4. *U. S. v. Lee*, 106 U. S. 196; *Orleans Nav. Co. v. Schooner Amelia*, 7 Martin (La.) 590; 12 Am. Dec. 516; *Goldsmith v. Revenue Cutter*, 6 Oregon 250; *Briggs v. Light-boats*, 11 Allen (Mass.) 157.

In *U. S. v. Lee*, 106 U. S. 196, Justice Miller, in delivering the opinion of the court, said: "If it be said that the proposition here established may subject the property, the officers of the *United States*, and the performance of their indispensable functions to hostile proceedings in the state courts, the answer is, that no case can arise in a state court, where the interests, the property, the rights, or the authority of the federal government may come in question, which cannot be removed into a court of the *United States* under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the *United*

*States*, in courts which are the creation of the federal government."

In *Briggs v. Light-boats*, 11 Allen (Mass.) 157, several vessels were built for the *United States* for the purpose of being used as floating lights, under an agreement to construct and equip them according to certain specifications annexed, and to the satisfaction and approval of an agent of the *United States*, and to deliver them in the State of *Massachusetts* for a gross sum to be paid by the *United States* to the builder after their completion; they were completed and the builder received the contract price; possession was taken by the *United States*, the spars and rigging were put up, and the lanterns put on board and prepared for use. It was held that the title to them was vested in the *United States*, subject to the lien for labor and materials furnished the builder, and that such lien could not be enforced in the courts of the state upon proceedings afterward commenced. The court, by Gray, J., said: "The *United States* have never, by general statute or special order, submitted themselves or their rights in this matter to the jurisdiction of the state courts. . . .

These vessels were not held by the *United States*, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. It is difficult to see how the government of a republic can hold any property for personal or private purposes. But these light-boats were built and held for public objects only, and were unsuitable for any other. They were, in the precise and emphatic language of the plea to the jurisdiction, 'held and owned by the *United States* for public uses, and as instruments for the execution of their sovereign and constitutional powers.' The government thus summoned in as a defendant, and from whose possession these vessels are sought to be wrested by the

personal privilege which must be pleaded in abatement, but an attribute of sovereignty, and goes to the jurisdiction.<sup>1</sup>

If the *United States* prosecutes its suits in the state courts, availing itself of the state law for that purpose, there is no reason why such state process as it uses for the purpose of enforcing its right, should not be subject to state law.<sup>2</sup>

**4. Set-off Against the United States.**—For the same reason that an original suit cannot be maintained against the *United States* without its consent, a set-off will not be allowed the defendant when the *United States* is plaintiff, without its express consent.<sup>3</sup>

order of this court, is not the government of the state by whose constitution and laws this court is established and the tenure of office of its judges secured. But it is the supreme government of the nation. . . . The petitioners suffered the title to pass, and the possession to be delivered, to the *United States*, before they took one step in the state courts to establish their lien. If they had filed their petitions and attached their vessels before these came into possession of the *United States*, they might well have contended that the courts of the commonwealth had acquired a jurisdiction of the cases, which could not be divested until the object of the suit was accomplished."

1. *Goldsmith v. Revenue Cutter*, 6 Oregon 250. And the objection is not waived by pleading to the merits.

2. **Subject to State Laws When Suing in a State Court.**—"The *United States* are a body corporate, having a capacity to contract, to take, and to hold property, and in this respect stand upon the same footing with other corporate bodies; if they will prosecute their suits in the state courts, and avail themselves of the state laws for this purpose, it is not perceived that any good reason can be given why such state process as they use for the purpose of enforcing their right, should not be subject to the state law." Hence, where a person committed to jail under a judgment at the suit of the *United States*, is discharged under state law, such discharge operates as a bar to an action by the *United States* on a bond for jail liberties. *Stearns v. U. S.*, 2 *Paîne* (U. S.) 300.

The *United States*, by voluntarily appearing in a state court, as claimant of a fund therein, subjects itself to the jurisdiction of this court, and will be bound by its decision. *Johnson v. Stimmel*, 89 N. Y. 117.

**Suits to Recover Duties.**—A suit by

the *United States* to recover a sum of money claimed to be due and owing to them for unpaid duties upon imported goods, may be brought in a state court. The primary object of such a suit being not simply to execute the laws of the *United States*, but to collect a debt by enforcing an obligation due to it, and in that class of cases, the *United States*, as a body politic, may maintain an action in a state court in the same manner as other states and sovereignties. *U. S. v. Graff*, 67 Barb. (N. Y.) 304.

And bonds given for duties to the *United States*, may be sued in the state courts, which have, by the Judiciary Act of the *United States*, concurrent jurisdiction with the courts of the *United States*, of all suits at common law, where the *United States* are plaintiffs. *U. S. v. Dodge*, 14 Johns. (N. Y.) 95.

3. See SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 22, p. 272; STATES, vol. 23, p. 72.

But when the *United States* proceeds *in rem*, it opens to consideration all claims of equity in regard to the property libeled, and it then stands, with reference to the rights of the defendants and claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them beyond the demand, or property in controversy. *U. S. v. MacDaniel*, 7 Pet. (U. S.) 1; *U. S. v. Ringgold*, 8 Pet. (U. S.) 150; *The Siren*, 7 Wall. (U. S.) 154.

The proper evidence to show that the claim has been rejected by the accounting officers, is a transcript from the office of the treasury. *U. S. v. Gilmore*, 7 Wall. (U. S.) 491; *U. S. v. Smith*, 1 Bond (U. S.) 68.

It is not necessary that the claim be presented before the commencement of the suit. *U. S. v. Hawkins*, 10 Pet. (U. S.) 125.

It has, however, been provided by law since an early date, that in suits brought by the government, claims for set-offs which have been presented to the accounting officers of the treasury, and disallowed by them, may be admitted upon trial in the reduction of damages, and, under some circumstances, without such presentation.<sup>1</sup> But no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a satisfactory and just balance, the government is indebted to the defendant for an ascertained amount.<sup>2</sup>

There is no limitation as to the nature and origin of the claim which may be set up, and so it is held that it is intended to allow the defendant full benefit of any credit, whether arising out of the particular transaction for which he is sued, or out of any distinct and independent one.<sup>3</sup> It is immaterial whether the claim to be

1. *United States Rev. Stat.*, § 951.

If not presented and disallowed in accordance with the statute, unless within the exception of the statute, a set-off cannot be allowed. *U. S. v. MacDaniel*, 7 Pet. (U. S.) 1; *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 397; *U. S. v. Giles*, 9 Cranch (U. S.) 212; *U. S. v. Gilmore*, 7 Wall. (U. S.) 491; *Halliburton v. U. S.*, 13 Wall. (U. S.) 63; *Western Union R. Co. v. U. S.*, 101 U. S. 548; *Watkins v. U. S.*, 9 Wall. (U. S.) 759; *U. S. v. Lamon*, 3 McArthur (D. C.) 204; *U. S. v. Austin*, 2 Cliff. (U. S.) 325; *U. S. v. Barker*, 1 Paine (U. S.) 156; *U. S. v. Smith*, 1 Bond (U. S.) 70; *U. S. v. Prentice*, 6 McLean (U. S.) 65.

Local law or usage cannot affect the determination of questions of set-off in federal courts, as they arise exclusively under acts of Congress. *Watkins v. U. S.*, 9 Wall. (U. S.) 765.

A postmaster, in an action against him to recover money received and not accounted for by him, could not set up a claim for commissions of which he alleged that he had been deprived by the illegal discontinuance of the post office. Such a claim was held to be one for damages merely, and not the subject of set-off, without showing a presentment of the claim, and the audited disallowance of it, or some valid excuse for non-presentment. *Ware v. U. S.*, 4 Wall. (U. S.) 617.

2. *DeGroot v. U. S.*, 5 Wall. (U. S.) 431; *U. S. v. Eckford*, 6 Wall. (U. S.) 484; *Schaumburg v. U. S.*, 103 U. S. 667.

In a suit in which under local process a verdict for the defendant for an amount set off is the foundation for a

*scire facias* against the plaintiff, no judgment can be rendered for the balance, nor can the writ be issued, the government being exempt from suit. *Reese v. Walker*, 11 How. (U. S.) 272.

Where, in an action by an assignee in bankruptcy against the *United States*, the defendant sets up a counterclaim exceeding the amount of the plaintiff's claim, and neither party desires the amount due on the counterclaim to be finally determined, it may be allowed to the extent of defeating the plaintiff's claim, and no further determination be made concerning it. *Boughton v. U. S.*, 13 Ct. of Cl. 284. Yet the indebtedness of the government to the defendant exceeding the amount of the government's claim against the defendant may be established, and such finding will thereafter be conclusive upon the parties. *Tillou v. U. S.*, 1 Ct. of Cl. 220.

3. *U. S. v. Wilkins*, 6 Wheat. (U. S.) 135; *Cox v. U. S.*, 6 Pet. (U. S.) 172; *U. S. v. Hart* (Arizona, 1888), 19 Pac. Rep. 4.

Set-offs have been allowed for claims for costs arising in a previous suit, *U. S. v. Ringgold*, 8 Pet. (U. S.) 150; for fees, *U. S. v. Mann*, 2 Brock. (U. S.) 9; *U. S. v. Fillebrown*, 7 Pet. (U. S.) 28, and the claims of a military officer for money expended by him in an official capacity. *U. S. v. Lent*, 1 Paine (U. S.) 417.

If the *United States* sues, and the defendant holds its negotiable paper, the amount of it may be claimed as a credit, and if, after being presented, it has been disallowed by the accounting officers of the treasury, it should be allowed by the jury as a credit on the debt claimed by the *United States*.

set off is legal or equitable;<sup>1</sup> but unliquidated damages cannot be allowed.<sup>2</sup>

**V. CLAIMS AGAINST THE UNITED STATES.**—Claims against the *United States* are to be settled in the treasury department, or, in cases provided by statute, in the court of claims,<sup>3</sup> whose jurisdiction is fully treated elsewhere in this work.<sup>4</sup> Where there is a dispute as to such claims against the *United States*, by the officers authorized to adjust such accounts, they may be compromised, and if the claimant voluntarily accepts a smaller sum than the claim, and executes a discharge in full, he is bound by the adjustments, and cannot sue for what he has relinquished.<sup>5</sup>

*U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 397.

If a navy agent, without a receipt from a purser, upon a requisition for money, volunteers to pay demands which it is the purser's duty to pay, or shall pay the orders of a purser and shall permit the receipts of the sums paid by him to go into the purser's possession by whom they are exhibited at the treasury, and allowed in the final settlement of his account, without the purser's having given credit to the navy agent, or to the government for the amount, it assumes the character of a private transaction between the purser and the navy agent, or becomes a debt due from the purser, as an individual, to the navy agent, as a private person, and the latter cannot claim the amount at the treasury as an allowance in settlement of his account, nor as a legal or equitable credit in a suit against him by the *United States*. *U. S. v. Hawkins*, 10 Pet. (U. S.) 125.

In a suit for taxes brought by the *United States*, a set-off growing out of independent claims cannot be pleaded. *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 69; *Apperson v. Memphis*, 2 Flap. (U. S.) 363.

1. *Gratiot v. U. S.*, 15 Pet. (U. S.) 336; *U. S. v. MacDaniel*, 7 Pet. (U. S.) 1; *U. S. v. Ripley*, 7 Pet. (U. S.) 18; *U. S. v. Duval*, Gilp. (U. S.) 356.

2. *U. S. v. Wells*, 2 Wash. (U. S.) 161; *U. S. v. Williams*, 5 McLean (U. S.) 103; *U. S. v. Buchanan*, 8 How. (U. S.) 83; *Ware v. U. S.*, 4 Wall. (U. S.) 617.

The court cannot allow as a set-off a claim which is a mere appeal to the generosity of the government, such as damages sustained by an officer in the discharge of his duty. *U. S. v. Wells*, 2 Wash. (U. S.) 161.

3. *United States Rev. Stat.*, §§ 263, 1063.

4. See UNITED STATES COURTS.

5. *Sweeney v. U. S.*, 17 Wall. (U. S.) 75; *Mason v. U. S.*, 8 Ct. of Cl. 125; *Murphy v. U. S.*, 104 U. S. 464; *Cruger v. U. S.*, 11 Ct. of Cl. 766; *Comstock v. U. S.*, 9 Ct. of Cl. 141.

A claimant who accepts certificates of indebtedness instead of money, in payment of his demand against the government, cannot afterward recover the difference in value. *Gibbons v. U. S.*, 2 Ct. of Cl. 421.

**Constructive Compromises.**—In *Comstock v. U. S.*, 9 Ct. of Cl. 141, the following rules concerning constructive compromises were deduced: First, Where the government is contractor, a refusal to carry out an express contract by the head of an executive department, or a dispute on the part of the officers authorized to adjust such accounts, will render the case not merely disputed, but "disputable," within the intent of the ordinary rule of law, so as to make it the subject of compromise, without the compromise being necessarily supported by a new consideration. Second, Where payment of an express contract is disputed by the head of an executive department, and a means of compromise is proffered beyond the ordinary accounting officers of the treasury, or the officers authorized by law to adjust such accounts, such as *quasi arbitrament*, in the form of a commission, there, if the party, voluntarily or involuntarily, avail himself of the proffered means, and accept the amount which is allowed, without affirmatively informing the government that it will not be taken in discharge of the debts, it will constitute a final and conclusive compromise. Third, Where an express contract is for any reason, or without a reason, disputed by the officers authorized to adjust such accounts, acceptance of the portion allowed, accompanied by the giving of a receipt in

The act of Congress<sup>1</sup> declaring void, under certain circumstances, assignments of claims against the *United States*, embraces in general every claim against the government, however arising, of whatever nature it may be, wherever and whenever presented.<sup>2</sup> The act, however, applies only to cases of voluntary assignment, and does not inhibit transfers by operation of law, assignments in bankruptcy, or for the benefit of creditors.<sup>3</sup> It operates directly

full, will attach to the receipt all the consequences of a release under seal, and be deemed conclusive evidence of a legal agreement to accept a portion in satisfaction of the whole.

**Receipt in Full.**—The receipt in full for a disputable account will bar a recovery by the claimant in the court of claims. *Murphy v. U. S.*, 14 Ct. of Cl. 537. And in such a case, a receipt cannot be impaired or varied by evidence that, by usage of the executive departments, such receipts are regarded only as acknowledgments of the amount paid. *Hancox v. U. S.*, 9 Ct. of Cl. 400.

A receipt in full given upon the payment of a part of a liquidated debt, is not a discharge of the whole debt, and the balance is recoverable. *Baldwin v. U. S.*, 15 Ct. of Cl. 297.

1. *United States Rev. Stat.*, § 3477; Act of Feb. 26th, 1853.

2. *U. S. v. Gillis*, 95 U. S. 407; *Irwin v. U. S.*, 97 U. S. 392; *Burke v. Child*, 21 Wall. (U. S.) 441; *Ely v. U. S.*, 19 Ct. of Cl. 658; *Morgan v. U. S.*, 14 Ct. of Cl. 319; *Johnston v. U. S.*, 13 Ct. of Cl. 217.

A transfer of an approved account by one of the government departments was held void. 16 Op. Atty. Gen'l 191. So was an agreement with an attorney to pay out of a particular fund a percentage for his services. *Burke v. Child*, 21 Wall. (U. S.) 441.

A mortgage sale of a claim for services rendered, under a contract to carry the mails, by a railroad company, is within the prohibition of an act, and void. *St. Paul, etc., R. Co. v. U. S.*, 112 U. S. 733.

A transfer or assignment of a decree against the government in an equity proceeding by it for an accounting given after the passage of the act, is void, unless made in accordance therewith, *Adams v. U. S.*, 3 Ct. of Cl. 312; and if the act in question covers the case of an assignment of the claim of a county for indemnity for swamp lands sold by the *United States*, the county which has sold and assigned such a claim, after it has been paid by the gov-

ernment, cannot invoke the law to set aside its contract of sale, or to recover the amount received by its assignee. *American Emigrant Co. v. Adams County*, 100 U. S. 61.

So far from giving new potency to assignments and transfers of rights of action, so far from changing the common-law rule relative to such rights, the statute strikes down, and denies any effect to powers of attorney, orders, transfers, and assignments which before were good in equity, and which a debtor was bound to regard when brought to his notice. *U. S. v. Gillis*, 95 U. S. 407. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself. *Spofford v. Kirk*, 97 U. S. 484.

The statute refers only to claims against the *United States* which can be presented by the claimant to some department or officer of the government for payment, or may be prosecuted in the court of claims. Accordingly, where a person, in anticipation of obtaining a government contract, forms a partnership with two other parties for the execution of the contract, such partnership contract is not a violation of the statute, as, at the time of the contract of partnership, there was no contract with the *United States*, nor, indeed, any certainty that one would be secured; and hence the party had no claim which he could present for payment, or on which he could have brought suit, and therefore no claim, the assignment of which the statute forbids. There could have been no claim, in any sense of the word, until after the contract with the *United States* had been performed, in whole or in part. *Hobbs v. McLean*, 117 U. S. 567.

3. *Goodman v. Niblack*, 102 U. S.

upon the claims themselves, not as a limitation upon, or a definition of, the powers of those who are to adjust or adjudicate them;<sup>1</sup> but payment to one authorized to receive it by power of attorney executed before the allowance of the claim is good, as between the claimant and the government, the statute being for the protection of the government.<sup>2</sup>

**VI. PRIORITY OF THE UNITED STATES AS CREDITOR.**—By virtue of the laws of Congress, clearly within its power to enact, debts due the *United States* have priority over all other debts of a decedent,<sup>3</sup>

556; *Phelps v. McDonald*, 99 U. S. 298; *Erwin v. U. S.*, 97 U. S. 392; *Goreley v. Butler*, 147 Mass. 8; *Stanford v. Lockwood*, 24 Hun (N. Y.) 291.

An assignment which takes place before the *United States* assumes the indebtedness, is not within the statute. *U. S. v. Griswold*, 12 Sawy. (U. S.) 398.

Where a shipowner conveys in general terms his interest in a ship and voyage to one of his co-owners, including "any claims by the owners of said ship against the *United States* government . . . being a compromise sale and settlement of all matters pertaining to the ship," and Congress afterward appropriates money for a pre-existing claim of such ship against the government, the conveyance is not void under this act. *United States Rev. Stats.*, § 3477; *Jernegan v. Osborn*, 155 Mass. 207.

**A Judgment by the Court of Claims** against the government is not within the statute, and may be assigned. 12 Op. Atty. Gen'l 216.

1. *Becker v. Sweetzer*, 15 Minn. 427; *Spofford v. Kirk*, 97 U. S. 484; *U. S. v. Gillis*, 95 U. S. 407, *overruling* *Lawrence v. U. S.*, 8 Ct. of Cl. 252, which *overruled* the previous cases of *Cooper v. U. S.*, 1 Ct. of Cl. 87; *Sines v. U. S.*, 1 Ct. of Cl. 12; *Cote v. U. S.*, 3 Ct. of Cl. 64, holding that all transfers and assignments of claims against the *United States* are made void by the statute, not only when the assignees set up claims in the treasury department, but also when they attempt to sue in a court of claims.

2. *Bailey v. U. S.*, 109 U. S. 432. If a government creditor voluntarily gives such an assignment or power, and the officers of the treasury treat it as valid, and pay the debt to the persons named therein, the parties thereby take the instrument out of the operation of the statute, and the courts must then deal with it as if no such statute existed. "While the courts of the *United States*

cannot give effect to such powers or assignments so long as they remain unexecuted, they cannot ignore consummated transactions under them, by either permitting the assignor to recover from the assignee money paid him, or by compelling the government, whose officers have acted on the faith of such an instrument, to pay the debt a second time. The purpose of the statute is not to protect individuals, nor to regulate the business transactions of private persons, but to protect the government."

But the payment by the government of part of such claim to assignees, will not estop it, when suing for the balance, from denying the validity of the assignment. *McKnight v. U. S.*, 98 U. S. 179. And if the government recognizes an assignment, parties to it cannot claim that it is invalid, as the sole purpose of the statute is the protection of the government, and not that of the parties to the assignment. *Goodman v. Niblack*, 102 U. S. 556.

**Mischiefs Designed to Be Remedied.**—They are mainly two, namely: *First*, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; *Second*, that, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or Congress, as frequently in desperate cases, when the reward is contingent on success. *U. S. v. Gillis*, 95 U. S. 407; *Spofford v. Kirk*, 97 U. S. 484.

3. See DEBTS OF DECEDENTS, vol. 5, p. 248.

**Taxes and funeral expenses** are not "debts of decedents," but charges imposed upon the estate, under state law, and must be paid before the claim of



and in cases of insolvency, over all the claims of other creditors.<sup>1</sup>

A mere state of insolvency, however, is not sufficient to give the preference under the statute; but there must be, as well, an actual assignment, either voluntary or by process of law, of all the debtor's property;<sup>2</sup> an assignment of all the property and not a part thereof.<sup>3</sup> But if the assignment be in fact of all the debtor's property, although it does not so appear in the instrument, or if a small part be left out for the purpose of fraudulent evasion, the priority attaches.<sup>4</sup>

The priority of the *United States* does not affect a lien, general or specific, existing when the event happened which gave it the preference to priority.<sup>5</sup>

the *United States*. *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199.

1. See BONDS, vol. 2, p. 4460; INSOLVENCY, vol. 11, p. 219; ASSIGNMENT FOR BENEFIT OF CREDITORS, vol. 1, p. 878.

2. *Thelusson v. Smith*, 2 Wheat. (U. S.) 396; *U. S. v. Monroe*, 5 Mason (U. S.) 572; *U. S. v. Knight*, 3 Sumn. (U. S.) 358; *U. S. v. King*, Wall. (C. C.) 12; *Smith v. Tinker*, 2 Day (Conn.) 236; *Beaston v. Farmers' Bank*, 12 Pet. (U. S.) 102; *Prentice v. Bartlett*, 8 Cranch (U. S.) 431.

When a deed of assignment transfers all property enumerated in a certain schedule, but does not purport to transfer all the debtor's property, the burden of proof of showing that all the debtor's property is included, is on the *United States*. *U. S. v. Howland*, 4 Wheat. (U. S.) 108.

**Partnership Assets.**—The *United States* has no priority over partnership assets by reason of the indebtedness of one of the partners. *U. S. v. Evans*, Crabbe (U. S.) 60; *U. S. v. Hack*, 8 Pet. (U. S.) 271.

3. *U. S. v. Hooe*, 3 Cranch (U. S.) 73. A conveyance to one or more creditors of all the debtor's property, not including the amount due and payable to them, and not for the benefit of the creditors at large, is not such a voluntary assignment as gives the *United States* priority. *U. S. v. McLellan*, 3 Sumn. (U. S.) 345.

4. *U. S. v. Langton*, 5 Mason (U. S.) 280; *U. S. v. Clark*, 1 Paine (U. S.) 639; *U. S. v. Hooe*, 3 Cranch (U. S.) 73; *U. S. v. Howland*, 4 Wheat. (U. S.) 108; *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 439; *U. S. v. Mott*, 1 Paine (U. S.) 188.

5. *Brent v. Bank of Washington*, 10

Pet. (U. S.) 596; *U. S. v. Canal Bank*, 3 Story (U. S.) 79; *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386; *Phillips v. The Thomas Scattergood*, Gilp. (U. S.) 1; *Thelusson v. Smith*, 2 Wheat. (U. S.) 396; *U. S. v. Duncan*, 4 McLean (U. S.) 99; *U. S. v. Sheriff*, Bee Adm. 196; *U. S. v. Mechanics' Bank*, Gilp. (U. S.) 51.

The priority does not supersede or overrule the assignment as to property, which the *United States* may subsequently take in execution and prevent such property from passing to the assignee. *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386. The priority is not a lien on the estate of the debtor, but his priority is simply over other creditors, and is subordinate to the rights of vendees and mortgagees. *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596. It will not avoid conveyance to a *bona fide* purchaser, made before an insolvency is declared according to law. *Conard v. Nicoll*, 4 Pet. (U. S.) 291.

Where a judgment has been obtained by the government after the debtor has filed his petition in insolvency, but before an assignment, it is entitled to priority. *Hunter v. U. S.*, 5 Pet. (U. S.) 173.

The government has priority in a case of a general assignment upon a bond for duties executed before, but payable after, assignment. *U. S. v. State Bank*, 6 Pet. (U. S.) 29.

In *U. S. v. Bryan*, 9 Cranch (U. S.) 374, it was held that the priority by the Act of 1797, did not extend to a debt contracted before, although the balance was substituted at the treasury after the act was passed.

**Where Public Moneys are Withheld.**—

One who retains public moneys with knowledge that they are such, is "in-

**VII. UNITED STATES OFFICERS<sup>1</sup>—1. Who Are.**—Any person occupying a position under the federal government, conferred upon him by a legally authorized election or appointment, whose duties consist of the exercise of important public powers and trusts, as a part of the regular administration of the government, such duties being continuing and permanent, not occasional or temporary, and prescribed by the government or by a superior officer, and whose compensation is paid out of the treasury, is an officer of the *United States*.<sup>2</sup> Unless one in the service of the *United States*

debted" to the *United States*, within the meaning of the Act of 1797, and in the event of his insolvency the government is entitled to the priority. *Bayne v. U. S.*, 93 U. S. 642.

1. See also ATTORNEY GENERAL, vol. 1, p. 974; PRESIDENT OF THE UNITED STATES, vol. 19, p. 32.

2. "An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." Accordingly, when a person, *viz.*, a clerk in the office of the assistant treasurer of the *United States*, was appointed pursuant to law and his compensation was fixed by law; where the "vacating of the office of his superior would not have affected the tenure of his place," and "his duties were continuing and permanent, not occasional or temporary, and were to be such as his superior in office should prescribe," such person was held to be an officer of the *United States*. *U. S. v. Hartwell*, 6 Wall. (U. S.) 385.

In *U. S. v. Germaine*, 99 U. S. 508, it was held that a surgeon appointed by the commissioner of pensions to examine pensioners and applicants for pensions is not such an officer. In delivering the opinion in this case, Miller, J., said: "The duties are not continuing and permanent and they are occasional and intermittent. The surgeon is only to act when called upon by the commissioner of pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year or none. He is required to keep no place of business for public use. He gives no bond and takes no oath, unless by some order of the commissioner of which we are not advised. No regular appropriation is made to pay his salary. . . . There is no penalty for his absence from duty or his refusal to perform."

"An office is defined to be a 'public charge or employment,' and he who performs the duties of the office is an officer. If employed on the part of the *United States*, he is an officer of the *United States*. Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or to perform a service without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract which an individual is appointed by government to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duty from an officer." *Marshall, C. J.*, in *U. S. v. Maurice*, 2 Brock. (U. S.) 103; 24 Myer's Fed. Dec., § 9.

When a person was appointed clerk in the fractional currency office of the treasury department by the direction and with the approbation of the Secretary of the Treasury, such an appointment constituted him an officer of the *United States*, within the meaning of the constitution and statutes in regard to officers charged with the safe keeping of public money. *U. S. v. Bloomgart*, 2 Ben. (U. S.) 356.

A receiver of a national bank, pursuant to an act of Congress, is a *United States* officer. *Platt v. Beach*, 2 Ben. (U. S.) 303.

A justice of the peace in the District of Columbia is an officer of the *United States* so as to render him exempt from militia duty. *Wise v. Withers*, 3 Cranch (U. S.) 331, *rev'g* 1 Cranch (C. C.) 262.

And deputies to a *United States* marshal are officers of the government, within § 22, Act April 20th, 1790. *U.*

holds his office by virtue of an appointment made by one of the courts of justice or heads of department authorized by law to make such appointment, he is not, strictly speaking, an officer of the *United States*.<sup>1</sup>

**2. Eligibility.**—The principles relating to eligibility to office in general, have been fully stated in a previous article;<sup>2</sup> and for any distinctions in this respect between public officers generally and the *United States* officers, reference must be made to the constitution and statutes.

**3. Appointment and Removal.**—As has been seen from a definition of a *United States* officer, his right to hold office is conferred upon him, either by a legally authorized election,<sup>3</sup> or by appointment by the President, with the advice and consent of the Senate, or by a court of law or the head of a department.<sup>4</sup>

**4. Departmental Officers.**—In regard to the relation of the different executive departments and their officers to the President of the *United States*, it may be said that while the latter is the chief executive officer,<sup>5</sup> and certain political duties imposed upon the officers are under his direction, it by no means follows that every officer of every branch of the department is under his exclusive control,<sup>6</sup> but he is said to act and speak through the heads of

*S. v. Tinklepaugh*, 3 Blatchf. (U. S.) 425.

1. So held of a clerk to a paymaster of the navy. *U. S. v. Mouat*, 124 U. S. 303; *U. S. v. Hendee*, 124 U. S. 309. In the latter case, however, it was said that while a paymaster's clerk is not for all purposes, and in the general sense of that term, an officer in the navy, yet that such clerk is included in the term "officer," as used by Congress in the act of March, 1883, providing for an increase of pay to officers of the navy according to the length of their service.

So a clerk of the collector of customs is not an officer, and for the same reason, viz.: that he is not appointed by the President, a court of law, or the head of a department; and the fact that his appointment was made with the approval of the Secretary of the Treasury does not alter the rule, such approbation not being required by law. *U. S. v. Smith*, 124 U. S. 525.

By act of March 2d, 1863, § 1, it is provided that any person in the land or naval forces of the *United States* who shall steal, etc., any money or other property of the government, shall be deemed guilty of a criminal offense and subject to trial by court martial. The third section of the same act provides that any person not in the military or naval forces committing any of

the acts prohibited by the first section, shall forfeit and pay to the *United States* the sum of \$2,000, and in addition double damages, etc. It was held that a paymaster's clerk in the navy is a person in the land or naval forces of the *United States*, under the first section, and is not liable under the third to the penalty, but only to actual damages in an action by the *United States* against him. *U. S. v. Bogart*, 3 Ben. (U. S.) 257.

The payment of navy and privateer pensions, under the orders of the Secretary of the Navy, does not constitute the person paying them an officer of the *United States*. *Brown v. U. S.*, 1 Curt. (U. S.) 15.

2. See PUBLIC OFFICERS, vol. 19, p. 397 *et seq.*

3. See ELECTIONS, vol. 6, p. 255.

4. *U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Mouat*, 124 U. S. 303; *U. S. v. Smith*, 124 U. S. 525.

5. PRESIDENT OF THE UNITED STATES, vol. 19, p. 32.

6. *Kendall v. U. S.*, 12 Pet. (U. S.) 610, where it was also said: "There are certain political duties imposed upon many officers in the executive departments, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may

these departments in relation to subjects which appertain to their respective duties.<sup>1</sup>

As a general rule, the official duties of the heads of departments are not ministerial, and therefore are not subject to the direction or control of the courts,<sup>2</sup> nor are their acts subject to be reviewed by their successors.<sup>3</sup> There may, however, be cases in which the conduct of such officers is subject to examination by the courts,

think proper which is not repugnant to any rights secured and protected by the constitution; and in such cases the duty and responsibility grow out of, and are subject to, the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."

The Secretary of State cannot lawfully withhold a command signed and sealed, though directed so to do by the President. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

**Regulations of a Department.**—This phrase in acts of Congress should be understood as meaning general rules relating to the subject upon which a department acts, made by the head of the department, under some act of Congress conferring power to make such regulations, and thereby giving to them the force of law. It does not include a mere order of the President or the Secretary of State. *Harvey v. U. S.*, 3 Ct. of Cl. 38.

The regulations of a department, however, in settling its accounts are intended for general rules in the transactions of its business, but are subject to the revision of a court and jury, when they work a manifest injustice to individuals. *U. S. v. McCall*, Gilp. (U. S.) 563.

1. In *U. S. v. Cutter*, 2 Curt. (U. S.) 617, where the immediate agent in requiring certain reservations of land for purposes of the government, was the Secretary of War, it was held that his act in requiring such reservation was, in legal contemplation, the act of the President, and, consequently, that the reservation thus made was, in legal effect, the reservation made by order of the President, within the terms of the act of Congress providing for such reservations. *Wilcox v. Jackson*, 13 Pet. (U. S.) 513.

The action of the Secretary of the Interior and Commissioner of the Land Office, in canceling an entry for land, is not a ministerial duty, but a matter of discretion, and the courts will not

interfere to control it. *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

The Secretary of the Navy is the organ through which the President, as commander-in-chief, makes known his will to the navy. Orders issued by him are, in legal contemplation, the orders of the President. 1 Op. Atty. Gen'l 325. His acts and decisions on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any other officer of another department to make them valid and conclusive. So where the Secretary of the Navy forwarded to a lieutenant a sum of money to pay the medical expenses necessitated by a wound received in a foreign country, the disbursing officer of the treasury had no right to detain it. *U. S. v. Jones*, 18 How. (U. S.) 92.

2. *Decatur v. Paulding*, 14 Pet. (U. S.) 497, where Taney, C. J., said: "The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is, from time to time, required to act. . . . The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment."

The official acts of the heads of the executive departments as organs of the President, which are of a political nature, and rest in executive discretion, are not within judicial cognizance, but are only politically examinable. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

3. *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 397; *Lavalette v. U. S.*, 1 Ct. of Cl. 147.

When a claim is presented to a department head, and by him decided adversely, after referring the same to the President, the principle of *res adjudicata* applies, and the official's successor cannot reopen and reverse the matter.

as where a specific duty is assigned by law, upon the performance of which individual rights depend, in which case an individual who considers himself injured, has a right to resort to the courts for redress.<sup>1</sup>

## UNITED STATES COMMISSIONERS.

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**I. DEFINITION.**—*United States* commissioners are but officers of the court to whom are committed some of the duties which must otherwise be performed by the court itself, or the judge thereof.<sup>2</sup>

### II. APPOINTMENT OF—1. How Appointed.—By act of Congress of

5 Asst. Atty. Gen'l 28; 5 Asst. Atty. Gen'l 664; 12 Op. Atty. Gen'l 169; 13 Op. Atty. Gen'l 387-456.

1. As, for example, to record a patent, or furnish the copy of a record. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

In *Brent v. Hagner*, 5 Cranch (C. C.) 71, it was held that the head of a department, chief of a bureau, or clerk of either, has not such possession of the archives of the department that a party can, by writ of replevin against such officer, obtain possession thereof.

2. The exigencies of the public service demand that speedy inquiry shall be made into all criminal charges, in order that the defendants shall be brought to justice; and as, from the press of business or remoteness from the place where the crime may be committed, or other cause, the court cannot always or ordinarily perform that service, commissioners are appointed to facilitate the business. In all that they do they are not separate or independent tribunals, but the arms

of the court to execute the preliminary work of securing the presence of the offenders at the time appointed for arraignment and trial. Indeed, they are not, and under the constitution they cannot be, clothed with judicial power to hear and finally determine any matter whatsoever. Their duties relate only to the detention of the accused until the charge against him be formally presented to the court, and constitutionally tried. In that they are not bound to hear more than the evidence of the government, and do not finally determine any question touching the guilt or innocence of the accused. *U. S. v. Berry*, 4 Fed. Rep. 779. In this case it was held that a writ of prohibition to control the conduct of the commissioner did not lie.

The commissioner "holds no court, he acts simply as an arresting, examining, and committing magistrate." By *Woodruff, J.*, in *U. S. v. Case*, 8 Blatchf. (U. S.) 250.

In *U. S. v. Schumann*, 2 Abb. (U.

March 2d, 1793, and amendatory acts of February 20th, 1812, and March 1st, 1817, it is provided that each circuit court may appoint in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called, "commissioners of the circuit courts," and shall exercise the powers which are or may be expressly conferred by law upon them.<sup>1</sup>

**2. Who Eligible.**—Any person of lawful age and sound mind, is eligible to appointment as a commissioner, except *United States* marshals and their deputies, who are prohibited by statute from holding the position or exercising any of its duties.<sup>2</sup>

**III. TENURE OF OFFICE.**—There being no statutory limitation of the term of office of a commissioner, he holds during good behavior, subject to removal for incompetency, neglect, or malfeasance in office, by the circuit court, which appointed him, upon a rule to show cause supported by affidavits charging misconduct, and granted on the district attorney's motion after due notice to the commissioner.<sup>3</sup>

**IV. DUTIES AND POWERS OF COMMISSIONERS.**—1. **Generally.**—The duties and powers of a *United States* commissioner are purely statutory, and are briefly summarized in the note.<sup>4</sup>

S.) 523, he is designated by Field, J., as "an examining and committing magistrate. The powers conferred are judicial in their nature, for judgment and discretion must be exercised, but they are not judicial in the sense in which judicial power is granted by the constitution to the courts of the *United States*." See *In re Kaine*, 14 How. (U. S.) 103.

An indictment for perjury committed before a district judge sitting as an examining magistrate, was held bad because it charged the perjury to have been committed in a "court of the *United States*." *U. S. v. Clark*, 1 Gall. (U. S.) 497. In delivering his opinion, Justice Story characterized the argument, that a judge under these circumstances was a court, as "utterly insupportable."

1. *U. S. Rev. St.*, § 670. Under the civil rights acts the circuit and district courts are required from time to time to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with crimes against the civil rights of citizens of the *United States*. Apr. 9th, 1866, ch. 13, § 4, vol. 14, p. 28, and May 31st, 1870, ch. 114, § 9, vol. 16, p. 142; *U. S. Rev. St. (U. S.)*, § 1983.

The appointment is a matter of record in the court from which it ema-

nates, and his authority may be proved by producing such record. *U. S. v. Stowell*, 2 Curt. (U. S.) 162.

2. Act of August 16th, 1856, *U. S. Rev. St.*, § 628.

3. *In re Gilbert*, 31 Fed. Rep. 277; *In re Eaves*, 30 Fed. Rep. 21. In this latter case it was held that while the appointing court has power to remove commissioners at pleasure, such discretion should be a sound and legal one, and such power should never be exercised capriciously or arbitrarily; but the court should proceed with great caution, and every presumption of innocence allowed in a criminal case should be indulged in favor of the commissioner.

4. **First.** To administer oaths and take acknowledgments, in all cases in which, under the laws of the *United States*, such oaths or acknowledgments might be made or taken before a justice of the peace of any state or territory, or the *District of Columbia*. *U. S. Rev. St.*, § 1778. Under this section, oaths and acknowledgments should be certified under the hand and official seal of the commissioner, and are given the same force and effect as if taken or made before a justice of the peace under the state laws. A paper certified by a commissioner, under his hand and official seal, as a true copy of the original record in a proceeding

within his jurisdiction, is admissible in evidence without oath. *Frost v. Holland*, 75 Me. 108. An oath under the *United States* banking law may be administered by a commissioner or notary public, and perjury assigned upon. *U. S. v. Neale*, 14 Fed. Rep. 767. But he has no authority to administer, such as is required by act of Congress, to a deputy surveyor of the *United States*, and to take and certify his affidavit in regard to the manner in which he has fulfilled a contract for surveying, to be used in procuring pay for such services. *U. S. v. Reilly*, 131 U. S. 58.

*Second.* To apprehend fugitives from justice in certain cases. U. S. Rev. St., §§ 5270, 5271.

*Third.* To bail, commit and examine offenders against the laws of the *United States*, in accordance with the usual mode of process against offenders in the state. U. S. Rev. St., § 1014. And see *Ex p. Kie*, 46 Fed. Rep. 485; *Ex p. Halley*, 1 Okla. 12.

*Fourth.* To take bail and affidavits, when required or allowed, in any civil case in any circuit or district court. U. S. Rev. St., § 945. In the absence of a rule of court providing otherwise, appeal bonds in admiralty may be taken and approved by a commissioner under this section, *The Canary No. 2*, 22 Fed. Rep. 536; but a stipulation in admiralty authenticated by the mere certificate of a commissioner appointed in another circuit is not authorized or binding. *Sawyer v. Oakman*, 11 Blatchf. (U. S.) 65. It has been held that these statutes make a distinction between civil and criminal business, giving commissioners of the circuit courts authority to take bail, affidavits and depositions in civil cases, while in criminal proceedings, they have the powers of magistrates in arresting and imprisoning offenders, but no general powers in respect to depositions and affidavits in criminal causes. *U. S. v. Smith*, 17 Fed. Rep. 510.

*Fifth.* To hold to security of the peace, and good behavior in cases arising under the laws of the *United States*, as may be lawfully exercised by any judge or justice of the peace of the respective states in cases cognizable before them. U. S. Rev. St., § 727.

*Sixth.* To issue search warrants authorizing any internal revenue officer to search premises, if such internal revenue officer shall make an oath in writing that he has reason to believe and does believe that a fraud upon the revenue has been or is being committed by the

use of the said premises. U. S. Rev. St., § 3462. By Act of Congress of August 14th, 1876, commissioners were also authorized to issue search warrants for counterfeits of trade-marks, labels, stamps, brands, wrappers, etc., where the owner of any registered trade-mark, or his agent, made oath that he had reason to believe that such trade-marks, labels, brands or wrappers were in the possession of any person with intent to use the same for the purposes of deception and fraud. This statute seems to have been omitted from the Revised Statutes.

*Seventh.* To take proof of debts in bankruptcy, subject to revision by the register of the court; and to take evidence and examinations in proceedings in bankruptcy. U. S. Rev. St., §§ 5076, 5003.

*Eighth.* To carry into effect the award, arbitration or decree of any consul, vice consul or commercial agent of any foreign nation, made as judge or arbitrator in differences between the captains and crews of vessels, and to issue all proper remedial process, *mesne* and final; to carry into full effect such award, arbitration or decree, and to enforce obedience thereto by imprisonment. U. S. Rev. St., § 728.

*Ninth.* To issue his warrant for, and arrest seamen of foreign nations in certain cases of controversy, difficulty or disorder, where the consuls or agents of the foreign governments have exclusive jurisdiction of such controversies by treaty stipulations. U. S. Rev. St., §§ 4079, 4080, 4081.

*Tenth.* To arrest deserting seamen from foreign vessels. U. S. Rev. St., § 5280.

*Eleventh.* To summon masters of vessels to show cause why process should not issue against the vessels for payment of wages due seamen. U. S. Rev. St., § 4546.

*Twelfth.* To discharge poor convicts of the *United States* who are imprisoned solely for the non-payment of a fine, or fine and costs, after such convict has been imprisoned thirty days, on taking the oath required by statute. U. S. Rev. St., § 5296.

*Thirteenth.* To institute prosecutions against all persons violating the civil rights of citizens of the *United States*. U. S. Rev. St., §§ 1982, 1983, 1984.

*Fourteenth.* To act as chief supervisor of elections when appointed for that purpose. U. S. Rev. St., §§ 2024-2031. And see ELECTIONS, vol. 6, p. 310.

In the territory of *Alaska* they have jurisdiction in all testamentary and probate matters, in accordance with the laws of *Oregon*,<sup>1</sup> and in *Utah*, commissioners appointed by the supreme court may exercise all the powers and jurisdiction possessed by justices of the peace of the territory.<sup>2</sup>

**2. Commissioner's Process.**—A commissioner's process runs throughout the district for which he is appointed, but cannot run into other states or districts, unless, perhaps, under indorsement from some commissioner or judge in the district where it is to be executed. A commissioner should, however, avoid bringing prisoners and witnesses from remote parts of his own district, if there are other commissioners residing nearer to the prisoner or the place of the commission of the offense before whom he can make his warrant returnable; as one commissioner can commit on an affidavit taken before another.<sup>3</sup> When an offense is begun in one circuit and completed in another, the commissioners for either circuit may examine and commit the offender just as if the crime had been wholly committed in their circuit, as the statute makes it punishable in either judicial circuit.<sup>4</sup> A subpcena may run into any other district.<sup>5</sup> Although the commissioner may not be "a court of the *United States*," within the meaning of the statute, process issued by him for the apprehension or detention of a criminal is "legal process" within the meaning of the statutes of the *United States*, so that resisting or obstructing an officer in the execution thereof, is a criminal offense.<sup>6</sup>

A commissioner is authorized to appoint one or more suitable persons who shall execute all such warrants or other process as he may issue.<sup>7</sup>

**3. Power to Secure Attendance of Witnesses.**—Witnesses should, if possible, be summoned at the same time that the prisoner is

As to the pay of supervisors and the presentation of their accounts, see *In re Conrad*, 15 Fed. Rep. 642; *Gayer v. U. S.*, 33 Fed. Rep. 625; *Muirhead v. U. S.*, 13 Ct. of Cl. 51; *U. S. v. McDermott*, 140 U. S. 151; *In re Allen*, 19 Fed. Rep. 809. This statute has been repealed by the Fifty-third Congress.

*Fifteenth.* To examine witnesses mentioned in letters rogatory addressed from any court of a foreign country to any circuit court of the *United States*. U. S. Rev. St., §§ 4071, 4072, 4073.

1. Under the organic law of *Alaska*, commissioners have jurisdiction in the first instance, subject to the jurisdiction of the district judge, in all testamentary and probate matters, in accordance with the laws of *Oregon*, applicable to that territory, and are vested with the jurisdiction of the county court of *Oregon* pertaining to probate courts. *Ex p. Emma*, 48 Fed. Rep. 211.

2. And a commissioner exercising such jurisdiction at a particular precinct, has only the power and jurisdiction belonging to a justice of the peace of that precinct. *People v. Hills*, 5 Utah 410.

3. *Ex p. Bollman*, 4 Cranch (U. S.) 129.

Where the examination is transferred by the commissioner before whom the warrant is returnable to another commissioner in the same district, the latter has jurisdiction to take the examination and commit the defendant, if the charge is sustained. *In re Wahl*, 42 Fed. Rep. 822.

4. U. S. Rev. St., § 731.

5. U. S. Rev. St., § 876.

6. *U. S. v. Martin*, 17 Fed. Rep. 153; *U. S. v. Lukins*, 3 Wash. (U. S.) 337.

7. U. S. Rev. St., § 1984. This power extends to all commissioners. *In re Upchurch*, 38 Fed. Rep. 25.



arrested, so as to avoid delay in the examination,<sup>1</sup> and all the names of witnesses should be included in one subpoena, if possible. The commissioner is authorized to require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, for his appearance to testify in the case, and where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the *United States*, he may require a like recognizance and sureties from the defendant's witnesses, if in his opinion their testimony is important and liable to be lost otherwise.<sup>2</sup>

All papers concerning the case or certified copies thereof, together with the recognizances of the witnesses, should be returned by the commissioner as speedily as may be into the hands of the clerk of the court.<sup>3</sup>

**4. Power to Punish for Contempt.**—It would seem to follow that as commissioners do not hold a court,<sup>4</sup> they have no power to punish for contempt committed against them, and where a witness refused to be sworn or testify before a commissioner, it was held, in a well-considered opinion, that the commissioner had no power to punish for contempt, but must refer any matter of contumacy, obduracy, or contempt to the court, as masters in chancery and registers in bankruptcy are required to do.<sup>5</sup>

**5. Power to Hold to Security of the Peace.**—A commissioner has a like power to hold to security of the peace, and for good behavior, in cases arising under the constitution and laws of the *United States*, as may be lawfully exercised by any judge or justice of the

1. *U. S. v. Worms*, 4 Blatchf. (U. S.) 332.

2. *U. S. Rev. St.*, §§ 879, 1014.

3. *U. S. Rev. St.*, § 1014.

4. See *supra*, this title, *Definition*.

5. In *Ex p. Perkins*, 29 Fed. Rep. 909, Gresham, J., said: "It is not necessary to decide whether a justice of the Supreme Court of the *United States*, or a circuit or district judge, sitting as an examining magistrate, may punish a contumacious witness or other person guilty of misconduct before him. It is sufficient in this case to hold that commissioners exercise such powers as are expressly conferred on them by Congress, and that neither section 1014, nor any other federal statute, authorizes them to punish for contempt."

In *Ex p. Doll*, 7 Phila. (Pa.) 595, it was held that a commissioner has no power to commit a citizen for an alleged contempt, and Cadwalader, J., in delivering the opinion of the court, said, that he very much doubted the power of Congress to invest a commissioner with authority, in a proceeding

originally instituted before him, to summarily commit a citizen for an alleged contempt. This was an exercise of the judicial power of the *United States*, which, under the constitution, could not be intrusted to an officer appointed and holding his office in the manner in which these commissioners are appointed and hold their offices.

On the other hand, it has been held that where, by the local law, a justice of the peace, or other similar state magistrate, has power to attach a disobedient witness and punish him for contempt, a commissioner has like authority, and that the punishment is left to the discretion of the commissioner within the limits of the power conferred on magistrates in similar cases by the state laws. In *re Thompson*, M. S., Opinion of Krekel, J., Conklin's Treatise 576.

A commissioner of the supreme court of *Utah* has no authority to arrest a person for contempt for writing and publishing newspaper articles concerning his court, and a writ of pro-

peace of the respective states, in cases cognizable before them,<sup>1</sup> and a judge or commissioner, if there are just grounds of suspicion, may require security for the observance of the neutrality laws.<sup>2</sup>

**6. Adjournment—Bail.**—A commissioner may adjourn a hearing to another time and place, but cannot do so in the absence of the accused.<sup>3</sup> On adjournment, the commissioner may take bail for the further appearance of the accused; but his power in this respect is the same as a state magistrate, and no greater.<sup>4</sup>

**7. Duties and Powers in Case of Extradition.**—(See EXTRADITION, vol. 7, p. 623 *et seq.*)

**8. In Proceedings to Secure Seamen's Wages.**—Where the residence of the district judge is more than three miles distant, or he is absent from home, *United States* commissioners are given authority, whenever any dispute arises between the master of a vessel and a seaman, concerning wages, or the wages of any seaman are withheld for more than ten days after the time they should have been paid, to summon the master to appear before them to show cause why process should not issue against the vessel to answer for the wages due the seamen.<sup>5</sup> Before assuming to act,

hibition will lie to prevent such arrest. *People v. Carrington*, 5 Utah 531.

1. U. S. Rev. St., § 727; U. S. v. Horton's Sureties, 2 Dill. (U. S.) 94.

If there is probable cause to believe that the accused is guilty of treason, he may be required to give security of the peace and for good behavior. U. S. v. Greiner, 4 Phila. (Pa.) 396.

2. U. S. v. Quitman, 2 Am. L. Reg. 645, 652.

3. The power to adjourn to another time and place is incident to the power to hear and determine, but the commissioner cannot adjourn in the absence of the accused. U. S. v. Rundlett, 2 Curt. (U. S.) 41.

In the recent cases the Supreme Court of the *United States* has expressly held that the granting or refusing of motions for continuance is a necessary incident to, and a part of the hearing and determining of criminal charges by a commissioner, and that the exercise of such a power in criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offense charged against him, and to a sufficient time for the summoning of his witnesses, as well as for employing and consulting with counsel to aid him in his defense. U. S. v. Jones, 134 U. S. 483; U. S. v. Ewing, 140 U. S. 142.

4. U. S. v. Horton, 2 Dill. (U. S.) 94. In this case the *Missouri* statute provided that a magistrate might adjourn

the examination of a prisoner for a period not exceeding ten days at one time. At the request of a prisoner charged with violating the revenue law, a commissioner adjourned the examination for nineteen days and took bail for his appearance at the end of that time; the bail having been forfeited, it was held, in a suit against the sureties, that the commissioner's order for the appearance of the accused after an interval of nineteen days was directly contrary to law, and that recognizance for such an appearance was invalid, and that the consent of the accused could not confer jurisdiction or power to make the order, nor did it estop him or his sureties to set up the invalidity of the recognizance. And to the same effect, see U. S. v. Rundlett, 2 Curt. (U. S.) 41; U. S. v. Ewing, 140 U. S. 142; U. S. v. Jones, 134 U. S. 483.

In *New York*, a commissioner has no authority to take bail for the appearance of a party accused for examination before himself at a future day, the magistrates in that state having no power to take such recognizance. U. S. v. Case, 8 Blatchf. (U. S.) 250.

5. U. S. Rev. St., §§ 4546, 4547; SEAMEN, vol. 21, p. 935 *et seq.*

**Class of Vessels Subject to this Proceeding.**—A ferry-boat which merely crossed and recrossed the Ohio river was held subject to be proceeded against under the above sections. *Murray v. Ferry-boat*, 2 Fed. Rep. 86; *Steamboat*

the commissioner should satisfy himself of the absence of the district judge, and his certificate should show this fact upon its face;<sup>1</sup> but if he once assumes to act, the court will not go behind the certificate.<sup>2</sup> If the master fails to show that the wages are paid, or otherwise satisfied, or forfeited, or if the matter in dispute is not settled, the commissioner shall certify to the clerk of the district court that there is a sufficient cause of complaint whereon to found admiralty process against the vessel, and the clerk shall thereupon issue process against the vessel, and the suit shall be proceeded with in the district court and final judgment given according to the usual course of admiralty courts in such cases.<sup>3</sup>

All the seamen should be joined as complainants in this proceeding;<sup>4</sup> but although the libel is in its form joint, the contract is treated in admiralty as a several and distinct contract with each seaman.<sup>5</sup> The seamen are competent witnesses for each other.<sup>6</sup> The remedy is a cumulative one, which the seamen may pursue at their option, and they are not thereby deprived of the right, in

*Cheeseman v. Two Ferry-boats*, 2 Bond (U. S.) 363; *The Gate City*, 5 Biss. (U. S.) 200; *The General Cass*, 1 Brown Adm. 334. A canal boat or barge, *Ex p. Easton*, 95 U. S. 68; a scow, a lighter, and probably a raft or timber ship, under certain circumstances would be held to be a ship or vessel and subject to proceedings under these sections, *Monongahela Nav. Co. v. Steam Tug Bob Connell*, 1 Fed. Rep. 218; *Ben. Adm.*, § 218. Navigability, so far as water is concerned, is the only test of maritime and admiralty jurisdiction, *The Eagle*, 8 Wall. (U. S.) 15; *The Hine v. Trevor*, 4 Wall. (U. S.) 555; and not the form, size, construction, equipment, or means of propulsion of the vessel. *Murray v. Ferry-boat*, 2 Fed. Rep. 89; *Ben. Adm.*, § 218; *The General Cass*, 1 Brown Adm. 334.

1. *The Commerce*, Sprague (U. S.) 34.

2. The principle *omnia præsumuntur esse acta rite* will apply to his conduct, and the court will not presume that he has usurped the jurisdiction which does not belong to him. *The Schooner Jefferson Borden*, 6 Fed. Rep. 301. In this case Bradford, J., says: "It is true, the commissioner is bound to inform himself of the absence of the judge from his place of residence, but the court will not go behind his certificate in that matter. Indeed, the court is not certain that the certificate of the commissioner should show affirmatively the absence of the judge from his resi-

dence. It does not appear in the form prepared by Benedict, now a distinguished admiralty judge, and formerly a *United States* commissioner."

3. U. S. Rev. St., § 4547.

**Hearing Before Commissioner.**—It is not the duty of the commissioner to take upon himself in this proceeding the decision of nice and difficult questions, or to enter into an elaborate or protracted examination of the merits, although he is bound to hear any legal evidence offered on either side of the controversy. 1 Conklin Adm. Pr. 56.

4. *The Sloop Merchant*, Abb. Adm. 1; *Oliver v. Alexander*, 6 Pet. (U. S.) 143.

5. *Oliver v. Alexander*, 6 Pet. (U. S.) 143. For other decisions relating to the powers given under these sections, see the following cases: *The Thomas Jefferson*, 10 Wheat. (U. S.) 428; *The Cypress*, B. & H. Adm. 83; *The Cadmus*, B. & H. Adm. 139; *The Warrington*, B. & H. Adm. 335; *Freeman v. Baker*, B. & H. Adm. 372; *The Phebe*, Ware (U. S.) 361; *Schooner David Faust*, 1 Ben. (U. S.) 183; *Whiteman v. Ship Neptune*, 1 Pet. Adm. 183; *The Commerce*, Sprague (U. S.) 34; *Collins v. Nickerson*, Sprague (U. S.) 126; *Ship William Jarvis*, Sprague (U. S.) 485; *Kief v. Steamboat London*, Newb. Adm. 6; *The Schooner Eagle*, Olc. Adm. 232.

6. *The Cypress*, B. & H. Adm. 83; *The Cabot*, Abb. Adm. 150.

the first instance, to resort to the ordinary admiralty process against a vessel upon a direct application to the court or judge.<sup>1</sup>

9. **Power to Carry into Effect Awards of Foreign Consuls.**—Commissioners have power to carry into effect the award or arbitration or decree of any consul, vice-consul, or commercial agent of any foreign nation made or rendered by virtue of authority conferred upon him.<sup>2</sup> The consul's authority to make any award or decree which will be enforced by officers or courts of the *United States* under this section, must come, not from any law, rule or regulation of his own country, but from some statute or treaty stipulation of the *United States*, conferring such power upon him, for under the general international law, a consular officer has no right to sit as judge or arbitrator within a foreign territory, and render decrees or orders enforceable by the foreign courts.<sup>3</sup>

1. *Murray v. Ferry-boat*, 2 Fed. Rep. 86. Acheson, J., in this case says: "The remedy conferred by the statute is not exclusive, but cumulative, and the right of the seaman to arrest the vessel is not dependent upon a previous resort to the statutory proceeding, but it is optional with him, whether to pursue the preliminary measure of summoning the master, or make direct application for admiralty process. *Ship William Jarvis, Sprague* (U. S.) 485; *The M. W. Wright*, 1 Brown Adm. 290; *The Waverly*, 7 Biss. (U. S.) 465. The first two of the above cited cases arose under the Act of 1790; the latter, under sections 4546 and 4547, of the Rev. Stats."

2. U. S. Rev. St., § 728. By this statute application for the exercise of this power, is required to be made by petition to the court or commissioner; and the commissioner is authorized to issue all proper remedial process, *mesne* and final, to carry into full effect, the award, arbitration or decree of the consul, and to enforce obedience thereto by imprisonment in the jail of the district, until such award is complied with, or the parties are discharged therefrom by the consent in writing of the consul, vice-consul, commercial agent, or his successor in office, or by the authority of the foreign government. The foreign government, or its agent, requiring such imprisonment, must, by the terms of the statute, bear all expenses of said proceeding, and the imprisonment and maintenance of the prisoner.

3. *In re Aubrey*, 26 Fed. Rep. 849; *Dainese v. Hale*, 91 U. S. 13; *The Elwine Kreplin*, 9 Blatchf. (U. S.) 438; 2 Op. Atty. Gen'l 378; *The Nereide*, 9 Cranch (U. S.) 389.

It has been held that section 728 of the Rev. Stats. should be construed in connection with sections 4079, 4080, and 4081, of the Rev. Stats., and that the authority, apparently given to all consular officers in section 728, is limited to such officers of foreign nations as are entitled thereto by treaty stipulations, and then only when such foreign country gives the same privilege to consular officers of the *United States*, which fact is to be ascertained and proclaimed by the President of the *United States*.

In *Re Aubrey*, 26 Fed. Rep. 848, Pardee, J., said: "In the revision of the statutes, the preamble to these sections is omitted, and the application of the statutes seems to be enlarged so as to embrace the consular agents of all nations; and it does embrace all consular agents whose governments give them jurisdiction, unless the statute is so construed as to hold that the authority conferred to sit as judge or arbitrator, etc., mentioned in the statute, refers to and is limited to authority conferred by the consent of the *United States*. Such a construction is strengthened by the original preamble to the statute, and by the fact that the Rev. Stats., sections 4079, 4080, 4081, are limited in terms to such officers of foreign nations as are entitled thereto, under treaty stipulations with the *United States*, and then only when such foreign country gives the same privilege to consular officers of the *United States*, the latter fact to be ascertained and proclaimed by the President."

**Arrest of Foreign Seamen on Application of Consul.**—By Rev. Stats., sections 4079, 4080, 4081, commissioners

**10. To Arrest Deserting Seamen from Foreign Vessels.**—Commissioners are given power to arrest deserting seamen from foreign vessels, where such seamen are not citizens of the *United States*, and to deliver them up to the consul or vice-consul of the foreign government.<sup>1</sup> This is the only remedy provided in case of a foreign seaman deserting,<sup>2</sup> and it applies only to desertion when the vessel is in a *United States* port, and the deserter is not an American citizen.<sup>3</sup>

**11. To Discharge Poor Convicts.**—A commissioner has power to discharge from imprisonment any person sentenced by any court of the *United States* to be imprisoned and pay a fine, or fine and costs, where such person has been confined in prison thirty days, solely for the non-payment of such fine and costs.<sup>4</sup>

are given power, on the application of foreign consuls, to cause the arrest and imprisonment of foreign seamen in certain cases of difficulty, controversy, and disorder on board of foreign ships, where, by treaty stipulations, the consuls of such foreign powers have exclusive jurisdiction of such controversies and disorders, and where American consuls are allowed similar privileges in the foreign nation represented by such consul. No citizen of the *United States* can be held under these provisions, but if it appears, upon an examination, that the person complained of is a citizen of the *United States*, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law, and no person can be imprisoned for a longer period than two months after his arrest; but, at the end of that time, shall be set at liberty, and shall not be again arrested for the same cause. The procedure and powers of the commissioner are fully set forth in the sections referred to.

1. No person so arrested shall be detained longer than two months or be again molested for the same cause. U. S. Rev. St., § 5280.

2. U. S. v. Minges, 5 Hughes (U. S.) 494.

3. 16 Op. Atty. Gen'l 358.

4. U. S. Rev. St., §§ 5296, 1042. In order to obtain a discharge under these sections, the convict must make application in writing to any commissioner of the *United States* court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and costs, and, after notice to the district attorney, who may appear, offer evidence, and be heard, the commissioner shall proceed to

hear and determine the matter. If, on examination, it shall appear to the commissioner that such convict is unable to pay such fine, or fine and costs, and that he has been imprisoned thirty days solely for the non-payment of the same, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall, upon his taking the following oath, "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the state where oath is administered), and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God," discharge such convict, and shall give to the keeper of the jail a certificate, setting forth the facts.

**Term of Imprisonment Must Have Been Completed.**—If one sentenced to a term of imprisonment and to pay a fine and costs and be imprisoned until they are paid, is pardoned on condition that such payment be made, he is not entitled to his discharge as a poor convict under this section, until the term has been completed, and thirty days in addition for the non-payment of the fine and costs. *In re Ruhl*, 5 Sawy. (U. S.) 186.

**Illegal Sentence.**—The object of this section is to grant a discharge to a poor convict, after he has been imprisoned for thirty days for a fine, or fine and costs, on showing his inability to pay the same; a sentence, therefore, of imprisonment for a stated period, and for fifty days beyond that period for the

**12. To Take Depositions de Bene Esse.**—In civil causes pending in a district or circuit court, the testimony of any witness may, in certain cases, be taken before a commissioner *de bene esse*.<sup>1</sup> The commissioner must not be of counsel or attorney to either of the parties, or interested in the event of the cause, and his certificate should so state.<sup>2</sup> This power can only be exercised in a civil cause pending in a district or circuit court,<sup>3</sup> and upon reasonable notice in writing to the opposite party, or his attorney of record.<sup>4</sup>

non-payment of a fine of one hundred dollars, was held erroneous, as authorizing an imprisonment for twenty days longer than the law under this section of the Rev. Stats. allows to be inflicted. *Kie v. U. S.*, 27 Fed. Rep. 356.

1. See generally BILL TO TAKE TESTIMONY DE BENE ESSE, vol. 2, p. 285. In civil causes pending in a district or circuit court, the testimony of any witness may be taken before a commissioner *de bene esse*, in the following cases: *First*, when the witness lives at a greater distance from the place of trial than one hundred miles; *second*, or is bound on a voyage to sea; *third*, or is about to go out of the *United States*, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the trial; *fourth*, when he is ancient and infirm. *U. S. Rev. St.*, § 863.

A commissioner of the district court may take a deposition under this section, when such district court has the power of a circuit court. *Whitney v. Hunt*, 5 Cranch (C. C.) 120. The certificate of the person taking the deposition that he is such commissioner, is sufficient, and his appointment need not be authenticated by the record. *Whitney v. Hunt*, 5 Cranch (C. C.) 120; *Vasse v. Smith*, 2 Cranch (C. C.) 31; *Ruggles v. Bucknor*, 1 Paine (U. S.) 358.

2. The commissioner's certificate should state: *First*, that he is not the attorney or counsel or a party in interest; *second*, that the depositions were reduced to writing in deponent's presence; *third*, in what court it is to be used; but where it fails to do so, leave will usually be given to withdraw the deposition, in order that the certificate may be amended. *Gartside Coal Co. v. Maxwell*, 20 Fed. Rep. 187; *Donahue v. Roberts*, 19 Fed. Rep. 863. But see *Miller v. Young*, 2 Cranch (C. C.) 53; *Peyton v. Veitch*, 2 Cranch (C. C.) 123.

3. And it has been held that, after an appeal is taken and perfected, the case

is no longer "depending" in the circuit court, and hence is removed from the operation of the act of Congress permitting depositions to be taken *de bene esse*. *Richter v. Jerome*, 25 Fed. Rep. 681; *Slaughter House Cases*, 10 Wall. (U. S.) 273. It has been held that this act has no application to cases pending in the supreme court, *The Argo*, 2 Wheat. (U. S.) 287; and must be strictly construed. *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Harris v. Wall*, 7 How. (U. S.) 693; *Shutte v. Thompson*, 15 Wall. (U. S.) 157.

4. Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition to the opposite party, or his attorney of record, as either may be nearest. *U. S. Rev. St.*, § 863. By the thirtieth section of the Judiciary Act of 1789 (1 Stats. at Large 88), notice was required to be served on the adverse party, or his attorney, provided either of them was within one hundred miles of the place where the deposition was to be taken, and the certificate of the commissioner, that neither the adverse party, nor his attorney, lived within one hundred miles of such place, and that therefore no notice was made out, was held sufficient. *Dick v. Runnels*, 5 How. (U. S.) 7.

If an attorney has acted in the cause, notice should be given, though his name does not appear on the record. *Allen v. Blunt*, 2 Woodb. & M. (U. S.) 121. And where depositions are to be taken against the government, the *United States* attorney must have notice. *The Argo*, 2 Gall. (U. S.) 314.

In an action against three persons, where only one was arrested, and the magistrate certified that no notice was given to the defendant under arrest, because he was not within one hundred miles of the place of caption, but the other two defendants were within that distance, a deposition was held inadmissible. *Brown v. Piatt*, 2 Cranch (C. C.) 253.

The notice must be reasonable,<sup>1</sup> and should contain the name of the witness to be examined,<sup>2</sup> and the time and place of examination;<sup>3</sup> but it need not state the reason for taking it.<sup>4</sup> Any person may be compelled to appear and depose,<sup>5</sup> and everyone deposing must be cautioned, as well as sworn, to testify the whole truth.<sup>6</sup> The mode of taking depositions is either by oral questions put at the time, if desired, and not necessarily by written interrogatories given to the officer before commencing;<sup>7</sup> but the testimony must

If the deposition be taken without notice, the other party must have it retaken. *Goodhue v. Bartlett*, 5 McLean (U. S.) 186.

**Waiver of Notice.**—The requirements as to previous notice are not necessary, if notice was in fact served, and the adverse party appears by counsel and cross-examines the witnesses. *Dinsmore v. Maroney*, 4 Blatchf. (U. S.) 416.

**1. Notice Must Be Reasonable.**—A notice served at noon, for the taking of a deposition between four and six o'clock on the same day, was held not to be a reasonable notice, no circumstances being shown why longer notice might not be given. *Renner v. Howland*, 2 Cranch (C. C.) 441. And a notice given at Washington the last day of December, of the taking of a deposition at Baltimore on January second following, was held not reasonable. *Barrell v. Simonton*, 3 Cranch (C. C.) 681. It was so held of a notice served at half-past eight o'clock to take testimony between nine and two on the same day, in the place where all the parties resided. *Irving v. Sutton*, 1 Cranch (C. C.) 575. But one hour's notice, where all the parties resided in the same place, in the absence of special circumstances showing it to be unreasonable, has been held a sufficient and reasonable notice. *Leiper v. Bickley*, 1 Cranch (C. C.) 29; *Nicholls v. White*, 1 Cranch (C. C.) 58.

**2.** *Carrington v. Stimson*, 1 Curt. (U. S.) 437.

**3.** *Leiper v. Bickley*, 1 Cranch (C. C.) 29; *Egbert v. Citizens' Ins. Co.*, 7 Fed. Rep. 47.

**4.** *DeButts v. McCulloch*, 1 Cranch (C. C.) 286. Nor that it was to "put interrogatories," nor is it bad if a word be accidentally omitted from the caption. *Bussard v. Catalino*, 2 Cranch (C. C.) 421.

**5. Compulsory Process.**—Any person may be compelled to appear and depose, as provided by this section, in the same manner as witnesses may be com-

pelled to appear and testify in court. U. S. Rev. St., § 863.

**6.** U. S. Rev. St., § 863. The deponent must be cautioned as well as sworn. *Luther v. The Merritt Hunt*, Newb. Adm. 4. But see *contra*, *Brown v. Piatt*, 2 Cranch (C. C.) 253. But if it be certified that he was "sworn in pursuance of the act," it will be sufficient, although it does not say that he was cautioned. *Moore v. Nelson*, 3 McLean (U. S.) 383.

The certificate should show that the deponent was carefully examined and cautioned and sworn to testify to the whole truth. *Pentleton v. Forbes*, 1 Cranch (C. C.) 507; *Garrett v. Woodward*, 2 Cranch (C. C.) 190; *Wilson Sewing Mach. Co. v. Jackson*, 1 Hughes (U. S.) 295; *Shutte v. Thompson*, 15 Wall. (U. S.) 151; *Rainer v. Haynes*, Hempst. (U. S.) 689; *Bussard v. Catalino*, 2 Cranch (C. C.) 421.

The witness may be sworn before or after the deposition is written, *Tooker v. Thompson*, 3 McLean (U. S.) 92; and may affirm, if it be certified by the commissioner that he is conscientiously opposed to taking, an oath. *Elliott v. Hayman*, 2 Cranch (C. C.) 678.

As to the form of the oath administered, the law of the state controls. *Wilson Sewing Mach. Co. v. Jackson*, 1 Hughes (U. S.) 295.

**7.** *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1.

Parties having a right to take a deposition under the federal statute in a common-law case, may, as to the mere mode of procuring the deposition, follow as their election, either the provisions of the state law or the acts of Congress; the depositions may be taken upon written interrogatories duly served under the state statute and in the mode therein provided, as well as in the manner provided by act of Congress. *Flint v. Com'rs*, 5 Dill. (U. S.) 481; *McLennan v. Kansas City R. Co.*, 22 Fed. Rep. 198. But see *contra*, opinion by Swing, District J., in *Sage*

be reduced to writing by the commissioner, or by the deponent in the commissioner's presence, and subscribed by the deponent,<sup>1</sup> and these facts must clearly appear upon the certificate, and will not be presumed.<sup>2</sup> The depositions should be retained by the commissioner until delivered into court with his own hand, or be sealed up by him and directed to the court, and remain under seal until opened by the court.<sup>3</sup>

*v. Tansky* (Ohio, 1877), 6 Cent. L. J. 7. And the *United States* circuit court, sitting in a state where, by state laws, depositions of witnesses can be taken only upon commission, can authorize, in the absence of any conflicting federal statute, commissioners to take depositions of witnesses, to be issued, executed, and returned in the manner, and subject to the regulations prescribed by the laws of such state, and the restrictions limiting the use of depositions *de bene esse* do not apply. *Warren v. Younger*, 18 Fed. Rep. 859. But see *Randall v. Venable*, 17 Fed. Rep. 162, where it was held that if a state law for the taking of depositions conflicts with the acts of Congress on the subject, depositions taken according to the mode prescribed by the statutes of the state, are not admissible in evidence in a circuit court of the *United States*. "The laws of the state are only to be regarded as rules of decisions in the federal courts, where the constitution, treaties, or statutes of the *United States* have not otherwise provided; when the latter speaks, they are controlling." By Bradley, J., in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 458. And see *Ex p. Fisk*, 113 U. S. 713. And where Congress has provided a mode of taking testimony, the district and circuit courts of the *United States* are not authorized to make rules touching the mode of taking such testimony. *Randall v. Venable*, 17 Fed. Rep. 162.

1. The testimony shall be reduced to writing by the magistrate taking the depositions, or by the deponent in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent. U. S. Rev. St., § 864.

2. *Bell v. Morrison*, 1 Pet. (U. S.) 355. The omission by the commissioner in his certificate, of the fact that he reduced the testimony to writing himself, or that it was done by the witness in his presence, is fatal. *Cook v. Burnley*, 11 Wall. (U. S.) 659; *U. S. v. Smith*, 4 Day (Conn.) 126; *Bell v. Morrison*, 1 Pet. (U. S.) 355; *Donahue v. Roberts*,

19 Fed. Rep. 863; *Marstin v. McRea*, Hempst. (U. S.) 688; *Banert v. Day*, 3 Wash. (U. S.) 243; *Edmondson v. Barrell*, 2 Cranch (C. C.) 228. But see *contra*, *Bussard v. Catalino*, 2 Cranch (C. C.) 421; *Rainer v. Haynes*, Hempst. (U. S.) 689.

A certificate by the commissioner that it was reduced to writing by the witness and himself, has been held good. *Bussard v. Catalino*, 2 Cranch (C. C.) 421. But where the commissioner certified that it was reduced to writing in his presence, without saying by whom, the certificate was held bad. *U. S. v. Smith*, 4 Day (Conn.) 121.

3. U. S. Rev. Stat., § 865, provides that the deposition taken under the previous sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it, together with a certificate of the reasons of taking it, and of the notice given to the adverse party, shall be sealed up and directed by him to such court, and remain under his seal until opened by the court. The commissioner should certify that he retained the deposition until it was sealed and directed to the court. *Shankwiker v. Reading*, 4 McLean (U. S.) 240.

If he does not retain the deposition until he delivers it into court, or seals or directs it to the court, it cannot be read. *Jones v. Neale*, 1 Hughes (U. S.) 268.

Where an officer by whom depositions are taken, sends them to the court by due course of mail, his certificate has been held sufficient, though it failed to state that he delivered the depositions to the court, or that he sealed them up and deposited them in the post office. *Egbert v. Citizens' Ins. Co.*, 7 Fed. Rep. 47.

A deposition not sealed must be rejected, but it is sufficient if it bears the seals of an express company over which is written the name of the commissioner. *In re Thomas*, 35 Fed. Rep. 337; *Thorpe v. Orr*, 2 Cranch (C. C.) 335.

If the commissioner personally de-



**13. Power Under *Dedimus Potestatem*.**—A commissioner may take depositions under a *dedimus potestatem*,<sup>1</sup> but where depositions *de bene esse* can be taken a *dedimus potestatem* will not be granted.<sup>2</sup>

**V. PROCEEDINGS BEFORE COMMISSIONER—1. Mode of Procedure.**—A commissioner, in the examination of criminals, and in his process of *mittimus*, should, in the absence of federal statutes, proceed according to the law of the state in similar cases;<sup>3</sup> and the provision of the *United States* statute that, "no writ is necessary to bring any prisoner into court or to remand him," has been held inapplicable to proceedings before commissioners—that commissioners should issue commitments on remanding prisoners for further examinations from day to day, and a final commitment on the decision of the case designating the crime for which the prisoner is held, such being the proceedings before committing officers under the state laws.<sup>4</sup>

A warrant of commitment not stating on its face any offense, is not evidence of a commitment for felony, although written on the back of a warrant of arrest charging a felony, but not referring to it in the commitment warrant.<sup>5</sup> A warrant of commitment of a seaman for deserting must be under the seal of the commissioner, must be founded on oath or affirmation, and must limit the term of imprisonment.<sup>6</sup>

The proceedings before the commissioner having terminated by a commitment of the prisoner, he has no further power over him and cannot afterward discharge him.<sup>7</sup> The only question before the commissioner is, whether there is probable cause, and the confession of the prisoner of the crime charged, without other proof of the *corpus delicti*, has been held sufficient to warrant a commissioner in committing him for trial.<sup>8</sup>

**2. The Complaint.**—A complaint must allege all necessary juris-

livers the deposition in court, he need not state any reason for taking it. *Jones v. Neale*, 1 *Hughes* (U. S.) 268.

1. U. S. Rev. St., §§ 866, 867, 868. These sections of the statutes being in derogation of the common law, are strictly construed, and no commission should be issued except to prevent a failure of justice. *U. S. v. Parrott*, McAll. (U. S.) 456.

2. *Walsh v. Rogers*, 13 *How.* (U. S.) 286; *Turner v. Shackman*, 27 *Fed. Rep.* 183.

3. *U. S. v. Martin*, 17 *Fed. Rep.* 154; *In re Kelley*, 25 *Fed. Rep.* 268.

*Indiana* Rev. Stats. (1881), §§ 1628, 1639, are made applicable to *United States* commissioners' examinations held in *Indiana* by U. S. Rev. St., § 1014, and they contemplate a trial and hearing, and a commissioner is not bound to accept an offer of the accused

to waive examination. *Van Buren v. U. S.*, 36 *Fed. Rep.* 77.

4. U. S. Rev. St., § 1030; *U. S. v. Martin*, 17 *Fed. Rep.* 154.

The commitment of a prisoner on a preliminary warrant for examination, should be for a short fixed period of time, and not for an indefinite time. The time should not exceed twenty-four hours, except for special cause shown, unless requested by the prisoner. *U. S. v. Worms*, 4 *Blatchf.* (U. S.) 332.

5. *U. S. v. Brown*, 4 *Cranch* (C. C.) 508.

6. *Ex p. Sprout*, 1 *Cranch* (C. C.) 424.

7. *U. S. v. Faw*, 1 *Cranch* (C. C.) 486; *Bundy's U. S. Commissioner*, p. 23.

8. *U. S. v. Bloomgart*, 2 *Ben.* (U. S.) 356.

dictional facts, and if made simply upon information and belief, is fatally defective, and gives the commissioner no jurisdiction.<sup>1</sup> The commissioner, before issuing the warrant, should have before him the oath of the real accuser to the facts upon which the charge is based, and on which belief or suspicion of guilt is founded,<sup>2</sup> and he has no jurisdiction to examine or commit on a complaint alleging facts, which, if true, would constitute no offense against the *United States*.<sup>3</sup>

**3. Authority of District Attorney Over Commissioner's Proceedings.**—A district attorney of the *United States* has no absolute power to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner. After indictment found, and before trial has commenced, the attorney has absolute power to enter a *nolle prosequi*, but while the charge is under investigation before the commissioner, he attends only as counsel for the government, to present the evidence against the accused, and has no control over the course to be pursued.<sup>4</sup>

**4. Correction of Errors.**—The errors of a commissioner may be

1. *Ex p. Lane*, 6 Fed. Rep. 34.

A warrant of commitment must state a good cause certain, supported by oath. *Ex p. Burford*, 3 Cranch (U. S.) 448.

**Objections to Complaint.**—Mere formal or doubtful objection to the complaint on preliminary hearing or examination, should not be considered by the commissioner, but the complaint should be treated as sufficient, unless so defective in its material averments, that a court, before which it was presented by a grand jury, would be bound to decline to act upon it. *In re Clark*, 2 Ben. (U. S.) 540.

**Amendment of Complaint.**—In extradition cases, it has been held that the commissioner has no power to amend the complaint or warrant, or to supply defects by his certificate after the case is closed, and a writ of *certiorari* is served upon him to produce the record of his proceedings. *Ex p. Lane*, 6 Fed. Rep. 34.

2. *In re Rule of Court*, 3 Woods (U. S.) 502. In this case Bradley, J., entered the following order for the guidance of commissioners: "No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the *United States* upon mere belief, or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge con-

stituting the grounds for such belief or suspicion."

3. *Ex p. Perkins*, 29 Fed. Rep. 900. A recognizance taken by a commissioner conditioned for the appearance of the principal, "to answer the charge of a willful and corrupt conspiracy to burn the steamer *Martha Washington* on the Mississippi river," is void, as not describing an offense made punishable by any act of Congress cognizable by the circuit court. *U. S. v. Hand*, 6 McLean (U. S.) 274.

4. *U. S. v. Schumann*, 2 Abb. (U. S.) 523.

The district attorney has no authority to take from the *United States* marshal a commissioner's warrant, for the purpose of deciding whether it shall be executed. It is the duty of the marshal to execute and return such warrants to the commissioner, notwithstanding any order of the district attorney to the contrary. The commissioner acts on his own responsibility, and is not subject to the control either of the district attorney or the marshal. See *U. S. v. Scroggins*, 3 Woods (U. S.) 529. In delivering the opinion in this case, Judge Woods said: "If the district attorney can suppress a commissioner's warrant after it is issued and before it is executed, he can forbid the commissioner to issue the warrant. If he has this supervision of the conduct of the commissioners, he has the same over the conduct of the circuit justices and the circuit and district judges, and can forbid them to issue warrants,

corrected by the court, upon application, in its discretion, for the purposes of justice.<sup>1</sup>

**VI. COMPENSATION AND ACCOUNTS.**—A commissioner is compensated by fees fixed by law;<sup>2</sup> and in case the fees for any service that he is authorized to render are not fixed by statute, he is permitted to charge the same fees that are allowed to clerks or

although, in their judgment, the warrants should issue. Such a power will hardly be claimed for the district attorney, and yet such a power is the logical sequence of what is claimed for him on this hearing. . . . The power does not exist in that office, and it would be a most dangerous power, and liable to the greatest abuses, if it did."

1. The commissioner is subject to the control of the court when acting as an examining magistrate, and the court can assume control of the proceedings, whenever justice may require it. *U. S. v. Berry*, 4 Fed. Rep. 779. But any defect of power or error committed by him can only be revised and corrected by the courts of the *United States*; the state court has no jurisdiction to remise or correct his judgment, or to liberate a prisoner committed or held by a commissioner upon *habeas corpus*, and no state court or judge, after they are judicially informed that the party is imprisoned under the authority of the *United States*, has any right to interfere with him, or require him to be brought before them. *Ableman v. Booth*, 21 How. (U. S.) 506.

2. U. S. Rev. St., § 847.

Where the *United States* district attorney examines and approves complaints drawn by a commissioner, the court will not reduce the fees for the same on account of being unnecessarily verbose, unless it appears that surplusage was inserted merely to increase fees. *Barber v. U. S.*, 355 Fed. Rep. 886. See *Bell v. U. S.*, 25 Ct. of Cl. 26; *Rand v. U. S.*, 36 Fed. Rep. 671.

The above section relates to commissioners appointed by the circuit court, and does not affect a private agreement between an attorney and a commissioner appointed by the court of commissioners of *Alabama* for claims providing for a certain charge per day for taking depositions. *Powers v. Manning*, 154 Mass. 370.

A commissioner in the territory of *Arizona* is entitled, under the U. S. Rev. St., § 837, and Act of August 7th, 1882 (22 Stat. at Large 244), to charge double the fees allowed to com-

missioners by the Act of Feb. 26th, 1853 (10 Stat. at Large 161). *McGrew v. U. S.*, 23 Ct. of Cl. 273.

In *Alaska*, if the duties of the commissioner arise from a violation of the *Oregon* statutes, made applicable to *Alaska*, he is entitled to the fees allowed in similar cases in *Oregon*, otherwise to the usual commissioner's fees. *Jewett v. U. S.*, 27 Ct. of Cl. 519.

A commissioner has discretionary powers in hearing and deciding criminal charges, to suspend the hearing of a case where, in his judgment, a proper regard for the interests of justice requires it, and is entitled to *per diem* fees where continuances are granted by him at a defendant's request. *U. S. v. Ewing*, 140 U. S. 142; *U. S. v. Carter*, 140 U. S. 702; *U. S. v. Jones*, 134 U. S. 483; *Marvin v. U. S.*, 44 Fed. Rep. 405. See also *McKinistry v. U. S.*, 34 Fed. Rep. 211; *Harper v. U. S.*, 21 Ct. of Cl. 56; *Goodrich v. U. S.*, 42 Fed. Rep. 392; *Rand v. U. S.*, 36 Fed. Rep. 671. And see 3 Lawrence's Comptroller Dec. 268.

He is entitled to *per diem* fees where the proceeding consists of an arraignment and plea, an examination of witnesses, granting a continuance, fixing the amount of bail, and committing the prisoner in default of bail. *McCafferty v. U. S.*, 26 Ct. of Cl. 1.

He is entitled to *per diem* fees pending the preliminary examination of an offender, though no witnesses are examined or arguments heard on some of the days. *Rand v. U. S.*, 48 Fed. Rep. 357; *U. S. v. Rand*, 53 Fed. Rep. 348; 3 C. C. A. 556; *Rand v. U. S.*, 36 Fed. Rep. 671.

He is entitled to fees for services rendered in good faith in criminal proceedings, in case of actual arrest and hearing, whether the accused was discharged or held for trial; and it is immaterial that the complaint was defective, if it was manifestly intended to charge an offense. *Southworth v. U. S.*, 151 U. S. 179. And see *Van Buren v. U. S.*, 36 Fed. Rep. 77.

But not to a *per diem* fee for an examination of a complaint antecedent to

other officers for like services.<sup>1</sup>

issuing a warrant, nor is he entitled to *per diem* fees for hearing and deciding different cases on the same day. *McCafferty v. U. S.*, 26 Ct. of Cl. 1. The expression "criminal charges" is restricted to cases in which formal written complaints have been legally preferred, and does not include the examination of complaining witnesses to determine whether a warrant shall issue, and this, although this duty is placed by statute upon committing magistrates of the state in which he acts. *U. S. v. Patterson*, 150 U. S. 65, *distinguishing U. S. v. Jones*, 134 U. S. 483. And see also *Ives v. U. S.*, 24 Ct. of Cl. 363.

Where a commissioner charged for services which he was not required to perform, but which might have been performed by clerks; for entries as to subpoenas where the warrants were returned "not executed;" for daily pay for an unusual number of days in criminal cases, for which the accounting officers requested an explanation and none was given; for new subpoenas, where a pending case was adjourned from day to day; for additional warrants on such adjournments; for separate recognizances for witnesses where all might have been joined in one; for process returned where the defendants were not held; and for copies when the original was required, it was held that his accounts would not be allowed. *Davies v. U. S.*, 23 Ct. of Cl. 468.

He is entitled to fees in each of two separate cases for distinct offenses against the same defendant, *McCafferty v. U. S.*, 26 Ct. of Cl. 1; and his fees will not be disallowed in two or more cases on the ground that they might have been jointly prosecuted with another case of the same character, where the district attorney elected that they be prosecuted separately. *Crawford v. U. S.*, 40 Fed. Rep. 446; *Barber v. U. S.*, 35 Fed. Rep. 886.

He is not entitled to fees for filing final bonds. *Crawford v. U. S.*, 40 Fed. Rep. 446.

**Fees in Criminal Cases.**—In criminal cases, a commissioner of the circuit court is entitled to the following fees: for drawing complaints, where the local practice requires the complaint to be reduced to writing, 20c. per folio; for each oath administered in connection with the complaint, 10c., and 15c. for each *jurat*; for filing a complaint or other paper, 10c.; for issuing

He is entitled to fees for enter-

a warrant, \$1; for entering returns thereon, 15c. per folio; for filing a warrant, 10c., and the same fees for like services in issuing and return of subpoena; for acknowledgment of recognizance, 25c. each; but only one acknowledgment can be allowed for each recognizance; for the oaths of sureties and the *jurats* to such oaths; for pay rolls of witnesses, 15c. per folio and 10c. for each oath administered to witness in support of his claim for his fees; for transcript of proceedings, 15c. per folio; for depositions on examinations, 20c. per folio; for filing each paper, 10c. *U. S. v. Barber*, 140 U. S. 177; *U. S. v. Barber*, 140 U. S. 164; *U. S. v. Ewing*, 140 U. S. 142.

In cases where the defendant is charged with violation of the elective franchise law, he is entitled to a fee of \$10 for all services incident to the arrest and examination. *Hazeltine v. U. S.*, 26 Ct. of Cl. 424.

He is entitled to fees for hearing and deciding criminal charges, where his services consist in fixing the amount of bail, and committing the defendant to jail if it is not tendered. *Faucett v. U. S.*, 26 Ct. of Cl. 154.

In internal revenue cases, unless the complaint is made by an officer of the internal revenue, the complaint must allege personal knowledge on the part of the affiant of the acts constituting the offense, or the prosecution must be approved by the district attorney, or by the circuit or district judge, as a prerequisite to the payment of any fees. Sundry Civil Appropriation Bill, June 30th, 1889; Treasury Circular, July 21st, 1891.

But where the attorney general requested the courts to adopt such a rule, and one of them failed to do so, a commissioner in that circuit who continues to issue warrants without the approval of the district attorney is entitled to his fees. *Morgan v. U. S.*, 24 Ct. of Cl. 481.

An indorsement by the district attorney that "the commissioner will issue the warrant if, in his opinion, there is reasonable ground to believe the accused guilty," is a sufficient compliance with the rule. *Churchill v. U. S.*, 25 Ct. of Cl. 1.

1. The words "like services" mean similar, not identical services, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, it is a

ing returns on warrants and subpœnas,<sup>1</sup> taking and filing depositions,<sup>2</sup> drawing affidavits,<sup>3</sup> administering oaths,<sup>4</sup> drawing and fil-

like service. *U. S. v. Wallace*, 116 U. S. 398.

Where a statute requires the services of public officers, who are paid exclusively by fees, but makes no provision therefor, they are entitled to the fees allowed by law in like cases. *Cass v. U. S.*, 24 Ct. of Cl. 118.

If, for any service which commissioners are authorized to render, no statute or rule of court fixes the compensation, the local law may be resorted to as a proper basis in cases where the fees are payable by the government. 4 Op. of Atty. Gen'l 233. And see *Cooper v. U. S.*, 25 Ct. of Cl. 346.

In *Tennessee*, the seal of a magistrate is necessary to validate a process, and the Rev. Stat., § 1014, requires the process issued by a commissioner to be the same as that issued against offenders under the state law by examining magistrates. The Rev. Stat., § 828, allows clerks one dollar for issuing and entering every process, with certain exceptions, and a further fee of twenty cents for affixing the seal of the court to any instrument when required. Rev. Stat., § 847, allows commissioners the same fees as are allowed clerks for like services. It was held that the allowance of twenty cents applies only to instruments for which specific provisions are not made, and that a commissioner in *Tennessee* is not entitled to such fee for affixing his seal to warrants, writs of *mittimus*, etc., issued by him upon preliminary examinations; such action being a necessary part of the issuance of the process and paid for by the fee for the process. *U. S. v. Clough*, 55 Fed. Rep. 373, reversing 47 Fed. Rep. 791; *Clough v. U. S.*, 55 Fed. Rep. 921.

1. *U. S. v. Ewing*, 140 U. S. 142; *Clough v. U. S.*, 47 Fed. Rep. 791; *Rand v. U. S.*, 48 Fed. Rep. 357; *Clough v. U. S.*, 55 Fed. Rep. 921; *U. S. v. Rand*, 53 Fed. Rep. 348; 3 C. C. A. 556; *Goodrich v. U. S.*, 42 Fed. Rep. 392; *Rand v. U. S.*, 38 Fed. Rep. 665; *McDermott v. U. S.*, 40 Fed. Rep. 217. But see *Stafford v. U. S.*, 25 Ct. of Cl. 280; *Faucett v. U. S.*, 26 Ct. of Cl. 154; *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211.

He is entitled to fees for entering the returns on warrants and subpœnas, since such returns are necessary in order to ascertain what the deputy mar-

shals have done, and what fees they have earned. *In re Gourdin*, 45 Fed. Rep. 842.

2. A charge of twenty cents per folio proper for depositions taken on examination is allowable, but each deposition is not a paper within the meaning of the Rev. Stat., § 828, allowing a "fee for filing and entering every declaration, plea, and other paper," and the charge for filing the same is improper. All depositions attached together and filed are a single paper. *U. S. v. Barber*, 140 U. S. 164.

The *Alabama* Code provides that the magistrate, in a preliminary examination of a criminal, shall reduce the testimony to writing, and styles such testimony a deposition; but the testimony need only be signed by him and need not be certified and filed, nor are the same formalities observed in the proceeding as are prescribed in the taking of depositions; and it was held that such an examination, in the case of one charged with an offense against the *United States*, not reduced to writing by a commissioner in *Alabama*, was a "deposition" within the meaning of the Rev. Stat., § 847, prescribing a fee of twenty cents per folio for taking and certifying depositions to file. *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211.

3. He is entitled to compensation for drafting affidavits of the supervisors that they had actually performed the services, where the attorney general instructs him that such affidavits are required before the supervisors shall be paid for their services. *U. S. v. McDermott*, 140 U. S. 151; 40 Fed. Rep. 217. But see *Stafford v. U. S.*, 25 Ct. of Cl. 280; *Bell v. U. S.*, 25 Ct. of Cl. 26. Or for drawing and filing affidavits upon which warrants are issued, where, by the laws of the state, such affidavits are necessary to the issuance of the warrants. *In re Gourdin*, 45 Fed. Rep. 842; *Ravesies v. U. S.*, 24 Ct. of Cl. 224. Or for drafting affidavits of sureties in bail bonds. *Clough v. U. S.*, 55 Fed. Rep. 921. But a commissioner is not entitled to fees for the preparation of affidavits to facilitate the discharge of the duties of the district attorney, that being no part of his duty. *Ravesies v. U. S.*, 23 Ct. of Cl. 299.

4. He is entitled to a fee of ten cents

ing complaints,<sup>1</sup> issuing writs,<sup>2</sup> and taking acknowledgments and

for each oath administered in connection with complaints in criminal cases, and fifteen cents for each *jurat*, as for a certificate. *U. S. v. Barber*, 140 U. S. 164. And see *Clough v. U. S.*, 55 Fed. Rep. 921; *McDermott v. U. S.*, 40 Fed. Rep. 217.

He is entitled to a fee for administering the oath in every criminal complaint made before him, and for filing the same, but not for drawing the complaint. *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211. And also to a fee for oaths administered to sureties in criminal cases, *Rand v. U. S.*, 36 Fed. Rep. 671; *McKinstry v. U. S.*, 34 Fed. Rep. 211, and for oaths administered to witnesses as to their mileage and attendance, and for each certificate issued to a witness for his pay. *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211.

His *jurat* to an oath of a supervisor of elections is a proper charge under the Rev. Stat., § 828, allowing fifteen cents per folio for entering any returns or making any record, "certificate," return, or report. *U. S. v. McDermott*, 140 U. S. 151. And he is entitled to a fee for administering an oath to a supervisor under the Rev. Stat., § 2927, requiring commissioners to forward oaths of office of supervisors of election. *Hoyne v. U. S.*, 27 Ct. of Cl. 289. But see *Crawford v. U. S.*, 40 Fed. Rep. 446, where it was held that he was not entitled to fees for drawing affidavits and administering oaths in qualifying supervisors, though he performed such services at the request of the chief supervisor. *Crawford v. U. S.*, 40 Fed. Rep. 446.

1. *U. S. v. Barber*, 140 U. S. 164; *U. S. v. Ewing*, 140 U. S. 142; *Rand v. U. S.*, 38 Fed. Rep. 665; *Rand v. U. S.*, 48 Fed. Rep. 357; *Clough v. U. S.*, 47 Fed. Rep. 791; *U. S. v. Barber*, 140 U. S. 177; *Goodrich v. U. S.*, 42 Fed. Rep. 392; *Crawford v. U. S.*, 40 Fed. Rep. 446.

He is entitled to fees for drawing complaints, as for taking and certifying depositions to file; for entering returns of process, and for writing out the testimony of witnesses examined by him. *U. S. v. Ewing*, 140 U. S. 142; *U. S. v. Carter*, 140 U. S. 702. He is entitled to fees for drawing complaints in criminal cases at the rate of twenty cents per folio. *Clough v. U. S.*, 55 Fed. Rep. 921.

He is entitled to fees for drawing complaints in criminal proceedings, in states where it is the practice for the committing magistrate to put them in writing. *U. S. v. McDermott*, 140 U. S. 151, *modifying* 40 Fed. Rep. 217.

He is entitled to fees for drawing complaints, although the accused is already in custody under process from the state court. *U. S. v. Rand*, 53 Fed. Rep. 348; 3 C. C. A. 556.

Though one complaint is ordinarily sufficient, notwithstanding the number of charges against the defendant, the court, in its discretion, may allow the commissioner's charges for more than one case against the same person for violation of the same section of the Revised Statutes. *U. S. v. Barber*, 140 U. S. 177, *reversing* 35 Fed. Rep. 886.

In *Stafford v. U. S.*, 25 Ct. of Cl. 280, and *Faucett v. U. S.*, 26 Ct. of Cl. 154, it was held that he was not entitled to fees for drawing complaints on which to base warrants of arrest, in the absence of a law of the state requiring committing magistrates to do so. And see *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211.

2. In a state where a prisoner is required to be committed to jail during adjournment, for want of bail, a commissioner is entitled to a fee for a *mitimus* issued by him for that purpose, if in his opinion the safe custody of the prisoner requires such precaution. *U. S. v. Ewing*, 140 U. S. 142; *U. S. v. Carter*, 140 U. S. 702. And see *Marvin v. U. S.*, 44 Fed. Rep. 405; *Clough v. U. S.*, 47 Fed. Rep. 791; *Clough v. U. S.*, 55 Fed. Rep. 921; *Hoyne v. U. S.*, 38 Fed. Rep. 542.

But he should not be allowed fees for temporary warrants of commitment issued by him to hold prisoners, already before him on proper warrants, in custody during adjournments, *Gilbert v. U. S.*, 23 Ct. of Cl. 218; unless a jailor refuses to receive the prisoner. *Faucett v. U. S.*, 26 Ct. of Cl. 154; *McCafferty v. U. S.*, 26 Ct. of Cl. 1; *Stafford v. U. S.*, 25 Ct. of Cl. 280.

The commissioner is entitled to fees for warrant, affidavit, etc., where the accused person was not arrested, having left the state. *Marvin v. U. S.*, 44 Fed. Rep. 405; *Faucett v. U. S.*, 26 Ct. of Cl. 154.

A new warrant is necessary when a prisoner is transferred from state to federal custody, and the commissioner

recognizances;<sup>1</sup> but the acknowledgment of a recognizance is a single act for which only a single fee is chargeable, though it be made by both principal and sureties.<sup>2</sup> He is entitled to fees for copies of protest and transcripts of the record returned to the clerk's office;<sup>3</sup> and formerly he was entitled to compensation for keeping a docket when directed by the court to do so, but that is

is entitled to a fee therefor. *Rand v. U. S.*, 48 Fed. Rep. 357.

He is entitled to fees for written orders of commitment and discharge of persons necessarily remaining in the custody of the commissioners over night. *Heyward v. U. S.*, 37 Fed. Rep. 764.

He may charge for issuing two subpoenas in the same case, where the witnesses reside in opposite directions and have to be subpoenaed by different officers. *Goodrich v. U. S.*, 42 Fed. Rep. 392.

He is entitled to a fee of \$1 for issuing, and 10c. for filing, a warrant, and 25c. for issuing a summons, and 10c. for filing it when returned. *McKinstry v. U. S.*, 34 Fed. Rep. 211.

1. *U. S. v. Barber*, 140 U. S. 164. And the fee is fixed by statute at 25c. *Barber v. U. S.*, 35 Fed. Rep. 886.

He is entitled to fees for taking acknowledgments of recognizances, since the acknowledgment is an essential part of the recognizance. *In re Gourdin*, 45 Fed. Rep. 842; *Goodrich v. U. S.*, 42 Fed. Rep. 392; *McKinstry v. U. S.*, 40 Fed. Rep. 813.

Where the justices of the peace of the state have power to take such recognizances, the commissioner is entitled to a fee for a recognizance of record taken by him. *Marvin v. U. S.*, 44 Fed. Rep. 405.

And where a statute of the state provides for taking the recognizance of an offender upon any adjournment of the examination, a commissioner examining an offender is entitled to fees for taking their recognizances from day to day. *U. S. v. Rand*, 53 Fed. Rep. 348; 3 C. C. A. 556, *aff'd*, 48 Fed. Rep. 357.

But where a bond for the defendant's appearance is taken, no recognizance is required, and the charge for taking the same will be disallowed. *Stafford v. U. S.*, 25 Ct. of Cl. 280.

Nor is he entitled to fees for drawing affidavits of justification of sureties to bail bonds of defendants, *Faucett v. U. S.*, 26 Ct. of Cl. 154; nor for taking acknowledgments to bail bonds.

*McKinstry v. U. S.*, 34 Fed. Rep. 211; *Strong v. U. S.*, 34 Fed. Rep. 17.

Fees for recognizances must be allowed, although the instruments exceed the length arbitrarily fixed by the comptroller as sufficient, when they contain no unnecessary verbiage. *Rand v. U. S.*, 48 Fed. Rep. 357.

His fees cannot be scaled, on the ground that the form of recognizance used was longer than necessary, where such form has been used in his district for a long time, and thus impliedly sanctioned by the court. *Crawford v. U. S.*, 40 Fed. Rep. 446.

2. *U. S. v. Barber*, 140 U. S. 177, *rev'd*, 35 Fed. Rep. 886; *U. S. v. Barber*, 140 U. S. 164; *U. S. v. Ewing*, 140 U. S. 142; *Heyward v. U. S.*, 37 Fed. Rep. 764; *U. S. v. Carter*, 140 U. S. 702; *Clough v. U. S.*, 47 Fed. Rep. 791; *Clough v. U. S.*, 55 Fed. Rep. 921; *Heyward v. U. S.*, 37 Fed. Rep. 764.

But where the principal and surety enter into recognizances by separate acknowledgments before the commissioner, he is entitled to a fee for each acknowledgment. *Marvin v. U. S.*, 44 Fed. Rep. 405; *McCafferty v. U. S.*, 26 Ct. of Cl. 1. And see *Crawford v. U. S.*, 40 Fed. Rep. 446; *Rand v. U. S.*, 36 Fed. Rep. 671; *Barber v. U. S.*, 35 Fed. Rep. 886.

It must appear that it was necessary to take separate acknowledgments, *U. S. v. Hall*, 147 U. S. 691; and where both are present and make the acknowledgment at the same time, he is entitled to but one fee. *Faucett v. U. S.*, 26 Ct. of Cl. 154; *Churchill v. U. S.*, 25 Ct. of Cl. 1.

3. He is entitled to fees for copies of process returned to the clerk of the court under § 1014 Rev. Sts., in cases where no charge was made for returning the originals. *Ravesies v. U. S.*, 23 Ct. of Cl. 299; *Churchill v. U. S.*, 25 Ct. of Cl. 1; *Stafford v. U. S.*, 25 Ct. of Cl. 280; *Rand v. U. S.*, 48 Fed. Rep. 357; *Clough v. U. S.*, 47 Fed. Rep. 791; 58 Fed. Rep. 921. And see *Crawford v. U. S.*, 40 Fed. Rep. 446. "Process," however, signifying only the warrant or writ by which the accused was brought

now prohibited.<sup>1</sup> He is also entitled to fees for certificates furnished to witnesses of the amount due them for attendance before him.<sup>2</sup>

to answer the charges preferred against him. *McKinstry v. U. S.*, 34 Fed. Rep. 211.

Fees should be allowed for transcripts of the record, under the statutory provision that "copies of the process shall be returned to the clerk's office." *Marvin v. U. S.*, 44 Fed. Rep. 405; *U. S. v. Barber*, 140 U. S. 164.

Accounting officers of the treasury have no right to make an arbitrary rule limiting the length of such copies. *Rand v. U. S.*, 38 Fed. Rep. 665; *Hoyne v. U. S.*, 38 Fed. Rep. 542.

He is not entitled to be paid for reports of the evidence in examinations before him, made in response to a circular letter of request from the district attorney; there being no law requiring such reports. *Gilbert v. U. S.*, 23 Ct. of Cl. 218; *Faucett v. U. S.*, 26 Ct. of Cl. 154. But where, according to the practice in his state, he makes written notes of the testimony in a case before him, and sends them in to the district attorney, he should be allowed compensation for the same under § 1014 Rev. Sts., requiring the commissioner to perform his duty "agreeably to the usual mode of process" in his state. *Stafford v. U. S.*, 25 Ct. of Cl. 280.

When required by order of the court to forward a transcript of the proceedings in each case examined by them to the clerk, they are entitled to be paid for the copy at the rate of ten cents per folio, and for the certificate annexed thereto at the rate of fifteen cents per folio, and are entitled to compensation for a monthly report in duplicate of all cases instituted or examined before them at the rate of fifteen cents per folio. *McKinstry v. U. S.*, 34 Fed. Rep. 211; *Strong v. U. S.*, 34 Fed. Rep. 17.

1. In *U. S. v. Wallace*, 116 U. S. 398; 20 Ct. of Cl. 273, it was held that a commissioner who, by direction of the court, keeps a docket of entries of each warrant issued and subsequent proceedings thereon, made on the day of the occurrence, is entitled to a fee like that allowed to the clerk for dockets, indexes, etc., although his docket entries may differ from those made by the clerk. And see *Phillips v. U. S.*, 33 Fed. Rep. 164; *Heyward v. U. S.*, 37 Fed. Rep. 764; *Rand v. U. S.*, 38 Fed. Rep. 665. And where the Chinese

Immigration Act of July 5th, 1884 (23 St. at L. 117), imposed duties upon commissioners, but made no provision for compensation, he was held nevertheless entitled to docket fees. *Cass v. U. S.*, 24 Ct. of Cl. 118.

But the Deficiency Appropriation Act of Aug. 4th, 1886 (24 *United States Stats.* 274), providing that commissioners shall "be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees," was held to operate as an amendment to § 847 of the Rev. Stat., and to abolish docket fees altogether. *U. S. v. Ewing*, 140 U. S. 142; *U. S. v. McDermott*, 140 U. S. 151, *rev'g* *McDermott v. U. S.*, 40 Fed. Rep. 217; *U. S. v. Carter*, 140 U. S. 702; *Marvin v. U. S.*, 44 Fed. Rep. 405; *Farris v. U. S.*, 23 Ct. of Cl. 374; *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211; *Rand v. U. S.*, 36 Fed. Rep. 671; *Clough v. U. S.*, 47 Fed. Rep. 791; *U. S. v. Hall*, 147 U. S. 691; *Goodrich v. U. S.*, 42 Fed. Rep. 392; *Crawford v. U. S.*, 40 Fed. Rep. 446; *McKinstry v. U. S.*, 40 Fed. Rep. 813; *Calvert v. U. S.*, 37 Fed. Rep. 762. But see *contra*, *Bell v. U. S.*, 35 Fed. Rep. 889; *Hoyne v. U. S.*, 38 Fed. Rep. 542. But it does not apply to docket fees earned before its passage. *Gardner v. U. S.*, 25 Ct. of Cl. 24; *Thornley v. U. S.*, 37 Fed. Rep. 765; *Rand v. U. S.*, 48 Fed. Rep. 357; *U. S. v. Rand*, 53 Fed. Rep. 348; 3 C. C. A. 556; *Rand v. U. S.*, 36 Fed. Rep. 671.

A commissioner who, before it was required by an order of the circuit court, kept a docket of all criminal cases, according to the practice of his state, was held entitled to his fees therefor. *Knox v. U. S.*, 23 Ct. of Cl. 367. And in *Phillips v. U. S.*, 33 Fed. Rep. 164, it was held that commissioners are impliedly authorized to keep a docket, and entitled to docket fees therefor.

Where the keeping of a commissioner's docket is not required by statute, and no fees are allowed or paid for keeping the same, the commissioner is not bound to allow a special agent of the department of justice to inspect a docket kept by him. *In re Rand*, 18 Fed. Rep. 99.

2. *Clough v. U. S.*, 45 Fed. Rep. 921,



The accounts of commissioners must be verified by oath and submitted for approval in open court by the district attorney,<sup>1</sup> which approval is *prima facie* evidence of the correctness of the items therein charged.<sup>2</sup> But the approval of the court is not a prerequisite to payment, and if the commissioner verifies and presents his accounts, as required by law, and the court declines to act upon them, his right to compensation is not thereby defeated.<sup>3</sup>

following *U. S. v. Barber*, 140 U. S. 164.

1. And the court will thereupon cause an order to be entered of record approving or disapproving the account, as may be according to law and justice. 18 St. at L., ch. 1, p. 95.

A commissioner cannot maintain a suit against the government to collect fees due him, unless his petition is filed within six years of the time when the last item of service charged for was rendered. *Patterson v. U. S.*, 21 Ct. Cl. Rep. 322.

**Payment of Witnesses.** — Witnesses before commissioners are paid by duplicate orders on the marshal of the district. If more than four witnesses are summoned, their materiality and importance must be certified to and approved by the district attorney. *U. S. Rev. St.*, § 981.

2. And in the absence of clear and unequivocal proof of mistake on the part of the court, is conclusive. *U. S. v. Jones*, 134 U. S. 483; *U. S. v. Ewing*, 140 U. S. 142.

And hence a commissioner was held entitled to fees for drawing orders, etc., in excess of the number of folios allowed by the accounting officers, where his account had been approved by the court. *Faucett v. U. S.*, 26 Ct. of Cl. 154; *McCafferty v. U. S.*, 26 Ct. of Cl. 1.

The decision of the comptroller is conclusive only within the executive department, and his disallowance of a commissioner's fees is not within the proviso of the Act of March 3d, 1887 (24 Stats., p. 505), giving the circuit and district courts concurrent jurisdiction of claims against the *United States*, providing that it shall not be construed as giving those courts jurisdiction to hear and determine "claims which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same." *U. S. v. Rand*, 53 Fed. Rep. 348; 3 C. C. A. 556.

3. *U. S. v. Knox*, 128 U. S. 230; *Knox v. U. S.*, 23 Ct. of Cl. 367.

. But the refusal of the court may be considered as bearing on the good faith of the transaction. *Southworth v. U. S.*, 151 U. S. 179.

The law in regard to the duties of the courts in approving the accounts of commissioners is contained in Act of Feb. 27th, 1875 (18 Stat. at L. 333), which provides: "*United States* commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. . . . Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the treasury, as exercised under the laws now in force."

In *Turner's Case*, 19 Ct. of Cl. 629, the court said: "In our opinion, the duty imposed upon the court of examining and approving or disapproving of accounts which are not to be taxed in cases pending therein, and are not chargeable to any fund within its control, but are payable out of the public treasury after review by the accounting officers, is not a judicial power, the exercise of which constitutes the approval or disapproval a judicial determination of the rights of the parties. A similar question, almost identical with this in principle, was discussed in the case of *U. S. v. Ferreira*, 13 How. (U. S.) 40, and we understand the views there expressed in the opinion of the court to warrant the conclusion which we have reached on that point. The statute having made such accounts, after approval or disapproval, subject to revision by the accounting officers of the treasury, in the ordinary processes of accounting, the order of the court is only *prima facie* evidence of the amount due thereon from the *United States*. That evidence may be rebutted by either party when the account is reviewed, either in the treasury department or by this court, in a suit brought upon it."

**UNITED STATES COURTS.**—(See also ADMIRALTY, vol. 1, p. 193; AMOUNT IN CONTROVERSY, vol. 1, p. 563; ATTORNEY GENERAL, vol. 1, p. 974; CONSTITUTIONAL LAW, vol. 3, p. 694; FINAL JUDGMENTS AND DECREES, vol. 7, p. 969; HABEAS CORPUS, vol. 9, p. 235; IMMIGRATION, vol. 9, p. 938; INFERIOR COURTS, vol. 10, p. 700; PATENT LAW, vol. 18, p. 70; REMOVAL OF CAUSES, vol. 20, p. 976.)

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**I. UNITED STATES COURTS IN GENERAL—1. Definition.**—The *United States* courts are the judicial tribunals established and maintained under the federal constitution and laws. They are courts of limited jurisdiction, and can exercise only such powers as are granted by the constitution and the acts of Congress.<sup>1</sup>

**2. Authority and Organization.**—The warrant for the existence of the *United States* courts resides in the constitution and in the laws passed in accordance therewith.<sup>2</sup> The constitution has established a judicial system, and roughly defined its jurisdiction, leaving to the subsequent legislation of Congress to provide for the organization of courts, fix the number of the judges, and regulate

1. *Imperial Refining Co. v. Wyman*, 38 Fed. Rep. 574; *Harland v. United Lines Telegraph Co.*, 40 Fed. Rep. 308; *Kempe v. Kennedy*, 5 Cranch (U. S.) 185; *Kennedy v. Georgia State Bank*, 8 How. (U. S.) 586; *U. S. v. Hudson*, 7 Cranch (U. S.) 32; *Boyce's "Manual of Practice in U. S. Circuit Court"* (1869), p. 21.

In *U. S. v. Lancaster*, 44 Fed. Rep. 885, the court, by Speer, J., said: "The courts of the *United States* are of limited jurisdiction, and they can

try no case which, either in the action of the court, the exercise of its jurisdiction, or in the controversy itself, is not a case provided for by the laws of the *United States*."

The *United States* Const., art. 3, § 1, provides that, "The judicial power of the *United States* shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

2. The provision of the *United States* Const. is to be found in art. 3, § 1.

more minutely the jurisdiction and procedure.<sup>1</sup> As to these matters the constitution is mandatory upon Congress,<sup>2</sup> whose duty it is to provide for them, and that body has full power to make proper changes at any time.<sup>3</sup> This power was exercised in an act passed Sept. 24th, 1789, entitled, "An Act to Establish the Judicial Courts of the *United States*,"<sup>4</sup> and thus was framed the system of tribunals which, with modifications, exists to-day.<sup>5</sup>

**3. Enumeration**—(See also COURTS, vol. 4, p. 447).—The courts of the *United States* are as follows: The Supreme Court; the Circuit Courts of Appeals; the Circuit Courts; the District Courts; the Court of Claims; the Court of Private Land Claims; and the courts of the territories and of the *District of Columbia*. Besides the foregoing, the Senate of the *United States* is a court for the trial of impeachments. There are also sundry other bodies and officers possessing certain judicial or *quasi* judicial powers, but which are not properly judges or courts.<sup>6</sup>

**4. Officers**—*a.* IN GENERAL.—The courts of the *United States* have the usual officers of judicial tribunals, such as clerks, reporters, marshals, deputy marshals, etc. Their duties and fees, and

1. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 721.

2. Speer on "The Law of the Federal Judiciary" (1883), §§ 7 and 8; 1 Kent's Com., lecture 14, p. 290; *Martin v. Hunter*, 1 Wheat. (U. S.) 304.

3. Congress has complete authority to establish courts, and commission officers of courts, in order to carry out the provisions of the constitution. *Stephens, Petitioner*, 4 Gray (Mass.) 559. It may, under the constitution, at any time establish circuit and district courts in any state of the Union, and confer on them both legal and equitable powers. *Livingston v. Story*, 9 Pet. (U. S.) 632. The courts thus established must, however, be invested with judicial powers, and cannot be made the instruments of Congress for conducting mere legislative investigation. *In re Pacific Railway Commission*, 32 Fed. Rep. 241. Military courts of a temporary character may be established in a state in insurrection. *The Bark Grapeshot*, 9 Wall. (U. S.) 129. Congress cannot confer judicial power on an executive officer. *Beatty v. U. S.*, Dev. Ct. of Cl. 231. Nor on a military commission. *Ex p. Milligan*, 4 Wall. (U. S.) 121. Congress may make changes in the constitution of courts pending a suit, so as to oust jurisdiction which has already attached. *Ex p. McCardle*, 7 Wall. (U. S.) 506.

4. Dunlap's "Digest of the General Laws of the *United States*" (1856), p. 40.

5. Justice Stanley Matthews' "Judicial Power of the *United States*" (pamphlet 1888), p. 13.

6. The interstate commerce commission is not a court. The court, by *Jackson, J.*, in *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, said it "is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. . . . The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of, and report upon, matters for subsequent judicial examination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the *United States*, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act. It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings."

The commissioner of pensions is not a judicial officer, and the *United States* can go behind his decisions and recover money paid under pensions improv-

the rules governing their eligibility and appointment, are in general prescribed by statute.<sup>1</sup>

*b. JUDGES*—(1) *Appointment and Removal*.—The President is empowered by the constitution to “nominate, and by and with the advice and consent of the Senate . . . appoint judges of the supreme court, and all other officers of the *United States* whose appointments are not otherwise provided for.”<sup>2</sup> This clause includes the appointment of judges of the lower federal courts, which is to be made in the same manner as that of the justices of the supreme court.<sup>3</sup>

Before exercising the powers, and performing the duties of judge, the appointee must take the oath of office prescribed by law.<sup>4</sup> The distinction between officers *de facto* and *de jure* existing at common law applies in the case of *United States* judges, and the powers, and the effect of the acts of each are governed by the general legal rules.<sup>5</sup>

The judges, when appointed, hold office during good behavior,<sup>6</sup> and receive for their services compensation which cannot be diminished during their continuance in office.<sup>7</sup> They are amenable for any corrupt violation of their trust, being subject to impeachment by the Senate. If convicted, they may be removed from office.<sup>8</sup>

(2) *Duties and Powers*.—It is the duty of the judge to preside at trials, decide upon questions of the admissibility of evidence, charge the jury, summing up the evidence, and, at his discretion,

erly granted. *U. S. v. Lalone*, 44 Fed. Rep. 475.

1. *Residence*.—Act of June 20th, 1874, ch. 328, § 2; 18 St. at L. 85; Supplement to Rev. St. (2d ed.), p. 18.

*Cannot Practice Law*.—*U. S. Rev. St.*, §§ 748, 749.

*Fees*.—*U. S. Rev. St.*, §§ 825, 827, 831, 833, 834, 849, 850. See *COSTS*, vol. 4, p. 313; *FEES*, vol. 7, p. 819.

2. *United States Const.*, art. 2, § 2.

3. *Kent's Com.*, vol. 1, lecture 14, p. 291.

4. *U. S. Rev. St.*, § 712.

5. A decree pronounced by a judge after his resignation, but before his successor is appointed, is valid as being the act of a judge *de facto*. *Northrop v. Gregory*, 2 Abb. (U. S.) 503.

6. In *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, the court, by Jackson, C. J., said: “Congress, in ordaining and establishing inferior courts and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office, that of holding ‘during good behavior,’ before they can become invested with any portion of the judicial power of

the government.” This provision of the constitution does not apply to judges of the territorial courts who exercise strictly no part of the “judicial power,” but are officers of courts erected by the *United States*, by virtue of its sovereignty over the territories. *American, etc., Ins. Co. v. 356 Bales of Cotton*, 1 Pet. (U. S.) 546; *McAllister v. U. S.*, 141 U. S. 176.

7. *United States Const.*, art. 3, § 1.

After ten years of service, and having attained the age of seventy years, a judge may retire on full pay. *U. S. Rev. St.*, § 714.

The fees of justices of the peace in the *District of Columbia* cannot be diminished during their term of office. *U. S. v. Moor*, 3 Cranch (U. S.) 160.

8. “Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the *United States*; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.” *United States Const.*, art. 1, § 3.

expressing his opinion on the facts, render judgments and decrees, and perform the other general judicial functions.<sup>1</sup>

To this end he is invested with the authority and powers usually granted to judges by the common law.<sup>2</sup> This includes the power to administer oaths, preserve order, and punish for contempt.<sup>3</sup> In addition to these general powers the statutes grant him certain special authority, as that of arresting offenders against the laws of the *United States*,<sup>4</sup> and issuing writs of *habeas corpus*.<sup>5</sup>

During his term of office he is forbidden to practice law.<sup>6</sup> In making official appointments, he is prohibited from conferring any office in his gift upon a near relative, either by blood or by affinity.<sup>7</sup>

**1. Summing Up the Evidence.**—It is the duty of the trial judge to sum up the evidence in order to assist the jury. *U. S. v. Lancaster*, 44 Fed. Rep. 896; *Rucker v. Wheeler*, 127 U. S. 85.

He may, in either civil or criminal cases, whenever he thinks it will assist them in arriving at a just conclusion, express his opinion on the questions of fact which he submits to them. *Simmons v. U. S.*, 142 U. S. 148; *Vicksburg R. Co. v. Putnam*, 118 U. S. 545; *U. S. v. Philadelphia, etc., R. Co.*, 123 U. S. 113.

In *Lovejoy v. U. S.*, 128 U. S. 171, the court, by Gray, J., said: "It is established by repeated decisions that a court of the *United States*, in submitting a case to the jury, may, at its discretion, express its opinion upon the facts, and that such an opinion is not reviewable in error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury."

The practice in *United States* courts is quite different in this regard from that of the state courts. The *United States* judge can comment on facts, although whatever he says will be advisory only, and have the effect alone of aiding the independent judgment of the jury. *U. S. v. Hall*, 44 Fed. Rep. 864.

In *Nudd v. Burrows*, 91 U. S. 439, the court, by Swayne, J., said: "Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence, and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them by recalling the testimony to their recollection, by col-

lating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge."

**Rulings.**—A judge will, in general, follow the rulings of one of his colleagues at a former stage of the case, or a precedent established in another case. *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685; *Wakelee v. Davis*, 44 Fed. Rep. 532; *Worswick Mfg. Co. v. Philadelphia*, 30 Fed. Rep. 625. But this is not invariable. *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604.

Greater respect will be paid to the ruling of a higher judge than to that of a lower judge. *Preston v. Walsh*, 10 Fed. Rep. 315.

**2.** *U. S. v. Hudson*, 7 Cranch (U. S.) 32.

**3.** See U. S. Rev. St., § 715.

Authority existed, however, independently of this statute, it being implied in the very existence of the court. *U. S. v. Lancaster*, 44 Fed. Rep. 885.

**4.** U. S. Rev. St., § 1014.

**5.** U. S. Rev. St., § 752.

**6.** U. S. Rev. St., § 713.

**7.** "No person related to any justice or judge of any court of the *United States*, by affinity or consanguinity within the degree of first cousin, shall hereafter be appointed to, or employed by, such court or judge in any office or duty in any court of which such justice or judge may be a member." 25 St. at L., p. 437.

Being a judicial officer, he cannot be required to perform any but judicial duties.<sup>1</sup> He is, while exercising the functions of his office, exempt from civil liability for his judgments.<sup>2</sup> In order that his acts may have the binding effect of valid judgments, they must be performed while the court is in session, or while he is exercising his legal powers in chambers. Under other circumstances, even though present in body, he is absent in the eye of the law.<sup>3</sup>

*c. CLERKS*—(1) *Appointment and Removal*.—Clerks are inferior officers whose appointment has been vested by Congress in the courts of law under certain restrictions differing in the several courts.<sup>4</sup> This power of appointment implies the right to remove, which may be exercised at any time by the appointing power, either by direct act, or by granting the office to a successor of the incumbent. The exercise of the right cannot be reviewed by the *United States Supreme Court*.<sup>5</sup> The clerk must, before entering on his duties, take the oath of office,<sup>6</sup> and give a bond in a sum to be fixed and sureties to be approved by the court which appoints him, for the faithful discharge of his duties.<sup>7</sup>

(2) *Powers and Duties*.—It is the duty of the clerk to keep the records, enter promptly the decrees, judgments, and determinations of the court, issue its process, and perform the other acts required of him by the law.<sup>8</sup> He is required to give his personal attention to the duties of his office,<sup>9</sup> and can hold or exercise no incompatible office, appointment, or employment.<sup>10</sup>

1. *Hayburn's Case*, 2 Dall. (U. S.) 410; *U. S. v. Todd*, 13 How. (U. S.) 52, note; *U. S. v. Ferreira*, 13 How. (U. S.) 49, note. The decision of a judge in matters arising upon the account of a *United States* marshal, although made in open court, is only *quasi* judicial. *U. S. v. Strobach*, 48 Fed. Rep. 908.

2. *Randall v. Brigham*, 7 Wall. (U. S.) 523; *Bradley v. Fisher*, 13 Wall. (U. S.) 335.

3. *Bingham v. Cabot*, 3 Dall. (U. S.) 19. See also *JUDGE*, vol. 12, p. 2.

4. *United States* Const., art. 2, § 2; *Ex p. Hennen*, 13 Pet. (U. S.) 230.

5. *Ex p. Hennen*, 13 Pet. (U. S.) 230.

6. *U. S. Rev. St.*, § 794.

7. *U. S. Rev. St.*, § 795; 18 St. at L., p. 333; *Sup. Rev. St.* (2d ed.), p. 65.

A new bond may be required at an amount to be fixed by the attorney general, not to exceed forty thousand dollars, should the business of the court render it necessary. Act Feb. 22d, 1875, 18 St. at L. 233; *Sup. Rev. St.* (2d ed.), p. 65.

8. *U. S. Rev. St.* §§ 795, 911.

*Records*.—There are no statutes prescribing what records the clerk shall keep or how they shall be kept in crim-

inal cases. In a general way he must be guided by the common law. *Erwin v. U. S.*, 37 Fed. Rep. 470.

Defects in the record in appeals to higher courts are cured by writs of *certiorari* addressed to the clerk of the court below, directing him to send up the omitted portions. *Curtis* on "Jurisdiction of U. S. Courts" (1880), p. 91.

Citizens have the right to examine the docket of decrees and judgments of circuit and district courts during office hours without the payment of fees. The clerk is entitled to charge only when he is required to make the search himself. *U. S. Rev. St.*, § 828; *In re Chambers*, 44 Fed. Rep. 786; *In re McLean*, 9 Cent. L. J. 425.

For the proper practice and the fees where the clerk is required to make such search, see *In re Woodbury*, 7 Fed. Rep. 705; 17 Blatchf. (U. S.) 517.

9. Act of June 20th, 1874; 18 St. at L., p. 85, ch. 328; *Sup. to U. S. Rev. St.* (2d ed.), p. 18.

10. Such as practicing law in his own court or district, *U. S. Rev. St.*, § 748, or acting as receiver or master except where the judge of the court shall determine that special reasons exist therefor, which reasons shall be assigned in



(3) *Deputies*.—Provision is made by statute for the appointment of deputies to the clerks of the various courts. The deputy is the mere representative of his principal. He stands in his place, exercises his rights, and performs his duties. The principal is entitled to the fees earned by him.<sup>1</sup>

(4) *Fees*.—(a) *In General*.—The fees of clerks are fixed by statute for each of the courts of the *United States*. The principal ones are prescribed in the revised statutes, and for the circuit and district courts are given in the note.<sup>2</sup>

the order of appointment. Act of March 3d, 1879; 20 St. at L. 415. But the offices of clerk and *United States* commissioner are not incompatible and a person performing both duties may receive the pay of both. *Erwin v. U. S.*, 37 Fed. Rep. 470. Nor are those of clerk and jury commissioner. *Goodrich v. U. S.*, 47 Fed. Rep. 267; *Marvin v. U. S.*, 44 Fed. Rep. 405; *Erwin v. U. S.*, 37 Fed. Rep. 470.

**Duties in Regard to Judgments.**—Every clerk of a circuit or district court shall, within thirty days after the adjournment of each term thereof, forward to the solicitor of the treasury a list of all judgments and decrees, to which the *United States* are parties, which have been entered in said court, respectively, during such term, showing the amount adjudged or decreed, in each case, for or against the *United States*, and the term to which execution thereon will be returnable. U. S. Rev. St., § 797.

**Accounts.**—At each regular session of any court of the *United States*, the clerk shall present to the court an account of all money remaining therein or subject to its order, stating in detail in what causes they were deposited and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court. U. S. Rev. St., § 798.

**Special Powers.**—Among the special powers granted to the clerk are, in case of absence or disability of the judge, the administering of oaths by circuit and district clerks to persons identifying papers found and to be used in admiralty trials, U. S. Rev. St., § 799; and the issuance of warrants of attachment on presentation of proper affidavit. U. S. Rev. St., § 926.

1. *Erwin v. U. S.*, 37 Fed. Rep. 470. See *DEPUTY*, vol. 5, p. 639.

2. **Clerk's Fees.**—The term folio, as used in the fee-bill, means one hundred words, counting each figure as a word.

In counting the folios, each separate or distinct order, or other proceeding, is to be counted separately, and is to be considered one folio, if more than one hundred words are counted. If the proceeding contains less than one hundred words, and over fifty in number, they are to be counted as one folio; but if less, they are not to be counted at all. U. S. Rev. St., § 854; *Erwin v. U. S.*, 37 Fed. Rep. 470.

For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a venire, or a summons or subpoena for a witness, one dollar; for issuing a writ of summons or subpoena, twenty-five cents. When there is a rule of court that the clerk, in issuing subpoenas in criminal cases, shall make copies of subpoenas to be left with the witnesses, he is entitled to charge for such copies. *U. S. v. Van Duzee*, 140 U. S. 169. Where the copies are made, in criminal cases, at the request of the district attorney, the fees are properly chargeable to the government. *Erwin v. U. S.*, 37 Fed. Rep. 470.

For filing and entering every declaration, plea, or other paper, ten cents. The clerk is allowed his fee for filing each separate paper connected with the arrest of offenders, under U. S. Rev. St., § 1014, and not one fee only for each case. *Taylor v. U. S.*, 45 Fed. Rep. 531; *Goodrich v. U. S.*, 35 Fed. Rep. 194. Thus, a clerk receiving papers from a commissioner holding the examination in a criminal case, is entitled to his fee for filing each one. U. S. v. *Van Duzee*, 140 U. S. 169. In *Erwin v. U. S.*, 37 Fed. Rep. 470, it was decided that the different papers need not be fastened together. In order that a paper be filed, it must be properly indorsed by the clerk, *Amy v. Shelby Co.*, 1 Flip. (U. S.) 104; but an entry on the court docket is not in every case necessary. *U. S. v. Van Duzee*, 140 U. S. 169. The clerk is entitled to his fees for each

voucher filed with his report of money on hand. *Goodrich v. U. S.*, 35 Fed. Rep. 193. The clerk may charge for filing *præcipes* when they are necessary, as in case of a *præcipe* for a bench warrant; but a *mittimus* after sentence is an unnecessary paper, not required by law, and no fee for filing it can be collected. *U. S. v. Van Duzee*, 140 U. S. 169. The clerk is entitled to fees for filing receipts from the collector of the *United States*; for fines paid by persons sentenced for violation of the internal revenue laws; for filing the written report of the district attorney as to the result of his examination of the accounts of the marshal, clerk, and commissioners; for filing discharges given by the district attorney to witnesses of the government; and for filing vouchers and duplicates accompanying the accounts of the marshal. *Van Duzee v. U. S.*, 48 Fed. Rep. 643.

For administering an oath or affirmation, except to a juror, ten cents. The clerk is entitled to compensation for administering the oath to witnesses in criminal cases, compensation for this service not being included in the docket fees. *Van Duzee v. U. S.*, 48 Fed. Rep. 643. He is allowed to charge for taking the affidavit as to the services of government witnesses. *Taylor v. U. S.*, 45 Fed. Rep. 531. The clerk cannot claim a fee for administering the oath of office to a district attorney, deputy marshal, jury commissioner, or bailiff, or for drafting their bonds, as "it is the duty of persons receiving appointments from the government to prepare and tender to the proper officer the oaths and bonds required by law; in other words, to qualify themselves for the office. What shall be done with such qualifying papers does not concern them. Their duty is discharged by the tender of such papers properly executed according to law." *Brown, J.*, in *U. S. v. Van Duzee*, 140 U. S. 169.

For taking an acknowledgment, twenty-five cents. The clerk is entitled to fees for taking the acknowledgment of sureties on recognizances. *Davis v. U. S.*, 45 Fed. Rep. 162; *Erwin v. U. S.*, 37 Fed. Rep. 470; *Jones v. U. S.*, 39 Fed. Rep. 410; *Goodrich v. U. S.*, 35 Fed. Rep. 193; *Rand v. U. S.*, 36 Fed. Rep. 674. In *U. S. v. Barber*, 140 U. S. 177, the court, by *Brown, J.*, said: "We have already held that a fee is properly chargeable for the acknowledgment of a recognizance,

but that such acknowledgment is a single act, though it be made by a principal and sureties, and that but a single fee is chargeable therefor." To the same effect are *U. S. v. Ewing*, 140 U. S. 142; *Churchill v. U. S.*, 25 Ct. of Cl. 1.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words; for a copy of such deposition furnished to a party on request, ten cents a folio. This clause includes a copy of a party's own deposition for use in printing evidence under a rule of court. *Brewster v. Shuler*, 38 Fed. Rep. 549.

For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents. The clerk is entitled to fifteen cents per folio for approving recognizances in criminal cases, by indorsing them in accordance with the usual practice. *Van Duzee v. U. S.*, 48 Fed. Rep. 643. Also for entering orders of continuance from day to day. *Taylor v. U. S.*, 45 Fed. Rep. 531. The clerk is not entitled to fees as for reports for letters transmitting receipts of the depository for money and stating the case and its nature, as the commissioners are intended to pay for these services. *Marvin v. U. S.*, 44 Fed. Rep. 405. The clerk is entitled to fees for entering the order requiring the marshal to pay jurors and for copies of the same for the marshal, and for making a report to the court of the *per diem* and mileage due the jurors. *Van Duzee v. U. S.*, 48 Fed. Rep. 643. The clerk is entitled to fees for entering orders of the approval of accounts of district attorneys, marshals, and commissioners. *Davis v. U. S.*, 45 Fed. Rep. 162; *Erwin v. U. S.*, 37 Fed. Rep. 470; *Jones v. U. S.*, 39 Fed. Rep. 410; *Goodrich v. U. S.*, 35 Fed. Rep. 193; *Rand v. U. S.*, 36 Fed. Rep. 671; *Dimmick v. U. S.*, 36 Fed. Rep. 82. The clerk may recover his fees for entering on the minutes, by order of the court, resolutions in memory of a public servant. *Erwin v. U. S.*, 37 Fed. Rep. 470.

For a copy of any entry or record or of any paper on file, for each folio, ten cents. It has been held in reported cases in the southern district of *New York* that the provision authorizes the clerk to forbid an attorney or party, to himself copy a paper in a suit or even an opinion, without payment of the

(b) **Fees for Special Service.**—While the fees of the clerk are in general strictly prescribed by statute, it does not follow that, if no specific provision has been made by Congress for payment for the services rendered, no fees may be charged. On the

same fees as if the clerk had made the copy. But this is probably not the law. 1 Foster's Federal Practice (2d ed.), § 331. The government must pay for copies of indictments furnished to defendants under order of the court. *U. S. v. Van Duzee*, 140 U. S. 169. The clerk is entitled to a fee for a duplicate of an order of the court which is in itself a voucher for the benefit of the marshal. *Van Duzee v. U. S.*, 48 Fed. Rep. 643. A clerk is entitled to proper fees for making and authenticating orders of the court upon a marshal to bring prisoners, who have been committed by a commissioner to jails of other counties, to court for trial. *Taylor v. U. S.*, 45 Fed. Rep. 531.

For making dockets, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined, and testimony given, three dollars. In *U. S. v. Van Duzee*, 140 U. S. 199, the court, by Brown, J., said: "The docket fee of three dollars was intended to cover the entry of the case upon the docket, indexing the same, making contemporaneous minutes and entries upon the docket or calendar, and such other incidental services as are not covered by other clauses of the statute. Where, however, the entry is not a mere memorandum, but requires to be made part of a permanent record, it is a proper subject of a charge per folio." An attachment for contempt against a defaulting witness or juror is a "cause" in which the clerk is entitled to his docket fee. *Erwin v. U. S.*, 37 Fed. Rep. 470; *Taylor v. U. S.*, 45 Fed. Rep. 531.

For making dockets and indexes, taxing costs, and all other services in a cause where issue is joined, but no testimony is given, two dollars; for making dockets and taxing costs and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar; for making dockets and taxing costs in cases removed by writ of error or appeal, one dollar; for affixing the seal of the court to any instrument when required, twenty cents. The clerk is allowed fees for attaching certificates and seals to copies of the orders of the courts when required.

*Taylor v. U. S.*, 45 Fed. Rep. 351. But see *Jones v. U. S.*, 39 Fed. Rep. 410.

For every search for any particular mortgage, judgment, or other lien, fifteen cents. This is exclusive of his fee of ten cents for filing the requisition for search. *In re Woodbury*, 7 Fed. Rep. 705.

For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made; for receiving, keeping, and paying out money in pursuance of any statute or order of court, one *per centum* on the amount so received, kept and paid. This includes money collected by the marshal in execution. *Fagan v. Cullen*, 28 Fed. Rep. 843. No commission is allowed the clerk "for receiving, keeping and paying out, in pursuance of any statute or order of court," any money, unless the money passes through his hands. *Upton v. Tribblecook*, 4 Dill. (U. S.) 232, note; *In re Goodrich*, 4 Dill. (U. S.) 230; *Leech v. Kay*, 4 Fed. Rep. 72; *Ex p. Plitt*, 2 Wall. Jr. (C. C.) 453; *Easton v. Houston*, etc., R. Co., 44 Fed. Rep. 718.

For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents a mile for returning, and five dollars a day for his attendance on the court while actually in session. The clerk is entitled to his *per diem* if he attends while the court is actually in session, whether any business is transacted on such days or not. If both circuit and district courts are in session at the same time, he can charge his *per diem* in either at his discretion, and the government officials cannot transfer the items to the account of the other court so as to cut down his compensation under the *maximum* allowance rule. *Goodrich v. U. S.*, 35 Fed. Rep. 193. The clerk may collect his *per diem* and his fees for entering orders, etc., when the circuit court is open, under the U. S. Rev. St., §§ 2011, 2014, providing for a term of the circuit court to appoint supervisors of elec-

contrary, wherever a service is performed, either in pursuance of law,<sup>1</sup> or at the request of a proper party,<sup>2</sup> or in accordance with an order of court,<sup>3</sup> the presumption is that the clerk shall be allowed his reasonable fees.

Where, however, the services performed are clearly outside of his duties as clerk, or where there is no provision of law for compensation, either express or by fair implication, no fees may be charged.<sup>4</sup> In case of disputed fees, the decision of the comptroller of the treasury disallowing charges, is not conclusive against the clerk.<sup>5</sup> While deputies are the mere representatives of their principals, yet where the law requires clerks to be in two places at the same time, the clerks will be entitled to double fees for services performed by themselves and their deputies.<sup>6</sup>

(c) *Accounting to Government and Compensation to Be Retained by the Clerk.*—The Revised Statutes provide that of the fees and emoluments received by circuit and district clerks, all, except a sum not exceeding thirty-five hundred dollars a year, shall be accounted for to the proper officers of the *United States*.<sup>7</sup> In prize cases, clerks may retain an additional amount not exceeding one-half of the compensation allowed them by way of their regular

tions. *Pleasant v. U. S.*, 35 Fed. Rep. 270. And he is entitled to his fees rendered in respect to such supervisors of election, even though the judge erred, and improperly ordered the appointment of a supervisor. *Goodrich v. U. S.*, 35 Fed. Rep. 193. No *per diem* is allowed for attendance at rule day. *U. S. Rev. St.*, § 831.

1. *Erwin v. U. S.*, 37 Fed. Rep. 470, where the court, by Speer, J., said, in reference to services performed by the clerk in the selection of jurors under the act of June 30th, 1879 (21 St. at L. 43); (*Sup. to U. S. Rev. St.* (2d ed.), p. 270): "Here was a new, important, and arduous duty placed upon the clerk, not contemplated at the time of the enactment of the clerk's fee-bill in 1853 (*U. S. Rev. St.* § 828), and yet the act is silent as to compensation to the clerk or to the jury commissioner. If the silence of the act in this particular be indicative of an intention to throw this additional labor upon the clerk without any compensation therefor, as Congress had an undoubted right to do, it would be indicative also of an intention not to compensate the jury commissioner, whose appointment is provided for also, and to make that office purely honorary. But the attorney general appears to have held otherwise. He allowed what he considered reasonable compensation to jury commissioners out of the fund

appropriated for the miscellaneous expenses of the courts. Annual Report of the Atty. Gen'l for 1883, p. 19."

In a case where an act of Congress is doubtful in the matter of compensation to officers for new services, the contemporaneous construction of the act by the government officials is of great weight. *U. S. v. Hill*, 120 U. S. 169.

2. *U. S. v. Van Duzee*, 140 U. S. 169; 1 Foster's Federal Practice (2d ed.), § 331, p. 606.

3. *U. S. v. Van Duzee*, 140 U. S. 169, where the court, by Brown, J., said: "When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

4. As for services in keeping a list of the names and residences of jurors, *Marvin v. U. S.*, 44 Fed. Rep. 405; Act of Jan. 31st, 1879, ch. 39, St. at L., p. 277; *Sup. Rev. St.* (2d ed.), p. 211.

5. *Davis v. U. S.*, 45 Fed. Rep. 162; *Harmon v. U. S.*, 43 Fed. Rep. 561.

6. *Erwin v. U. S.*, 37 Fed. Rep. 470. See generally *COSTS*, vol. 4, p. 313; *FEES*, vol. 7, p. 819.

7. *U. S. Rev. St.*, § 839. The surplus must be paid into the treasury. *U. S. Rev. St.*, § 844. Special provision is made for clerks in *California*,

salary.<sup>1</sup> The compensation of clerks for each year shall, in all cases, be allowed only out of the fees and emoluments of that year.<sup>2</sup>

*d. MARSHALS AND OTHER MINISTERIAL OFFICERS*—(See also *SHERIFFS*, vol. 22, p. 564).—The marshal is the chief ministerial officer of the *United States* court, and his principal duties are to preserve order during the trial, and execute the process of the court.<sup>3</sup> Among the inferior officers of the courts are criers, who may be appointed either by the circuit or district courts or by the marshal.<sup>4</sup>

*e. ATTORNEYS*—(See also *ATTORNEY AND CLIENT*, vol. 1, p. 942)—(1) *In General*.<sup>5</sup>—In every case in the federal courts, a party has a right to plead and manage his own cause.<sup>6</sup> If, however, he appoints an attorney, the authority of the latter, while acting within the scope of his employment, is complete, and he cannot be hampered in the discharge of his duty by the actions of other agents of his client.<sup>7</sup> In order to entitle an attorney to be heard, he must be a member of the bar of the court.<sup>8</sup>

(2) *Fees of Attorneys Generally*.—The fees of attorneys in the *United States* courts are established by law;<sup>9</sup> they are recovered

*Oregon and Nevada.* U. S. Rev. St., § 840.

1. U. S. Rev. St., § 842.

2. U. S. Rev. St., § 843.

3. 2 Bouv. Law Dict. (12th ed.), p. 107.

4. U. S. Rev. St., § 715.

5. The regulations as to the admission of attorneys, the rules governing them, and the practice as to discipline in case of misfeasance, differ in the various *United States* courts. These matters are, in general, in the discretion of the court. U. S. R. S., § 747.

6. U. S. R. S., § 747.

7. *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. (U. S.) 338.

8. By judicial courtesy, a member of the bar of the *United States* Supreme Court will generally be recognized in a circuit or district court without producing any warrant of authority. 1 *Foster's Federal Practice* (2d ed.), § 101. See also the case of *Goodyear Dental Vulcanite Co. v. Osgood*, 13 Off. Gaz. 325.

9. U. S. Rev. St., § 824. The court will protect an attorney in his fees. *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352; *McPherson v. Cox*, 96 U. S. 404.

The fees provided by law are as follows: "On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty

dollars: Provided, that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars." A district attorney appearing for the government in an attachment for contempt is allowed the statutory fees. *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456. For services rendered in bringing suit against a national bank, and obtaining a forfeiture of its charter, he is entitled to his fees. *Bashaw v. U. S.*, 47 Fed. Rep. 40. If, after a decree refusing a preliminary injunction, the plaintiff dismisses the bill, the docket fee of twenty dollars is taxable for the solicitor of the prevailing party upon final hearing. *Louisville, etc., R. Co. v. Merchant's Compress, etc., Co.*, 50 Fed. Rep. 449. The fee is allowed as for a jury trial, although the jury disagrees. *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456. A district attorney is entitled to compensation under this section of the revised statutes for services rendered by him in defending an action brought against the *United States* by an ex-district attorney for fees alleged to have been earned by the latter while in office. *Bashaw v. U. S.*, 47 Fed. Rep. 40. In cases at law when judgment is rendered without a jury, ten dollars; in cases at law when the cause is discontinued, five dollars; for *scire facias* and other proceed-

in like manner as the fees of the attorneys of the states respectively for like services rendered.<sup>1</sup> The scale of fees laid down in the revised statutes does not, however, prohibit attorneys from charging and receiving from their clients, other than the government, such compensation as is sanctioned by usage in the states, or agreed upon by the parties.<sup>2</sup>

(3) *Attorneys of the United States*.—The counsel of the *United States* are chiefly the attorney general, solicitor general, the district attorneys, and their assistants, together with the counsel specially retained.

(a) *Attorney General and Solicitor General*.<sup>3</sup>—See ATTORNEY GENERAL, vol. 1, p. 974.

(b) *District Attorneys*.—(See also DISTRICT OR PROSECUTING ATTORNEYS, vol. 5, p. 713).—District attorneys are sworn officers of the government appointed for a term of four years.<sup>4</sup> They are required to be persons learned in the law,<sup>5</sup> and represent the government in its legal matters, generally within the districts for which they are appointed.<sup>6</sup> It is the general, but not universal, rule that there shall be a district attorney for each separate district.<sup>7</sup>

(c) *Compensation of District Attorneys*.—(See also DISTRICT OR PROSECUTING ATTORNEYS, vol. 5, p. 713).—The district attorneys are allowed fees for particular services in addition to those of attorneys generally.<sup>8</sup> They may also be employed by the

ings on recognizances, five dollars; for each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. This fee is allowed in any case, and it is immaterial before what officer the deposition was taken. *Ferguson v. Dent*, 46 Fed. Rep. 88.

1. U. S. R. S., § 857.

2. U. S. R. S., § 823.

3. U. S. R. S., § 347.

4. U. S. R. S., § 769.

5. U. S. R. S., § 767.

6. U. S. R. S., § 771. See also U. S. R. S., § 838.

On instituting a suit for the recovery of any fine, penalty, or forfeiture, the district attorney is required to immediately transmit a statement thereof to the solicitor of the treasury. U. S. R. S., § 772.

He is required, immediately after the end of every term of the circuit and district courts, to forward a report of the cases to the solicitor of the treasury, and on October first of each year, must make a report of the litigation in his district for the year past. U. S. R. S., § 773.

For returns to the commissioners of internal revenue and the various other reports required, see U. S. R. S., §§ 774, 775.

By the settled practice of the *United States* courts, the district attorney and assistants are permitted to attend before the grand jury, *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; and the fact that a stenographer of the district attorney, at the latter's request, attended before the grand jury and took notes of the testimony, is no ground for quashing an indictment. *U. S. v. Simmons*, 46 Fed. Rep. 65.

7. A special legislation exists affecting certain states in this regard. U. S. R. S., § 767.

8. The district attorney is allowed fees for attendance before a commissioner on days when recognizance was taken and the hearing was continued; and also for attendance for the examination of poor convicts applying for discharge. *Bird v. U. S.*, 45 Fed. Rep. 110; *Stanton v. U. S.*, 37 Fed. Rep. 259.

He is entitled to mileage from his place of abode to the place of any examination of a person charged with crime, before a commissioner, and to his *per diem* for the examination of such person before such commissioner in any case where, in his judgment, it was necessary for him to attend, and he actually did attend such examination. *U. S. v. Perry*, 50 Fed. Rep. 743.

department of justice for the performance of services not covered by their fees and salaries, as established by law, and paid therefor.<sup>1</sup> They may also collect their fees for action taken on the complaints of the collectors of their districts as to alleged violations of the customs laws, even though no proceedings are instituted.<sup>2</sup> Certain fees are also allowed in other cases.<sup>3</sup> In general, as to the multifarious duties of the district attorney, it may be said that no compensation can be allowed, unless it is expressly provided or reasonably implied from the terms of the law directing that the services be performed.<sup>4</sup>

(d) **Accounting to the Government and Compensation to Be Retained.**—The district attorneys are required to make a semi-annual return of fees,<sup>5</sup> and an annual account of sums received for their services in prize causes, and they can retain of the latter amount a sum not exceeding three thousand dollars annually, in addition to the compensation otherwise allowed them.<sup>6</sup>

(e) **Special Counsel of the Government.**—Special counsel may be employed by the government to conduct suits involving public

If the district attorney in his service of the government selects routes which are most convenient and practical, though such routes are not the shortest, yet he is entitled to mileage fees. *U. S. v. Perry*, 50 Fed. Rep. 743.

Where a district attorney goes from a place where he is engaged in the duties of his office to a place whither he is officially called to appear before a commissioner, where the distance is less than from his home to the place where the commissioner sits, he is entitled to mileage fees for the distance traveled. In *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456, the court, by Allen, J., said: "If in such cases the distance to the point of examination has been greater than from the place of his abode, the objection to the allowance of the items might be well founded; but where there was a saving to the government by the course pursued, it should not be heard in the complaint."

The power to allow counsel fees resides in the court, and allowances made are not subject to reduction by the attorney general or any other officer of the government. *U. S. v. Waters*, 133 U. S. 208; *Bird v. U. S.*, 45 Fed. Rep. 110.

Thus the accounting officers of the treasury have no jurisdiction in the matter. *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456; *U. S. v. Waters*, 133 U. S. 208.

1. Act of June 20th, 1874, ch. 328, § 3; 18 St. at L., p. 85; Supp. to Rev. St.

(2d ed.), p. 18. As in searching the titles to land purchased by the *United States* government. In such cases the attorney general is invested with the sole power to fix fees. *Op. Atty. Gen'l*, vol. 19, p. 63.

2. Act of June 22d, 1874, ch. 391, § 15; 18 St. at L. 186; Supp. to Rev. St. (2d ed.), p. 34; *Bashaw v. U. S.*, 47 Fed. Rep. 40; *In re Account of District Attorney*, 23 Fed. Rep. 26.

**Commissions on collections** in the revenue cases are allowed. *U. S. Rev. St.*, § 825.

3. *U. S. R. S.*, § 826; *U. S. R. S.*, § 827; *U. S. R. S.*, § 838.

4. Hence he is not entitled to fees for services rendered in actions instituted by him to recover penalties for violation of immigration laws, where such suits were finally compromised and dismissed by the government without any judgment being rendered—there being no statute giving fees in such cases. *Bashaw v. U. S.*, 47 Fed. Rep. 40.

Nor for services in obtaining warrants for the removal of prisoners from one district to another. *Bird v. U. S.*, 45 Fed. Rep. 110.

5. *U. S. R. S.*, §§ 833, 834.

6. *U. S. R. S.*, § 4647; *U. S. R. S.*, § 835.

As to the district attorney for the southern district of *New York*, see *U. S. R. S.*, §§ 770, 836; as to *Oregon* and *Nevada*, see *U. S. R. S.*, § 837; as to *California*, see *U. S. R. S.*, § 770.

interests. Such employment is generally authorized under conditions prescribed by statute.<sup>1</sup>

f. COMMISSIONERS.—(See UNITED STATES COMMISSIONERS.)

5. *Seats and Terms*.—This subject is treated in a succeeding portion of this article.<sup>2</sup>

6. *Jurisdiction*.—a. TO WHAT CASES IT EXTENDS.—The cases<sup>3</sup> to which the judicial powers<sup>4</sup> of the *United States* extend are defined in the constitution.<sup>5</sup> They are as follows: *First*, "to all cases in law and equity<sup>6</sup> arising under this constitution,<sup>7</sup> the laws

1. U. S. R. S., §§ 4648, 4649, and §§ 363, 364, 365, 366 and 380.

2. See *infra*, this title, the treatment of the several courts by name.

3. The word "cases" means contests before judicial tribunals, and is synonymous with "suits" and "actions." It is narrower than "controversies." To constitute "cases," there must be proceedings in court which are not necessary to "controversies." *Home Ins. Co. v. North-Western Packet Co.*, 32 Iowa 223.

4. Judicial power is "the authority vested in the judges." *Bouv. Law Dict.* The power to exercise judicial power is jurisdiction. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718.

Jurisdiction is also defined as "the power to hear and determine a cause." *U. S. v. Arredondo*, 6 Pet. (U. S.) 709. To the same effect is *U. S. v. Crawford*, 47 Fed. Rep. 561.

Power to examine claims in *ex parte* proceedings and report results to a government officer is not "judicial power," in the sense in which the term is used in the constitution. *U. S. v. Ferreira*, 13 How. (U. S.) 40. See also *JURISDICTION*, vol. 12, p. 244.

5. U. S. Const., art. 3, § 2.

6. The power to try cases in law or equity arises from the constitutional provision only, and is not derived from state laws. *Fitch v. Creighton*, 24 How. (U. S.) 159; *Parsons v. Lyman*, 5 Blatchf. (U. S.) 178.

And a state cannot, by prescribing an action at law to enforce statutory rights, such as a mechanic's lien, oust a federal court, sitting in equity, of its jurisdiction to enforce such rights, provided they are of an equitable nature. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574. But see *Hershberger v. Blewett*, 55 Fed. Rep. 170.

The equitable jurisdiction of the federal courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different

states. *Mississippi Mills v. Cohn*, 150 U. S. 202.

But although this power cannot be restrained by state statutes giving exclusive jurisdiction to a particular court, the rights of the parties are to be ascertained by the laws of the state. *Bellows v. Sowles*, 52 Fed. Rep. 528.

The rights of parties as given or restricted by the exclusive jurisdiction of state probate courts are fully recognized by the federal courts, and the latter, sitting as courts of equity, will not assume jurisdiction of the settlement of an estate, where the state statutes restrict such settlements exclusively to the probate courts. *Sowles v. St. Albans First Nat. Bank*, 54 Fed. Rep. 564.

The probate court of the Choctaw Nation has no equity powers, and hence a suit to enforce an equitable lien or mortgage upon personal property, created by an agreement of the parties, against the estate of an intestate, which is of purely equitable jurisdiction, is properly brought in the *United States* circuit court in the *Indian Territory*. *Riddle v. Hudgins*, 58 Fed. Rep. 490.

In order to ascertain whether a suit is at law or in equity, the law of the state is disregarded. If it was originally a common-law proceeding, it is such now, even though it be a case removed from a state court under whose practice equitable relief might have been granted, had the suit not been removed. *Potts v. Accident Ins. Co.*, 35 Fed. Rep. 566.

Jurisdiction in equity must be given by law; it cannot be conferred by consent. *Elgin v. Marshal*, 106 U. S. 578; *Citizens' Street R. Co. v. City R. Co.*, 56 Fed. Rep. 746.

7. In determining jurisdiction under this clause, it is necessary to look only to the subject-matter; the citizenship of the parties is immaterial. *Home Ins. Co. v. North-Western Packet Co.*, 32 Iowa 223; *Hodgson v. Millward*, 3 Grant's Cas. (Pa.) 418.



of the *United States*<sup>1</sup> and treaties made, or which shall be made, under their authority." Law and equity are thus recognized as two complete systems. In the *United States* courts, each is kept distinct from the other. The union practice under state codes is

The fact that a single question dependent on the constitution or a law or treaty of the *United States* is involved, makes a case cognizable by the federal courts, and it is immaterial that other questions dependent on general principles of law are also involved. *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746; 53 Am. & Eng. R. Cas. 293; 29 Ohio L. J. 233.

If the legislation of a state is in conflict with the Constitution of the *United States*, the officers of the state may be enjoined from acting in obedience thereto. *Blaybrook v. Owensboro*, 16 Fed. Rep. 297. Thus the *United States* courts may entertain actions involving the validity of state taxes claimed to be in violation of the federal constitution, the citizenship of the parties thereto being immaterial. *U. S. Express Co. v. Allen*, 39 Fed. Rep. 712.

A federal question may be presented as to whether a reservation in a charter of a corporation is operative to prevent subsequent legislation affecting such charter from violating the prohibition in the *United States* Constitution against the impairment of the obligation of contracts. *Citizens' Street R. Co. v. Memphis*, 53 Fed. Rep. 715.

Wherever, upon the record considered as a whole, there appears to be a controversy involving the constitution or laws of the *United States*, the federal courts have jurisdiction. *Van Allen v. Atchison, etc., R. Co.*, 1 McCrary (U. S.) 598. And see *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339.

A suit arising out of the seizure of the plaintiff's property under color of a state law, which is claimed to be in violation of the federal constitution, is within the jurisdiction of the *United States* courts, and the question of jurisdiction is sufficiently presented by a demurrer, there being no necessity for the defendant to set up, in answer to the charges of seizure and the unconstitutionality of the law, that the circumstances were such as to bring such seizure within the terms of the state law. *Booth v. Lloyd*, 33 Fed. Rep. 593.

But a claim that a state statute violates the state constitution against the taking of private property for public

use without due compensation, presents no federal question. *Smith v. Bivens*, 56 Fed. Rep. 352.

In a case in which the federal courts assumed jurisdiction on account of the alleged invalidity of a state law as being opposed to the Constitution of the *United States*, the federal question became eliminated. It was held that the jurisdiction of the court having once attached, the court could retain the case for the consideration of the question as to whether the state law was in accordance with the state constitution. *Omaha Horse R. Co. v. Cable Tram-Way Co.*, 32 Fed. Rep. 727.

Where it is sought to be shown in a federal court that a state law impairs the obligation of the contract sued on, the fact that the supreme court of the state has held the act void on that ground, does not affect the jurisdiction of the federal court. *Sawyer v. Concordia Parish*, 4 Woods (U. S.) 273.

The federal courts have no jurisdiction of actions relating to violations of a state law or constitution by the officers of a state, which do not affect rights granted or secured under the federal laws or constitution. *Bertonneau v. Board of Directors, etc.*, 3 Woods (U. S.) 177.

The decision of the *United States* Supreme Court as to the constitutionality of an act of Congress, is binding on state courts. *Burwell v. Bugess*, 32 Gratt. (Va.) 472.

1. As, for instance, a suit on a marshal's bond. *Bachrack v. Norton*, 132 U. S. 337; *Feibelman v. Packard*, 109 U. S. 421.

But a question as to the title of public land claimed under a statute of the *United States* does not fall within the jurisdiction of the federal circuit court, unless it involves the construction of a federal statute. *Theurkauf v. Ireland*, 27 Fed. Rep. 769.

An action on a judgment recovered in a *United States* court is not necessarily a suit arising under the laws of the *United States*. *Provident Sav. L. Assur. Soc. v. Ford*, 114 U. S. 635. Neither does a case arise under the *United States* laws simply because a federal court has decided in another suit the questions of law which are in-

not regarded,<sup>1</sup> and only the forms of actions and defenses in cases of each kind are allowed, which belong properly to it. No actions other than legal or equitable can be heard.<sup>2</sup> The judiciary department of the *United States* is the final expositor of the constitution as to all questions of a judicial nature, and of the

involved in it. *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778.

But where a plaintiff's title rests upon the validity of a lien claimed to have been acquired under a judgment of a federal court, the disposition of the issue depends upon the laws of the *United States* and the rules of its courts, and a federal court has jurisdiction. *Cooke v. Avery*, 147 U. S. 375.

When it is apparent that a case depends on the construction of a law of the *United States*, and the complainant invokes its aid, a federal court has jurisdiction. *Richards v. Rock Rapids*, 31 Fed. Rep. 505.

A suit to enjoin the state treasurer from paying over, and an agricultural college from demanding, a certain sum payable under the act of Congress for the endowment of agricultural colleges, and to have the same payable to the complainant college, arises under the laws of the *United States* and is cognizable in the *United States* circuit court. *Brown University v. Rhode Island College of Agricultural, etc.*, Arts., 56 Fed. Rep. 55.

A case arises under a law of the *United States*, whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. *Lowry v. Chicago, etc.*, R. Co., 46 Fed. Rep. 83; *Tennessee v. Davis*, 100 U. S. 257.

Where an action is brought against a receiver of a railroad under the Act of Congress of March 3d, 1887 (24 St. at L. 552, ch. 373), as amended by the act of Aug. 13th, 1888 (25 St. at L. 433, 436, ch. 866), which allows a receiver of a *United States* court to be sued without leave of the court, the suit is one arising under the constitution and laws of the *United States*. *Texas, etc.*, R. Co. *v. Cox*, 145 U. S. 593.

On the ground that a suit has arisen under the laws of the *United States*, the *United States* court cannot entertain a suit brought by an assignor of national bank stock to recover from his assignee the amount which he was compelled, through the failure of such assignee to properly register the transfer,

to pay toward the bank's liabilities, the National Banking Act not having imposed the duty of seeing to such registry on the assignee. *Le Sassier v. Kennedy*, 123 U. S. 521.

But telegraph companies which have accepted the provisions of the Act of Congress of July 24th, 1866, and put their lines at the service of the *United States*, giving precedence to its messages, become agents of the government, entitled to seek relief in the circuit court in all matters affecting their existence as such agents. *Western U. Tel. Co. v. Charleston*, 56 Fed. Rep. 339.

The federal courts having taken jurisdiction under this clause of the constitution, may retain the case for the determination of issues which would otherwise be triable by the state courts, but cannot extend their jurisdiction to other issues raised by a supplemental bill filed after the original case has been decided. *Omaha Horse R. Co. v. Cable Tram-Way Co.*, 33 Fed. Rep. 689.

1. Thus, although state practice allows the mingling of law and equity in the same proceeding, the *United States* courts sitting in that state will not follow it. *Shuford v. Cain*, 1 Abb. (U. S.) 302.

A state statute allowing equitable defenses to be entertained in an action at law, will have no effect on a suit in a *United States* court sitting in that state, *Herklotz v. Chase*, 32 Fed. Rep. 433; *Burnes v. Scott*, 117 U. S. 582; neither will one abolishing the distinction between legal and equitable actions. *Duncan v. Greenwalt*, 3 McCrary (U. S.) 378; *Foster's Federal Practice*, vol. 1, § 4 (2d ed.); *Bennett v. Butterworth*, 11 How. (U. S.) 669; *Jones v. McMasters*, 20 How. (U. S.) 8; *Thompson v. Central Ohio R. Co.*, 6 Wall. (U. S.) 134; *Walker v. Dreville*, 12 Wall. (U. S.) 440.

2. Thus they have no jurisdiction upon the subject of divorce, or for an allowance of alimony, either as an original proceeding in chancery, or as an incident to divorce *a vinculo*, or from bed and board. *Barber v. Barber*, 21 How. (U. S.) 582. They neither

national legislation in general.<sup>1</sup> Its jurisdiction extends over these matters whether the controversy in which they arise be in federal or in state courts.<sup>2</sup>

*Second.* "To all cases affecting ambassadors and other public ministers and consuls."<sup>3</sup>

*Third.* "To all cases of admiralty and maritime jurisdiction."<sup>4</sup> Jurisdiction over admiralty proceedings is thus included in the constitutional grant, and cannot be enlarged or affected by subsequent legislation, although the modes of its exercise may be prescribed.<sup>5</sup> This grant of admiralty jurisdiction is exclusive,<sup>6</sup> but as it depends upon forms of procedure and not upon the remedies applied, it often happens that the state courts may have cognizance of proceedings at common law or chancery looking to the same result. But of admiralty proceedings proper, the state tribunals have no jurisdiction.<sup>7</sup>

*Fourth.* "To controversies to which the *United States* shall be a

claim nor exercise probate jurisdiction. *Parsons v. Lyman*, 5 Blatchf. (U. S.) 170.

1. 1 Kent's Com., lecture 14, p. 296.

2. Cooley on Constitutional Limitations (4th ed.), p. 12; *Colder v. Bull*, 3 Dall. (U. S.) 399; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 625; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174. But the question arising must be a genuine federal question, and none such appears in a suit in a state court where an attempt is made to enforce, on the part of a state court, rights under a judgment of a *United States* court. *Carson v. Dunham*, 121 U. S. 421.

To give jurisdiction, it must appear that the decision of a federal question was necessary to the determination of the cause in the state court. *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140.

And the federal court will not review the decision of a state court, unless the question of federal law was actually presented to, and decided by, the state court. *Santa Cruz Co. v. Santa Cruz R. Co.*, 111 U. S. 361.

3. Construed in *Davis v. Packard*, 7 Pet. (U. S.) 276. The subject-matter of the controversy is immaterial. *Home Ins. Co. v. North-Western Packet Co.*, 32 Iowa 223.

4. A case in admiralty is not one arising under the constitution and laws of the *United States*. The clause granting jurisdiction in such cases, and that giving jurisdiction in admiralty cases are separate and distinct, and each exclusive of the other. *American,*

*etc., Ins. Co. v. 356 Bales of Cotton*, 1 Pet. (U. S.) 545.

The jurisdiction of admiralty courts is not taken away by the fact that courts of common law have concurrent jurisdiction in certain matters. *Waring v. Clarke*, 5 How. (U. S.) 441.

*United States* admiralty courts have jurisdiction of petitory as well as mere possessory actions. *Ward v. Peck*, 18 How. (U. S.) 267.

Admiralty jurisdiction can be exercised in the states in those courts only, which are established in pursuance of the third article of the constitution; but the same limitation does not extend to the territories and their courts. *American, etc., Ins. Co. v. 356 Bales of Cotton*, 1 Pet. (U. S.) 511.

State law has no effect in the consideration of admiralty cases. *Watts v. Camors*, 115 U. S. 362.

5. *The St. Lawrence*, 1 Black (U. S.) 522.

6. *The Moses Taylor v. Hammons*, 4 Wall. (U. S.) 411. See also ADMIRALTY, vol. 1, p. 200.

7. *Home Ins. Co. v. North-Western Packet Co.*, 32 Iowa 223. Both common-law courts and courts of admiralty have concurrent jurisdiction of bills of lading, policies of marine insurance, charter parties, and shipping articles. *Albany City Ins. Co. v. Whitney*, 70 Pa. St. 248.

This want of jurisdiction in admiralty does not preclude a suit under state law to recover for an injury to a dredge. *Walter v. Kierstead*, 74 Ga. 18.

The exercise of admiralty jurisdiction by *United States* courts does not

party."<sup>1</sup> The government being sovereign, no suit can be maintained against it without its consent.<sup>2</sup> When this consent is given, the suit can only be maintained in the court designated, and under the conditions and regulations prescribed, by Congress.<sup>3</sup>

*Fifth.* "To controversies between two or more states." The state must, in order to come within this clause, be either a technical party to the record or else the substantial party in interest.<sup>4</sup> "Between a state and citizens of another state."<sup>5</sup> As the judicial power stood originally, it extended to suits against a state by citizens of another state, or by citizens or subjects of any foreign state.<sup>6</sup> This was subsequently changed by the Eleventh Amendment, which provides that "The judicial power of the *United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the *United States* by citizens of another state or by citizens or subjects of any foreign state."<sup>7</sup>

depend at all upon the residence or citizenship of the parties. *Peyroux v. Howard*, 7 Pet. (U.S.) 341; *The Genesee Chief v. Fitzhugh*, 12 How. (U.S.) 442, 453.

As a general rule, where the only question in a salvage suit is as to the rate of reward, and the salvaged property is within the jurisdiction of the court, a court of admiralty, in this country, notwithstanding that all the parties are foreigners, will entertain the suit. But in its discretion it may remit the parties to their home forum, and if the facts are of a nature to be more properly inquired into by the foreign courts, the court will not exercise jurisdiction. *One Hundred and Ninety-Four Shawls*, 1 Abb. Adm. 317. And the rule is the same as to maritime matters generally. *The Bee*, 1 Ware (U.S.) 336; *The Bark Havana*, 1 Sprague (U.S.) 402; *Mason v. The Blaireau*, 2 Cranch (U.S.) 264. And in cases in which the parties are citizens of the same foreign country, the court will give no further remedy than the party would have possessed in the foreign jurisdiction. *The Infanta*, Abb. Adm. 263.

1. Where the *United States* is the real plaintiff, all suits should be in its name, unless Congress orders otherwise. *Benton v. Woolsey*, 12 Pet. (U.S.) 27.

2. *U. S. v. Lee*, 106 U.S. 196.

3. *U. S. v. Lee*, 106 U.S. 196; *Com'rs of Sinking Fund v. Buckner*, 48 Fed. Rep. 533. See *UNITED STATES*.

When the *United States* voluntarily appears in a court, it at the same time voluntarily submits to the law, and places itself upon an equality with other

litigants. *U. S. v. Ingate*, 48 Fed. Rep. 251; *U. S. v. Beebee*, 17 Fed. Rep. 40.

A suit against the government to determine questions of title under the land laws, cannot be maintained in the courts, for Congress has never given the courts power or jurisdiction to pass upon questions of title, where there is a controversy between a person claiming title under the laws of the *United States* as against the government itself. *U. S. v. Jones*, 131 U.S. 1.

4. As a suit against the governor of a state, as such. *Governor v. Sundry African Slaves*, 1 Pet. (U.S.) 124.

5. But the suit must not be for a mere penalty imposed by state law. Thus, the *United States* courts have no jurisdiction of an action brought by a state against an insurance company of another state, upon a judgment for a penalty imposed by statute by the first state. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265.

Suits in which a state is a party are not exempted from the operation of that portion of the federal constitution (U. S. Const., art. 3, § 2), which extends the judicial power of the *United States* to all cases arising under the constitution and laws of the *United States*. *Ames v. Kansas*, 111 U.S. 449; *Kansas Pac. R. Co. v. Kansas*, 111 U.S. 449.

6. 1 Kent's Com., lecture 14, p. 296.

7. The Eleventh Amendment prohibits suits wherein a state is a nominal defendant, and also suits against its officers, agents, and representatives, where the state, though not named as the defendant, is the real party against

"Between citizens of different states."<sup>1</sup> In order to give jurisdiction to the *United States* courts under this clause, the fact that the parties are citizens of different states must affirmatively appear on the record.<sup>2</sup> The warrant of jurisdiction must be clearly

whom relief is asked, and the judgment will operate. *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *In re Ayres*, 123 U. S. 443. But it must be an actual, substantial party. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 831.

The *United States* court may grant an injunction restraining the railroad commissioners of a state from enforcing a schedule of rates in pursuance of a statute claimed to be unconstitutional, such a suit not being against a state nominally or actually, and, therefore, not in conflict with the Eleventh Amendment. *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866.

The inhibition applies only to citizens or subjects, and does not extend to suits by a state, or by foreign powers. I Kent's Com., lecture 14, p. 297.

1. The improper joinder of parties in a suit in a *United States* court, as if citizens of the same state with the plaintiff be made defendants in a bill with citizens of another state properly made defendants, will not affect the jurisdiction of the court, as between the parties properly before it. *Carneal v. Banks*, 10 Wheat. (U. S.) 181.

Thus, a writ issued from a circuit court against A and B, was returned executed as to A and *non est* as to B. The declaration alleged citizenship of the plaintiff in *New York* and of A in *Ohio*, being silent as to that of B. It was held that the court had jurisdiction. *Morrison v. Bennett*, 1 McLean (U. S.) 330.

And where a bill is filed by the beneficiary of a trust to remove a cloud upon the trust property, the jurisdiction of the federal court is not ousted by the fact that the beneficiaries, residents of the state in which the suit is brought and in which the defendants are citizens, are not made parties. *Bowdoin College v. Merritt*, 54 Fed. Rep. 55.

Although a partnership is authorized by the laws of a state to sue in its partnership name, it is not a citizen of the state so as to give the federal courts jurisdiction in the absence of citizenship in the state of component partners. *Carnegie v. Hulbert*, 10 U. S. App. 454; 3 C. C. A. 391; 53 Fed. Rep. 10.

If a suit can be maintained in a state

court, it can also be maintained by original process in the federal courts, where the parties are citizens of different states. *Chicot County v. Sherwood*, 148 U. S. 529.

The citizenship which determines the jurisdiction of a federal court in regard to mortgaged property is that of the mortgagee, and not of the beneficiaries in the mortgage, since they are represented by the mortgagee. *Morris v. Landaer*, 54 Fed. Rep. 23.

#### Effect of State Laws on Jurisdiction.—

The jurisdiction of federal courts over controversies between citizens of different states cannot be impaired by state laws prescribing the modes of redress in their courts, or regulating the distribution of their judicial power. *Chicot County v. Sherwood*, 148 U. S. 529.

**Common-Law Trade-Mark.**—The federal courts have no jurisdiction of an action for the infringement of a common-law trade-mark between citizens of the same state. *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, 53 Fed. Rep. 493.

2. *Scott v. Sandford*, 19 How. (U. S.) 393; *Ex p. Smith*, 94 U. S. 455; *Halsted v. Buster*, 119 U. S. 341; *Imperial Refining Co. v. Wyman*, 38 Fed. Rep. 574; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379; *Kempe v. Kennedy*, 5 Cranch (U. S.) 185; *Pittsburgh, etc., R. Co. v. Ramsey*, 22 Wall. (U. S.) 322; *Boyce's Manual of Practice in U. S. Circuit Courts* (1869), p. 21; *Briges v. Sperry*, 95 U. S. 401; *Smith v. Sun Printing & P. Assoc.*, 55 Fed. Rep. 240.

The consent of parties will not give jurisdiction, but they may admit facts showing jurisdiction. *Pittsburgh, etc., R. Co. v. Ramsey*, 22 Wall. (U. S.) 322.

The fact of citizenship need not be pleaded; it is sufficient if it appears in the record, but this does not include papers merely copied into the transcript, which do not make a part of the record by bill of exceptions, or by an order of the court referring to them, or by some other legal mode. *Robertson v. Cease*, 97 U. S. 646; *Denny v. Pironi*, 140 U. S. 121.

The courts of the *United States*, being of limited but not of inferior juris-

shown.<sup>1</sup> An allegation of residence would be insufficient.<sup>2</sup> The provision must be taken literally, and the citizen of a territory has no standing in court under this grant of jurisdiction;<sup>3</sup> nor has a citizen of the *District of Columbia*,<sup>4</sup> nor the next friend of an insane plaintiff, on the ground of the difference of citizenship between such next friend and the defendant, the real plaintiff and

diction, their proceedings are not nullities, though their jurisdiction does not appear on the record. Until reversed, their proceedings are conclusive evidence between parties and privies; but if their jurisdiction does not appear of record, they are erroneous and may be reversed. *McCormick v. Sullivan*, 10 Wheat. (U. S.) 192; *Reed v. Vaughan*, 15 Mo. 137; 55 Am. Rep. 133; *Kempe v. Kennedy*, 5 Cranch (U. S.) 185; *Skillern v. May*, 6 Cranch (U. S.) 267.

Where the record does not show jurisdiction, and the fault rests upon the plaintiff, the supreme court will reverse judgment in his favor at his cost. *Halsted v. Buster*, 119 U. S. 341.

There is nothing in the Fourteenth Amendment to the federal constitution which makes the mere allegation of residence sufficient to establish jurisdiction, the presumption being against jurisdiction unless it affirmatively appears. *Robertson v. Cease*, 97 U. S. 646.

The *United States* courts may entertain a suit between citizens of different states, to annul deeds of lands forfeited to the state, though such deeds and sales were made under an order of a state court of the county where the lands were situated. *De Forest v. Thompson*, 40 Fed. Rep. 375.

An averment of citizenship in the first count is sufficient to give jurisdiction to a federal court, though no such allegation is made in the other counts of the declaration. *Jones v. Heaton*, 1 McLean (U. S.) 317.

When it appears that the parties are citizens of the same state, and, therefore, that the federal court has no jurisdiction, the court may direct pleadings to be filed in order to settle the question before raising the issue and proceeding with the suit. *Gribble v. Pioneer Press Co.*, 15 Fed. Rep. 689.

1. *U. S. v. Town-Maker*, Hempst. (U. S.) 304; *U. S. v. Alberty*, Hempst. (U. S.) 444.

Where the bill alleges the plaintiffs to be citizens of the *United States*, and this is not denied in the answer, it must

be considered as admitted, although no other evidence of citizenship is offered. *Webb v. Powers*, 2 Woodb. & M. (U. S.) 497.

Where it appears by proper averments in the record, that the parties are citizens of different states, the court has jurisdiction, unless it be ousted by denial of the citizenship of either party, as alleged, and proof that such citizenship does not exist; but this exception must be taken by plea in abatement, or it will not avail. *Wood v. Mann*, 1 Sumn. (U. S.) 578.

2. *Robertson v. Cease*, 97 U. S. 646; *Everhart v. Huntsville College*, 120 U. S. 223; *Menard v. Goggan*, 121 U. S. 253.

An averment in the record that the parties are "of" or are "inhabitants" or "residents" of different states is not sufficient to show jurisdiction. The record must allege that the parties are "citizens" of different states. *Wood v. Wagon*, 2 Cranch (U. S.) 1; *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.) 594; *Turner v. Bank of North America*, 4 Dall. (U. S.) 8; *Mossman v. Higginson*, 4 Dall. (U. S.) 12; *Bingham v. Cabot*, 3 Dall. (U. S.) 382; *Abercrombie v. Dupnis*, 1 Cranch (U. S.) 343; *Capron v. Van Noorden*, 2 Cranch (U. S.) 126; *Course v. Stead*, 4 Dall. (U. S.) 22; *Wood v. Mann*, 1 Sumn. (U. S.) 581.

3. *Watson v. Brooks*, 8 Sawy. (U. S.) 316; *Corporation of New Orleans v. Winter*, 1 Wheat. (U. S.) 91.

In an action brought in a territorial court where both defendants are citizens of the territory, and the two plaintiffs are respectively citizens of a state and another territory, the admission of both territories as states will not make the suit a "controversy between citizens of different states." *Dunton v. Muth*, 45 Fed. Rep. 390.

The *United States* courts have no jurisdiction over actions between alien and alien, where the question of jurisdiction turns on citizenship. *Orosco v. Gagliardo*, 22 Cal. 83.

4. *Vasse v. Miffin*, 4 Wash. (U. S.) 519.

the defendant being citizens of the same state.<sup>1</sup> Likewise in suits by executors and administrators, the citizenship of these representatives determine the question of jurisdiction, and not that of the testator or intestate respectively.<sup>2</sup> Corporations are citizens of the states which created them.<sup>3</sup> And although recognized by other states, and allowed to do business therein, they still remain citizens of the state to which they owe their existence.<sup>4</sup> The

1. *Wiggins v. Bethune*, 29 Fed. Rep. 51.

2. *Continental Ins. Co. v. Rhoads*, 119 U. S. 237; *Childress v. Emory*, 8 Wheat. (U. S.) 642; *Dodge v. Perkins*, 4 Mason (U. S.) 435. The fact that the property attached is in the hands of an executor, who is a citizen of the same state as the plaintiff, does not oust jurisdiction, if the plaintiff and defendant are citizens of different states. *Bacon v. Rives*, 106 U. S. 99.

Nor is a party made a citizen of a state so as to deprive a federal court of jurisdiction, by the fact that he is appointed trustee by a court of such state of property in the state, and sues in his representative capacity. *Shirk v. La Fayette*, 52 Fed. Rep. 857.

3. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Ohio, etc., R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Empire, etc., Transp. Co. v. Empire, etc., Min. Co.*, 150 U. S. 159; *Western Union Tel. Co. v. Dickinson*, 40 Md. 444; *Atlanta, etc., R. Co. v. Western R. Co.*, 50 Fed. Rep. 790, which was a case in which a *Georgia* corporation was the defendant, and where the court, by McCormick, J., said: "It is settled by the decisions of the *United States* Supreme Court that the appellant, being a corporation created under the laws of *Georgia*, is, from its creation through the whole period of its existence, a citizen of that state; that it is a person, within the meaning of the law regulating the institution and conduct of suits, and that it cannot emigrate from the state of its creation."

The rule is the same whether the corporation be political, municipal, or commercial, the citizenship of its members being immaterial. A parish of *Louisiana* is therefore a citizen of that state. *Tunstall v. Madison Parish*, 30 La. Ann. 471.

A corporation formed by the consolidation of corporations of several states, is a citizen of either of them. *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609. Hence a citizen of one of such states may sue the corporation

in the federal courts for the other state, it being a citizen of that state for the purposes of the suit. Page *v. Fall River, etc., R. Co.*, 31 Fed. Rep. 257.

Corporations created by different states, but consolidated for the purpose of operating one entire line of road, are not prevented from bringing suit against each other in the federal courts, by the fact of consolidation. *St. Louis, etc., R. Co. v. Indianapolis, etc., R. Co.*, 9 Biss. (U. S.) 144. And see *Western, etc., R. Co. v. Robertson*, 61 Fed. Rep. 592.

A corporation of one state can sue a corporation formed by the consolidation of two corporate bodies, one chartered by the state, and the other by a sister state, in the federal courts for that sister state. *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609.

In a suit to foreclose a mortgage brought by bondholders against a corporation, citizens of the state of the corporation cannot join. *Jackson v. Burlington, etc., R. Co.*, 29 Fed. Rep. 474.

The jurisdiction of the federal court of suits against municipal corporations, on the ground of diversity of citizenship, cannot be divested by a state law providing that all suits against such corporations shall be brought in state courts. *Cunningham v. Rawls Co.*, 1 McCrary (U. S.) 117; *National Bank v. Sebastian Co.*, 5 Dill. (U. S.) 414. See also *Allen v. Allen*, 3 Wall. Jr. (C. C.) 248; *Greely v. Townsend*, 25 Cal. 604.

The right of a foreign corporation to sue in a federal court is not affected by the existence of a state law forbidding it to resort thereto. *Metropolitan L. Ins. Co. v. Harper*, 3 Hughes (U. S.) 260.

4. *Antelope Co. v. Chicago, etc., R. Co.*, 16 Fed. Rep. 295. They cannot be considered citizens or residents of a state in which they have not been incorporated. *Southern P. Co. v. Denton*, 146 U. S. 202.

And the fact that a corporation has its principal place of business in such

citizenship of merely formal parties, however, has no effect on jurisdiction.<sup>1</sup> The requirement as to citizenship refers only to the parties to the suit at the time it was instituted.<sup>2</sup> If the cause of action has been assigned, it is immaterial whether or not a difference in citizenship existed between the original holders,<sup>3</sup> or what motives induced the transfer.<sup>4</sup> If the parties have changed their domicile from a state in which they could have no standing in a *United States* court, to one where they could be heard, the motives of such removal cannot be inquired into.<sup>5</sup>

Nor is jurisdiction, which has once attached, ousted by any

other state, and appoints a person there under a state statute on whom service may be made, does not make it a citizen of such state. *St. Louis R. Co. v. Pacific R. Co.*, 52 Fed. Rep. 770.

But where a corporation is chartered by several states, it must, for the purpose of determining the jurisdiction of the federal courts, when sued in either state, be treated as a citizen of that state alone without regard to where it has its principal place of business. *Phinizy v. Augusta, etc.*, R. Co., 56 Fed. Rep. 273.

1. *Moore v. Davis*, 18 How. (U. S.) 467.

The citizenship of a marshal, in an action by him on a forthcoming bond, is immaterial. *Wade v. Wortsman*, 29 Fed. Rep. 754.

As to a trustee, in an action to set aside or enforce a deed of trust, see *Rust v. Brittle Silver Co.*, 58 Fed. Rep. 611; *Reibach v. Atlantic, etc.*, R. Co., 58 Fed. Rep. 33.

A receiver appointed by a court is not made a necessary party so as to affect jurisdiction where it depends on citizenship, by the fact that charges are made against the validity of his appointment. *Phinizy v. Augusta, etc.*, R. Co., 56 Fed. Rep. 273. But where a railroad company has sold an undivided interest in a portion of its line to another company and entered into a traffic agreement, by which it was to receive a certain portion of the freight earnings over that part of the line, while not a necessary party to a suit by a lessee of its line against such other company for an accounting as to the earnings, is a proper party in view of its interest in the maintenance of the lease as affecting its income as rentals, and its contention that those clauses could not be abandoned or modified by the successor companies without its consent. *Pittsburg, etc.*, R. Co. *v. Bal-*

*timore, etc.*, R. Co., 61 Fed. Rep. 705.

2. *Mollan v. Torrance*, 9 Wheat. (U. S.) 537.

3. *Thompson v. Perrine*, 106 U. S. 589.

But where the action is by the assignee of a chose in action, the record must affirmatively show, by apt allegations, that the assignor could have maintained the action. *Holmes v. Goldsmith*, 147 U. S. 150. And the assignee of a state judgment recovered on contract, cannot, under Act of Congress 1875, maintain a suit for its enforcement in the circuit court, unless the assignor could have done so. *Mississippi Mills v. Cohn*, 150 U. S. 202.

4. *Blackburn v. Selma, etc.*, R. Co., 2 Flap. (U. S.) 525.

5. If a citizen of one state removes with his family into another state with a *bona fide* intention to reside there, he instantly becomes a citizen of that state within the meaning of this clause of the constitution, and may sue as such, in those courts. *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.) 594; *Butler v. Farnsworth*, 4 Wash. (U. S.) 101; *Read v. Bertrand*, 4 Wash. (U. S.) 516; *Den v. Sharp*, 4 Wash. (U. S.) 609; *Catlin v. Gladding*, 4 Mason (U. S.) 308; *Knox v. Greenleaf*, 4 Dall. (U. S.) 360.

To deprive a citizen of the *United States* of the right of suing in the federal courts, on the ground of his not being a citizen of any particular state, the evidence must be very strong that he is a mere wanderer without any home. *Raband v. D'Wolf*, 1 Paine (U. S.) 580.

A suit will not be enjoined by a state court, on the ground that there was a removal from one state to another for the purpose of suing in the federal courts. *Thompson v. Norris*, 11 Abb. N. Cas. (N. Y.) 163.

But the removal must be a real



change of residence during the progress of the case,<sup>1</sup> nor by any transfer of the subject-matter.<sup>2</sup> If jurisdiction is acquired, the court will retain it for the settlement of actions following the original suit, if they are continuations of such suit,<sup>3</sup> or merely auxiliary or ancillary thereto,<sup>4</sup> even though the parties to such actions are residents of the same states.

As an original and a cross-bill are in fact but one proceeding, if the federal court has jurisdiction of the former, it will retain

change of domicile, and not one merely colorable, as where the pretended removal is without any present intention to remain permanently or for an indefinite time, but with a present intention to return as soon as the suit is ended. *Morris v. Gilmer*, 129 U. S. 315.

The fact that a citizen of another state is appointed administrator for the purpose of conferring on the federal court jurisdiction of an action, does not defeat the jurisdiction. *Goff v. Norfolk, etc. R. Co.*, 36 Fed. Rep. 299.

1. *U. S. v. Myers*, 2 Brock. (U. S.) 516; *Mollan v. Torrance*, 9 Wheat. (U. S.) 537; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290. See also *Thomas v. Newton, Pet. (C. C.)* 444; *Clarke v. Mathewson*, 12 Pet. (U. S.) 164.

2. *Jarboe v. Templer*, 38 Fed. Rep. 213; *Elliot v. Teal*, 5 Sawy. (U. S.) 249. And see *Hardenbergh v. Ray*, 151 U. S. 112.

3. As a bill of revivor brought against the executor of the defendant. *Hone v. Dillon*, 29 Fed. Rep. 465.

Where a bill was filed in the circuit court for *Rhode Island*, against a citizen of that state, by a citizen of *Connecticut*, and, pending the bill, the complainant died and administration of his effects in *Rhode Island* was taken out by a citizen of that state, who filed a bill of revivor, it was held that the latter bill was a mere continuation of the former, and that the court had jurisdiction thereof. *Morgan v. Morgan*, 2 Wheat. (U. S.) 290.

Where the *United States* filed a bill to subject property conveyed in trust to secure their debt, and, pending the suit, a surety for the debt, at whose instance the bill was filed and who was a party thereto, paid the debt, it was held that the court had jurisdiction to retain the suit for the benefit of the surety, though the principal debtor and surety being citizens of the same state, a suit between them would not lie in the federal courts. *U. S. v. Myers*, 2 Brock. (U. S.) 516.

A, a citizen of *Virginia*, recovered

judgment in ejectment in the circuit court for *Ohio*, against B, a citizen of that state. After the death of A, a bill was filed in the same court, the plaintiffs and defendants all being citizens of *Ohio*, for an injunction to the judgment, and praying that a conveyance of the land might be made to the complainants. It was held, that to the extent of the prayer for an injunction, the bill was not an original proceeding, and that the court had jurisdiction for that purpose, not being deprived of its equitable control over the judgment by the change of residence of the parties; but that, so far as other relief was prayed, the court had not jurisdiction of the bill. *Dunn v. Clarke*, 8 Pet. (U. S.) 1.

4. But where a federal court acquires jurisdiction on the ground of diverse citizenship, it has no jurisdiction over the reasonableness of an interstate commerce rate. *Swift v. Philadelphia, etc., R. Co.*, 58 Fed. Rep. 858; *Root v. Woolworth*, 150 U. S. 401; *Ex p. Tyler*, 149 U. S. 164; *Lamb v. Ewing*, 54 Fed. Rep. 269.

Therefore, pending a suit in equity brought by assignees in bankruptcy to set aside a conveyance of a bankrupt in fraud of creditors, a creditor, to whom the assignees have, under order of the court, conveyed the bankrupt's title, may file a supplemental bill, although a citizen of the same state as the defendants. *Miller v. Rogers*, 29 Fed. Rep. 401; *Jones v. Andrews*, 10 Wall. (U. S.) 327; *Krippendorf v. Hyde*, 110 U. S. 276; *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 U. S. 522; *Seymour v. Phillips, etc., Construction Co.*, 7 Biss. (U. S.) 460.

If a *United States* court has jurisdiction of an action at law, it may also entertain an equitable suit—as one to reform a contract, upon which the suit at law was brought—if auxiliary to the suit at law. *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. Rep. 724, where the court, by Shiras, J., said: "Jurisdiction, therefore, existing of the action at law, all auxiliary or dependent proceed-

jurisdiction for the settlement of issues under the latter, even though the requisite citizenship as between the parties to the cross-bill does not exist.<sup>1</sup>

Where jurisdiction exists under this section of the constitution, it will be retained for a complete determination of the controversy, although other questions of fact or law may be involved.<sup>2</sup>

"Between citizens of the same state claiming lands under grants of different states." This grant of jurisdiction is not exclusive of the state courts.<sup>3</sup> It applies only to grants of land made by states by virtue of their sovereignty.<sup>4</sup>

"Between a state or the citizens thereof and foreign states, citizens, or subjects."<sup>5</sup> Thus, under the constitution, the judicial power extends to various classes of cases, generally national

ings necessary to the full and final hearing and disposition of that action, are sustainable in the federal courts without regard to the citizenship of the parties."

But a federal court obtaining jurisdiction of a suit against an administrator on the ground of diverse citizenship can go no further than that extends, and cannot administer the estate, or adjudicate the rights of citizens of a state as between themselves. *Byers v. McAuley*, 149 U. S. 608. And where a bill is not ancillary to a former suit, and when considered as an original bill, jurisdiction is defeated by the citizenship of the parties, a federal court has no jurisdiction. *Ralston v. Sharon*, 51 Fed. Rep. 702.

Where, however, a federal court has acquired jurisdiction in other suits of the property of a railroad company, it has jurisdiction to foreclose a mortgage thereon, without regard to the citizenship of the parties, whether the bill therefor be regarded as an original bill, a cross-bill, or an original bill in the nature of a cross-bill. *Carey v. Houston*, etc., R. Co., 52 Fed. Rep. 671.

1. *First Nat. Bank v. Salem Capital Flour Mills Co.*, 31 Fed. Rep. 580; *Osborne v. Barge*, 30 Fed. Rep. 805.

But where citizens of a state, who are partners in business, are both sued in equity in a *United States* court, one of them cannot, by cross-bill against the other, settle their disputes *inter sese*. *Vannerson v. Leverett*, 31 Fed. Rep. 376.

2. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738.

3. *Shepard v. Young*, 1 T. B. Mon. (Ky.) 203.

4. Hence, it has no application to a *Tennessee* grant on *North Carolina*

claims, made by virtue of a compact between the states. *Thompson v. Kendrick*, 5 Hayw. (Tenn.) 113.

But they have jurisdiction of a case between citizens of *Kentucky*, claiming lands under different grants, one issued by *Kentucky* and the other by *Virginia*, but upon warrants issued by *Virginia*, and locations founded thereon prior to the separation of *Kentucky* from *Virginia*. The grant passes the legal title to the land, and if the controversy is founded on the conflicting grants of different states, the judicial power of the Union extends to the case, whatever may have been the equitable title of the parties before the grant. *Colson v. Lewis*, 2 Wheat. (U. S.) 377. See also *Pawlet v. Clark*, 9 Cranch (U. S.) 322.

5. An Indian tribe living within the limits of a state is not a "foreign state." *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1.

Residence is only *prima facie* evidence of citizenship. Where the plaintiff, a native of *France*, came to the *United States* in her childhood, and afterward married a citizen of this country, was divorced, and again married to a French citizen, it was held that she was an alien, and competent to sue in the federal court, notwithstanding she and her husband continued to reside in this country. *Pequignot v. Detroit*, 16 Fed. Rep. 211.

The jurisdiction of a suit brought by an alien is not ousted by the joining of a co-plaintiff who had no standing in a federal court. *Graham v. Boston*, etc., R. Co., 14 Fed. Rep. 753.

Where a suit in equity is brought by foreign creditors to enforce their rights under a state statute declaring that an assignment with any preference

in their character,<sup>1</sup> and determined in various ways, some by the subject-matter involved in the action, others by the parties, and the remainder by the remedy and procedure.<sup>2</sup>

*b. EXCLUSIVE OF STATE COURTS.*—The provisions of the revised statutes are as follows:<sup>3</sup>

"The jurisdiction vested in the courts of the *United States* in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

"*First.* Of all crimes and offenses cognizable under the authority of the *United States*.<sup>4</sup>

shall create a trust fund, to be administered in equity for all creditors, the federal courts have jurisdiction. *Wyman v. Mathews*, 53 Fed. Rep. 678.

The jurisdiction of a federal court of a suit of a citizen against an alien, is not defeated by the fact that the defendant is consul of a foreign government. *Börs v. Preston*, 111 U. S. 252.

1. 1 Kent's Com., lecture 14, p. 296.

2. *Home Ins. Co. v. North Western Packet Co.*, 32 Iowa 223.

3. U. S. R. S., § 711.

4. The jurisdiction of offenses against the laws of the *United States* is by this clause made exclusive in the federal courts. *Ross v. Georgia*, 55 Ga. 192; 21 Am. Rep. 278. But the federal courts have no jurisdiction over offenses not made punishable by the constitution, laws, or treaties of the *United States*. *Petibone v. U. S.*, 148 U. S. 197.

The same act may be an offense against both the state and federal law, and in that case the tribunals of each government may punish the infraction of its laws. Thus, an act may be prosecuted as a violation of the National Banking law by the general government, and also as a forgery by the state, and this will be so even in a case where the act of forgery was committed solely in order to deceive an examiner under the National Bankrupt law. *Cross v. North Carolina*, 132 U. S. 132.

To the same effect is *U. S. v. Mari-gold*, 9 How. (U. S.) 569, where the court, by Daniel, J., said: "The same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

The same principle is laid down in *Fox v. Ohio*, 5 How. (U. S.) 410;

*Moore v. Illinois*, 14 How. (U. S.) 13; *In re Loney*, 134 U. S. 372; *Ex p. Siebold*, 100 U. S. 390.

Under a state law which provides for the punishment of anyone having in his possession tools for counterfeiting bank notes, the state courts have jurisdiction of a prosecution under this law, though the offense is punishable also under the federal statute. *People v. McDonnell*, 80 Cal. 285.

This clause does not affect the jurisdiction of the state courts to punish counterfeiting of *United States* coin current in the state. *Dashing v. State*, 78 Md. 357.

The federal courts have exclusive jurisdiction of perjuries committed before a notary public in giving a deposition to be used in the case of a contested election of a member of Congress, as provided in the Revised Statutes, § 110. U. S. R. S., § 5392.

In *Re Loney*, 134 U. S. 372, the court, by Gray, J., said: "A witness who gives his testimony, pursuant to the constitution and laws of the *United States*, in a case pending in a court or other judicial tribunal of the *United States*, whether he testifies in the presence of that tribunal or before any magistrate (either of the nation or of the state) designated by act of Congress for the purpose, is accountable for the truth of his testimony to the *United States* only; and perjury committed in so testifying is an offense against the public justice of the *United States* and within the exclusive jurisdiction of the courts of the *United States*."

**The Criminal Jurisdiction of the United States.**—The federal courts have no common-law criminal jurisdiction. *U. S. v. Eaton*, 144 U. S. 677; *U. S. v. Worrall*, 2 Dall. (U. S.) 384; *U. S. v. Lancaster*, 2 McLean (U. S.) 431; *U. S. v. Hudson*, 7 Cranch (U. S.) 32.

The jurisdiction of the federal courts

"*Second.* Of all suits for penalties and forfeitures incurred under the laws of the *United States*.<sup>1</sup>

"*Third.* Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."<sup>2</sup>

"*Fourth.* Of all seizures under the laws of the *United States*,

in matters of conspiracy extends only to a conspiracy for a purpose forbidden by some *United States* statute, or to be accomplished by acts expressly forbidden by a law of the *United States*, and hence a conspiracy to disbar an attorney from practising in state courts because of his conduct in a federal court, is not cognizable in a federal court. *Greene v. Rogers*, 56 Fed. Rep. 220.

The circuit court has jurisdiction to try and sentence a criminal for a murder committed on the Fort Leavenworth military reservation, although committed on the part not used for military purposes. *Benson v. U. S.*, 146 U. S. 325.

Under U. S. Rev. Stats., § 5346, the federal courts have jurisdiction to try a person for an assault with a dangerous weapon committed on a vessel belonging to a citizen of the *United States*, when such vessel is in the Detroit river, out of the jurisdiction of any particular state and within the territorial limits of the Dominion of *Canada*. *U. S. v. Rodgers*, 150 U. S. 249. But an indictment for manslaughter against a pilot, charging him with a willful and felonious assault, by propelling a tug boat against a yacht in which the deceased then was, so as to cast him out of the yacht into the river, is not within U. S. Rev. Stats., § 5344, making every captain, engineer, pilot, or other person employed on a steamboat, by whose misconduct, negligence, or inattention to duties the life of another is destroyed, guilty of manslaughter, so as to deprive a state court of jurisdiction. *Re Welch*, 57 Fed. Rep. 576.

Jurisdiction in a criminal action by the district attorney, to recover a fine of \$5,000 from the owner of a bridge over a navigable stream, is given to the district court only when the Secretary of War has found that the bridge is an unreasonable obstruction of free navigation, and the owner has failed to obey the order of the Secretary in regard thereto. *Oregon City Transp. Co. v. Columbia Street Bridge Co.*, 53 Fed. Rep. 549.

1. This clause refers only to penalties and forfeitures of a public nature, which may be recovered by the *United States* or by some person suing in its behalf. *Ordway v. Central Nat. Bank*, 47 Md. 217; 28 Am. Rep. 455.

It includes a suit for a penalty imposed by an act of Congress. *Haney v. Sharp*, 1 Dana (Ky.) 442; *Jackson v. Rose*, 2 Va. Cas. 34; *U. S. v. Lathrop*, 17 Johns. (N. Y.) 4. But see *Stearns v. U. S.*, 2 Paine (U. S.) 300; *Buckwalter v. U. S.*, 11 S. & R. (Pa.) 193. But does not embrace civil actions by parties aggrieved to recover such a penalty. *Ordway v. Central Nat. Bank*, 47 Md. 217; 28 Am. Rep. 455.

*Qui tam* actions on penal statutes do not survive at common law, and this rule prevails in the *United States* courts as to actions on penal statutes of the *United States*, even in states where the local statutes allow suits on state penal statutes after the death of the offender. *Schreiber v. Sharpless*, 110 U. S. 76.

2. The expression, "saving and reserving to suitors in all cases a common-law remedy, where the common law is competent to give it," refers only to remedies existing under the common law as it stood in 1789, when the statute was first enacted, and does not include such remedies as might afterward be given by the state statute. *Henry on Admiralty Jurisdiction and Procedure* (1885), § 1.

A state court has jurisdiction of a suit *in personam* against the master and owners of a vessel to enforce a claim given by the state statute, *State v. Voorhies*, 39 La. Ann. 499; also of an action for a maritime tort, where there is a remedy at common law and by state statute. *Billings v. Breinig*, 45 Mich. 65.

Though possession by the state court will not be disturbed, yet that court can only deal with the property subject thereto, and when its jurisdiction has determined, the admiralty courts may proceed. *Moran v. Sturges*, 154 U. S. 256. See also ADMIRALTY, vol. 1, p. 200.

on land or on waters not within admiralty and maritime jurisdiction.<sup>1</sup>

"*Fifth.* Of all cases arising under the patent-right,<sup>2</sup> or copy-right laws of the *United States*.<sup>3</sup>

"*Sixth.* Of all matters and proceedings in bankruptcy.<sup>4</sup>

"*Seventh.* Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or

1. The *United States* courts alone have jurisdiction to decide upon the validity of seizures made by officers of the *United States*, under the laws of Congress, where the proceedings are *in rem*, or where the action divests the officer of the possession of the property seized. *Stoughton v. Mott*, 13 Vt. 175.

**Comparative Jurisdiction of National and State Courts.**—When a seizure is made for a forfeiture, no state authority can have possession of the property so as to defeat the national jurisdiction; if it has possession, the latter may compel a redelivery. *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1.

2. See PATENT LAW, vol. 18, p. 70.

The jurisdiction in cases under the patent laws, is exclusive of state courts, whatever may be the citizenship of the parties. Consent of parties cannot confer jurisdiction. 3 *Robinson on Patents* (1890), §§ 855, 863.

Where the owners of a patent, after granting to complainant the exclusive right to make, use, and sell the patented machine in a certain territory, conveyed their right to the patent to defendant, subject to the rights of complainant, a suit by complainant to restrain defendant from manufacturing and selling the machine in the territory granted him, is an ordinary suit for infringement of a patent, cognizable in the federal courts, and not a suit founded on contract. *Adriance v. McCormick Harvesting Machine Co.*, 55 Fed. Rep. 287. And see *Walter A. Woods Harvester Co. v. Minneapolis-Esterly Harvester Co.*, 61 Fed. Rep. 256.

But where a partner fails to comply with an agreement of dissolution, whereby he takes the plant of the firm with the right to manufacture under a patent owned by it, this gives the latter no right to sue in the federal courts, although the unauthorized manufacture under the patent constitutes an element of damage; but the right of action is solely for breach of contract. *Routh v. Boyd*, 51 Fed. Rep. 821.

State courts have no jurisdiction of

an action for the manufacture and sale of a patented article, unless there was an agreement to pay royalties for the manufacture. *Denise v. Swett*, 142 N. Y. 602.

3. See COPYRIGHT, vol. 4, p. 147.

The state courts may grant an injunction to restrain the infringement of an author's common-law right of property in a manuscript, but not his copyright under the acts of Congress; and it is immaterial that the plaintiff is an alien. *Palmer v. De Witt*, 47 N. Y. 532; 7 Am. Rep. 480.

This clause of section 711 was not affected by the acts of March 3d, 1875, or March 3d, 1887. *Miller-Magee Co. v. Carpenter*, 34 Fed. Rep. 433.

4. The states have the power to pass bankruptcy and insolvency laws, and to exercise jurisdiction in controversies arising under them. See BANKRUPTCY, vol. 2, p. 88.

The *United States* court in bankruptcy cases has no power to interfere with the proceedings of a state court in the ordinary and legitimate exercise of its jurisdiction. *Clark v. Binninger*, 38 How. Pr. (N. Y.) 341.

The jurisdiction of all matters in bankruptcy vested in the federal courts does not prevent a state court from entering an action for the abatement of a liquor nuisance on property belonging to the bankrupt estate, that being a matter of police regulation. *Radford v. Hornell*, 81 Iowa 709.

Creditors of a bankrupt may, if they wish, pursue their claims in the state courts, instead of under the *United States Act*. *Peck v. Jenness*, 16 N. H. 516; 43 Am. Dec. 573.

The *United States* courts sitting in bankruptcy, cannot, upon appeal or petition, correct or annul judgments rendered in a state court. *In re Dunn*, 11 Nat. Bank. Reg. 270.

State courts have concurrent jurisdiction of suits brought by assignees in bankruptcy, to set aside fraudulent conveyances by bankrupts, made prior to their being adjudicated such. *Rison v. Powell*, 28 Ark. 427.

between a state and citizens of other states, or aliens.<sup>1</sup> "

c. CONCURRENT WITH STATE COURTS.—Unless otherwise provided by law, the jurisdiction exercised by the *United States* courts is concurrent with that of the state courts.<sup>2</sup> The two systems of courts are each independent of the other, and are of equal dignity.<sup>3</sup> It is no objection to the jurisdiction of the one that there is a suit involving the same questions pending in the other.<sup>4</sup> But where one has acquired jurisdiction over the subject-matter, it is entitled to proceed without interference by the other.<sup>5</sup> This rule is essential to due harmony of administration, and to avoid conflicts. State legislation cannot impair or affect the jurisdiction of the *United States* courts.<sup>6</sup>

d. LEGAL AND EQUITABLE.—The jurisdiction of the federal courts extends to both legal and equitable suits.<sup>7</sup> The relief

1. A state may sue in a circuit court of the *United States*. The jurisdiction of the supreme court is not exclusive where a state is plaintiff. *State v. Atkins*, 35 Ga. 315.

2. Thus, a suit for the foreclosure of a mortgage, brought by the receiver of an insolvent bank, is not within the exclusive jurisdiction of the federal courts. *Witters v. Sowles*, 61 Vt. 366.

Each state has the right of determining all controversies between her citizens and all conflicting claims to property within her limits, unless this jurisdiction is clearly and expressly taken away. *Ferris v. Coover*, 11 Cal. 185. But Congress may vest exclusively in the courts of the *United States* all the judicial power of the *United States*. *Stearns v. U. S.*, 2 Paine (U. S.) 300; *The Moses Taylor v. Hammons*, 4 Wall. (U. S.) 429; *Martin v. Hunter*, 1 Wheat. (U. S.) 334; *Ex p. McNiel*, 13 Wall. (U. S.) 236.

Actions for breach of contract in relation to a patent, or for a tort to a patent, are not within the exclusive jurisdiction of the *United States* courts. *Robinson on Patents*, vol. 3 (1890), §§ 864, 865.

3. *Walker v. Flint*, 7 Fed. Rep. 435; *Chapin v. James*, 11 R. I. 87; 23 Am. Rep. 412; *Foster's Federal Practice* (2d ed.), § 6; *Currie v. Lewiston*, 15 Fed. Rep. 377; *M'Kim v. Voorhies*, 7 Cranch (U. S.) 279; *Ableman v. Booth*, 21 How. (U. S.) 506; *Gamewell Fire Alarm Tel. Co. v. Mayor*, 31 Fed. Rep. 312.

4. *Sharon v. Hill*, 22 Fed. Rep. 28; *Washburn, etc., Mfg. Co. v. Scutt*, 22 Fed. Rep. 710; *Weaver v. Field*, 16 Fed. Rep. 22; *Henry in Admiralty Ju-*

isdiction and Procedure (1885), § 119; *Pierce v. Feagans*, 39 Fed. Rep. 587.

5. *Parks v. Wilcox*, 6 Colo. 489. And see *Cole v. Oil Well Supply Co.*, 57 Fed. Rep. 534. But this rule applies only where the parties and subject-matter are both the same. *Boston, etc., R. Co. v. New York, etc., R. Co.*, 12 R. I. 220.

A federal court will not appoint a receiver of property which is already in possession of a receiver appointed by a state court. *Reinach v. Atlantic, etc., R. Co.*, 58 Fed. Rep. 33; *Central Trust Co. v. South Atlantic, etc., R. Co.*, 57 Fed. Rep. 3. Nor is a constable authorized, under the *South Carolina* Dispensary law, to seize, without warrant or judicial action, intoxicating liquors in the possession of a receiver appointed by a federal court. *Re Swan*, 150 U. S. 637. But a federal court will not, through principles of comity, hold its hand and leave the determination of the validity of a state statute to the state courts. *Re Langford*, 57 Fed. Rep. 570.

6. *Bank of British N. A. v. Barling*, 44 Fed. Rep. 641; *Curtis on Jurisdiction of U. S. Courts* (1880), p. 13; *Payne v. Hook*, 7 Wall. (U. S.) 425; *Parsons v. Lyman*, 5 Blatchf. (U. S.) 170; *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Hull v. Dills*, 19 Fed. Rep. 657.

7. *United States Const.*, art. 3, § 2.

As to the latter, it is provided that, "Suits in equity shall not be sustained in either of the courts of the *United States*, where a plain, adequate, and complete remedy may be had at law." U. S. R. S., § 723.

This provision, however, is merely

afforded by the law must be quite as full and complete as that which equity would grant, in order to defeat jurisdiction.<sup>1</sup> It must be a relief at law which may be pursued in a federal court, and it is no objection to the exercise of jurisdiction in equity, that the state court affords an adequate remedy,<sup>2</sup> or that such remedy exists under the probate law or by special statutory proceedings.<sup>3</sup> If there is a proper remedy at law, there is a jurisdictional defect in the suit in equity, and the court should dismiss the bill upon its own motion, even though objection is not taken by demurrer, plea, or answer.<sup>4</sup> By the remedy at law is meant the remedy at common law, and the equitable jurisdiction is not affected by the fact that supplementary statutes of a state give a new legal remedy which is plain, adequate, and complete.<sup>5</sup>

The jurisdiction in equity is the same as that of the English chancery courts,<sup>6</sup> except that, on the one hand it is restricted to matters of federal cognizance, and on the other, extended to

declaratory of the common law. *Payne v. Kansas, etc.*, R. Co., 46 Fed. Rep. 546; *Lewis v. Cocks*, 23 Wall. (U. S.) 466; *New York Guaranty, etc., Co. v. Memphis Water Co.*, 107 U. S. 214.

1. *Fechheimer v. Baum*, 37 Fed. Rep. 175; *Payne v. Hook*, 7 Wall. (U. S.) 430; *Barber v. Barber*, 21 How. (U. S.) 591; *Boyce v. Grundy*, 3 Pet. (U. S.) 210.

2. *Parsons v. Lyman*, 5 Blatchf. (U. S.) 178; *Rich v. Bray*, 37 Fed. Rep. 273; *Barber v. Barber*, 21 How. (U. S.) 592.

3. *De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.*, 46 Fed. Rep. 829; *Rich v. Bray*, 37 Fed. Rep. 273; *Grand Rapids, etc., R. Co. v. Sparrow*, 36 Fed. Rep. 210.

4. *Hoey v. Coleman*, 46 Fed. Rep. 221.

5. *Grand Rapids, etc., R. Co. v. Sparrow*, 36 Fed. Rep. 210; *Curtis on Jurisdiction of United States Courts* (1880), p. 171.

Thus, a bill *quia timet* is maintainable in a case where there was no full remedy at the common law, even though by state legislation the action of ejectment had been extended to cover the case in question. *McConihay v. Wright*, 121 U. S. 201.

6. *Foster's Federal Practice* (2d ed.), § 5; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Payne v. Hook*, 7 Wall. (U. S.) 430; *Hull v. Dills*, 19 Fed. Rep. 657; *Van Norden v. Norton*, 99 U. S. 380. But it extends only to "those judicial powers which the high court of chancery in *England*, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the forma-

tion of the Constitution of the *United States*. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit [or other federal] courts." *McLean, J.*, in *Fontain v. Ravenel*, 17 How. (U. S.) 369, which held that the *United States* courts, for reasons given above, had not the power over charitable donations possessed by the English chancery court. The same principle is laid down in *Loring v. Marsh*, 2 Cliff. (U. S.) 469.

The rule adopting the equity jurisprudence of *England* as the basis of that of the federal courts applies only to the remedy granted, but not to the right enforced, which is governed by the special law of each state. *Meade v. Beale*, Taney's Dec. (U. S.) 339. In this case the court, by Taney, C. J., said: "The power of courts of chancery of the *United States* is, under the constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity, as recognized in the jurisprudence of *England*, is to be observed in the courts of the *United States*, in administering the remedy for an existing right. The rule applies to the remedy and not the right; and it does not follow, that every right given by the English law, and which, at the time the constitution was adopted, might have been enforced in a court of chancery, can also be enforced in a court of the *United States*; the right must be given by the law of the state, or of the *United States*. It is the form of remedy for which the con-

cover the granting of relief created by the legislation of the state where the court sits, or where the right which is sought to be enforced arose.<sup>1</sup>

Where equity has once taken jurisdiction, it will retain it until the complete settlement of issues in controversy. If necessary to this end, supplementary and ancillary proceedings may be entertained, although the court would not have had jurisdiction of the parties, if the proceedings had been original.<sup>2</sup>

c. TERRITORIAL.—This subject is more particularly considered under the heads of the several courts. There are, however, certain provisions common to all the federal courts.

(1) *Crimes*.—The trial of offenders punishable with death must be had in the county where the offense was committed, where

stitution provides; and if a complainant has no right, the circuit court, sitting as a court of chancery, has nothing to remedy in any form of proceeding."

It is for a federal court, after the cause is docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case is made which, according to the principles of equity, entitles a plaintiff to the relief asked. *Marshall v. Holmes*, 141 U. S. 589.

1. *Ex p. McNiel*, 3 Wall. (U. S.) 243; *Broderick's Will*, 21 Wall. (U. S.) 503; *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Smith v. Fort Scott, etc., R. Co.*, 99 U. S. 398; *Borland v. Haven*, 37 Fed. Rep. 394; *Fechheimer v. Baum*, 37 Fed. Rep. 167; *Clark v. Smith*, 13 Pet. (U. S.) 195; *Ex p. Biddle*, 2 Mason (U. S.) 472; *Fitch v. Creighton*, 24 How. (U. S.) 159; *Lorman v. Clarke*, 2 McLean (U. S.) 568; *Goshorn v. Alexander*, 2 Bond (U. S.) 158; *Scott v. Neely*, 140 U. S. 106; *Holland v. Challen*, 110 U. S. 15; *U. S. v. Block*, 3 Biss. (U. S.) 208.

Where the legislation of a state provides that, in the case of fraudulent assignments, a court having jurisdiction is authorized to declare the assignment void, although the assignee had no notice of the fraud, the equity courts of the *United States* can enforce such rights. *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Bernheim v. Birnbaum*, 30 Fed. Rep. 885.

Where the equity jurisdiction of the federal court is derived from the state statute, the construction put upon the statute by the state supreme court is binding upon the federal court. *Beebe v. Louisville, etc., R. Co.*, 39 Fed. Rep. 481.

2. *Dunn v. Clarke*, 8 Pet. (U. S.) 1; *Clarke v. Mathewson*, 12 Pet. (U. S.)

164; *Freeman v. Howe*, 24 How. (U. S.) 460; *Johnson v. Christian*, 125 U. S. 642; *Conwell v. White Water Valley Canal Co.*, 4 Biss. (U. S.) 195.

Thus, if necessary to prevent abuse of its own process, a federal court will entertain a bill by a stranger to a suit in which the process issued without regard to diversity of citizenship. *Krippeendorf v. Hyde*, 110 U. S. 276.

One in whose favor an injunction has been granted in a *United States* court may always institute proceedings in that court for its violation. *U. S. v. Lancaster*, 44 Fed. Rep. 885.

A federal court has jurisdiction of a suit to set aside its former decree for being fraudulently obtained, although by present citizenship a purely original bill between the parties could not be maintained, as it is but a continuation of the former controversy. *Foster v. Mansfield, etc., R. Co.*, 36 Fed. Rep. 627.

The limits of ancillary jurisdiction are defined in *Ralston v. Sharon*, 51 Fed. Rep. 709, where the court, by Hawley, J., said: "The ancillary jurisdiction of the court can only be maintained where the parties to a former suit are before the court, or the facts are such as to make the case a continuation of the former suit, or where the court is called upon to enforce or vacate its judgment or decree, or set aside its process, or to give relief with reference to property in its possession or under its control, or to bring in outside parties having an interest in the litigation, or where the property involved is in the custody of the court or its officers, and the rights of the parties thereto could not be determined in any other court without a conflict of jurisdiction between the courts."



it can be done without great inconvenience.<sup>1</sup> Other crimes are triable in the state and district where they were committed.<sup>2</sup> The trial for crimes committed without the jurisdiction of any particular state or district, whether upon the high sea or elsewhere, must be held in the district where the offender is found or into which he is first brought.<sup>3</sup> When an offense is begun in one district and completed in another, it may be prosecuted in either.<sup>4</sup>

(2) *Suits to Recover Penalties.*—Pecuniary penalties and forfeitures may be sued for either in the district where they accrue, or in that in which the offender is found.<sup>5</sup>

(3) *Suits for Internal Revenue Taxes.*—Taxes accruing under any law providing internal revenue, may be recovered by suit, either in the district where the liability for such tax occurs, or in the district where the delinquent resides.<sup>6</sup>

(4) *Ordinary Civil Suits.*—It is provided by law that “no civil action shall be brought before either of said courts [circuit or district] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”<sup>7</sup> This provision, however, confers a mere personal privilege, which is waived by entering a general appearance and filing a plea in bar.<sup>8</sup>

1. U. S. R. S., § 729.

But this is a mere privilege of the accused, which he waives by not objecting to a trial out of the county. In the last instance, the matter of venue is left to the court, the question of convenience being always in its discretion. *U. S. v. Cornell*, 2 Mason (U. S.) 101.

2. *United States Const.*, art. 3, § 2; U. S. R. S., § 563; *U. S. v. Bird*, 1 Sprague (U. S.) 299.

The constitutional provision upon this subject applies only to trials in federal courts. *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96.

Special laws regulating the criminal jurisdiction of federal courts held in several states, have been enacted as follows: *Georgia*, 21 St. at L. 63; *Michigan*, 20 St. at L. 175; *Missouri*, 20 St. at L. 263; *Ohio*, 20 St. at L. 101; 21 St. at L. 63; *Tennessee*, 21 St. at L. 175; *Texas*, 21 St. at L. 198.

3. U. S. R. S., § 730.

4. U. S. R. S., § 731. But a libel written in one district and published in another does not come within this provision. *In re Buell*, 3 Dill. (U. S.) 122.

5. U. S. R. S., § 732.

6. U. S. R. S., § 733; *U. S. v. New York, etc., R. Co.*, 10 Ben. (U. S.) 144.

7. Act of March 3d, 1887, § 1; 24 St. at L. 552; Act of August 13th, 1888, 25 St. at L. 433; *McCormick Harvesting Mach. Co. v. Walther*, 134 U. S. 41; *Bostwick v. American Finance Co.*, 43 Fed. Rep. 897; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 33 Fed. Rep. 385.

Thus a suit brought by two persons on a contract entered into by them as partners, cannot be maintained in a district of which the defendant and one of the plaintiffs are non-residents. *Smith v. Lyon*, 38 Fed. Rep. 53.

This clause has no application to suits in admiralty. *In re Louisville Underwriters*, 134 U. S. 488.

**Estoppel.**—A company which has represented itself in doing business as a corporation of a certain state, cannot deny that it is such to defeat the jurisdiction of the federal courts of that state over it. *Blackburn v. Selma, etc., R. Co.*, 2 Flip. (U. S.) 525.

8. *Betzoldt v. American Ins. Co.*, 47 Fed. Rep. 705; *Ex p. Schollenberger*, 96 U. S. 377; *Toland v. Sprague*, 12 Pet. (U. S.) 330; *Harrison v. Rowan, Pet. (C. C.)* 489; *Flanders v. Aetna Ins. Co.*, 3 Mason (U. S.) 158; *Hall v. Continental L. Ins. Co.*, 12 Fed. Rep.

*f.* DISMISSAL FOR WANT OF JURISDICTION.—There are in federal practice, as at the common law,<sup>1</sup> two kinds of defects of jurisdiction, *i. e.*, that arising from the nature of the subject-matter, and that due to the character of the parties litigant. The former is fatal, the latter may be waived by the act of the party. If the court has no jurisdiction of the subject-matter, it is its duty to dismiss the suit on demand of the litigant, or *sua sponte*.<sup>2</sup> It must also reverse any judgment which it may have granted.<sup>3</sup> Its jurisdiction is then at an end, and it cannot retain the case for any purpose, nor can it award costs or issue execution to collect costs to either party.<sup>4</sup>

7. Rules of Decision—*a.* STATUTORY PROVISION.—The fundamental rule is laid down in the revised statutes as follows: "The laws of the several states, except where the constitution, treaties, or statutes of the *United States* otherwise require,<sup>5</sup> or provide, shall be regarded as rules of decision in trials at common law, in courts of the *United States*, in cases where they apply."<sup>6</sup> This provision applies only to civil cases and does not regulate proceedings in equity or admiralty or in criminal prosecutions.<sup>7</sup> It includes in its purview both the statute and common law of the several states.

359; *Gracie v. Palmer*, 8 Wheat. (U. S.) 699; *Segee v. Thomas*, 3 Blatchf. (U. S.) 11; *McClaskey v. Cobb*, 2 Bond (U. S.) 16; *Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. (U. S.) 89.

1. Robinson's *Elementary Law* (1882), § 284; Gould on Pleading (5th ed.), ch. 5, §§ 13, 25; Cooley on Constitutional Limitations (4th ed.), p. 398.

2. *Vannerson v. Leverett*, 31 Fed. Rep. 376; *U. S. v. Crawford*, 47 Fed. Rep. 561; *Williams v. Nottaway*, 104 U. S. 209; *Lewis v. Cocks*, 23 Wall. (U. S.) 466; *Wood v. Mann*, 1 Sumn. (U. S.) 578. Even after verdict. *Hartog v. Memory*, 23 Fed. Rep. 835. No plea in abatement is necessary. *Rae v. Grand Trunk R. Co.*, 14 Fed. Rep. 401.

3. *U. S. v. Huckabee*, 16 Wall. (U. S.) 414.

4. *Nashville v. Cooper*, 6 Wall. (U. S.) 247.

5. This provision precludes the adoption of a state law as a rule of decision, whenever such a course of proceeding would deprive a complaining party of a remedy essential to the vindication of a right derived from, or protected by, the federal constitution. *Poindexter v. Greenhow* (*Virginia Coupon case*), 114 U. S. 270.

6. U. S. R. S., § 721, which is a literal reenactment of section 34 of the Judiciary Act of 1789. And see *Western, etc., R. Co. v. Roberson*, 61 Fed. Rep. 592;

*Balkam v. Woodstock Iron Co.*, 154 U. S. 177; *Pennsylvania R. Co. v. National Docks, etc., R. Co.*, 58 Fed. Rep. 929; *Mutual Benefit L. Ins. Co. v. Robinson*, 58 Fed. Rep. 723; *Prentice v. Duluth Storage, etc., Co.*, 58 Fed. Rep. 437; *Wood v. Brady*, 150 U. S. 18; *Milker v. Anderson*, 150 U. S. 132.

The matter is further regulated by statute in civil and criminal proceedings brought in accordance with the provisions of the Revised Statutes in the titles, "Crimes" and "Civil Rights." See U. S. Rev. Stat., § 722; *Bank of North America v. Rindge*, 57 Fed. Rep. 279. And see *Pennsylvania R. Co. v. National Docks, etc., R. Co.*, 56 Fed. Rep. 697. But the responsibility of a railroad company to its employes is a matter of general law, and, in the absence of statutory regulations by the state in which the cause of action arises, the *United States Supreme Court* is not bound to follow the decisions of the state courts on the subject. *Gardner v. Michigan, etc., R. Co.*, 150 U. S. 349. And see *Western U. Tel. Co. v. Wood*, 57 Fed. Rep. 471; *Western U. Tel. Co. v. Cook*, 61 Fed. Rep. 624.

Where a question of general right arises, the federal courts will not necessarily follow the decisions of the state courts. *Todd v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

7. *U. S. v. Reid*, 12 How. (U. S.) 361;

*b. THE LAWS OF THE SEVERAL STATES; HOW DETERMINED—*  
 (1) *As to State Statutes.*—In all questions involving the existence or non-existence of state statutes, the decision of the state courts is binding upon the courts of the *United States*. The discussion of whether the proper formalities in the enactment of the statute have been complied with cannot be raised in the *United States* court.<sup>1</sup> Similarly in all matters of the construction of statutes, the federal courts will strive towards uniformity with the courts of the state enacting the statute, and will look to their decision as strong evidence of what the statute really means.<sup>2</sup> Reference is mainly had to the decision of the highest state court.<sup>3</sup>

The rule, with its proper limits, may be stated as follows:

*First.* If there is in any state a settled construction of a statute, and if that construction was announced before the rights which are the subject of the controversy in the *United States* courts attached, the *United States* courts will be bound by the adjudicated rule of the state courts, even though they have to overrule their own former decisions.<sup>4</sup>

*Bucher v. Cheshire R. Co.*, 125 U. S. 555.

1. *Holt on Concurrent Jurisdiction* (1888), p. 160; *Leeper v. Texas*, 139 U. S. 462; *Leavenworth Co. v. Barnes*, 94 U. S. 70; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Amoskeag Co.*, 105 U. S. 667; *In re Duncan*, 139 U. S. 449; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812.

2. *South Branch Lumber Co. v. Ott*, 142 U. S. 622; *Stutsman Co. v. Wallace*, 142 U. S. 293; *Gormley v. Clark*, 134 U. S. 338; *Fairfield v. Gallatin Co.*, 100 U. S. 47; *Post v. Amoskeag Co.*, 105 U. S. 667; *Webster v. Cooper*, 14 How. (U. S.) 488; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Randall v. Brigham*, 7 Wall. (U. S.) 523; *Elmwood Tp. v. Marcy*, 92 U. S. 289; *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457; *Berrian v. Rogers*, 43 Fed. Rep. 467; *In re Converse*, 42 Fed. Rep. 217.

3. *McElvaine v. Brush*, 142 U. S. 155.

4. *Bishop on the Written Laws* (1882), § 35 b; *King v. Wilson*, 1 Dill. (U. S.) 556; *Leffingwell v. Warren*, 2 Black (U. S.) 599; *Pease v. Peck*, 18 How. (U. S.) 595; *The Princess Alexander*, 8 Ben. (U. S.) 209; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297; *Tloga R. Co. v. Blossburg, etc.*, R. Co., 20 Wall. (U. S.) 137; *Townsend v. Todd*, 91 U. S. 452; *Scipio v. Wright*, 101 U. S. 665; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Aicardi v. Alabama*, 19 Wall. (U. S.) 635; *First Nat. Bank v. Bennington*, 16 Blatchf. (U. S.) 531; *Green v. Neal*, 6 Pet. (U. S.) 291;

*Suydam v. Williamson*, 24 How. (U. S.) 427; *League v. Egery*, 24 How. (U. S.) 264. The rule is thus stated by Field, J., in *Louisiana v. Pilsbury*, 105 U. S. 294, his words being quoted with approval by Shiras, J., delivering the opinion of the court in *Morley v. Lake Shore, etc.*, R. Co., 13 Sup. Ct. Rep. 54: "The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. . . . The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it." "The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes, in a case not involving any question re-examinable in this court under the twenty-fifth section of the Judiciary Act, must be regarded as conclusive in this court." And thus by Fuller, J., in *Stutsman Co. v. Wallace*, 142 U. S. 293: "It is well settled that upon the construction of the constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy

*Second.* If the state decisions are conflicting, or if the question has not been raised in the state courts, the federal courts will follow their own judgment.<sup>1</sup>

*Third.* If the rule of the state courts is settled, but was announced after the rights in question attached, the state decisions will be of great weight as a precedent, but will not be regarded as binding.<sup>2</sup>

(2) *As to the Common Law.*—The principles which determine how the unwritten law of the states shall be ascertained, are not essentially different from those already laid down for the construction of statutes. In general, the decisions of a state's highest court, if uniform, and if announced before the rights under investigation accrued, will be regarded as binding by the federal court, although it be already committed to a different view of the law. Under other circumstances, the adjudications of the state courts are looked to only as precedents having more or less weight.<sup>3</sup> But while this is the general rule, it is subject to important qualifications. It is most fully applied in the case of

of some provision of the federal constitution or of a federal statute or a rule of general commercial law."

In *Burgess v. Seligman*, 107 U. S. 20, the court, by Bradley, J., said: "Since the ordinary administration of the law is carried on by state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."

The federal courts will follow the construction given by a state supreme court to the words "charity" and "necessity," in the state Sunday law prohibiting traveling on that day, except in a work of necessity or charity. *Bucher v. Cheshire R. Co.*, 125 U. S. 555.

In deciding whether a given instrument is a deed of trust in the nature of a mortgage or a deed of assignment for the benefit of creditors, the federal courts will follow the decisions of the supreme court of the state. *Rainwater-Boogher Hat Co. v. Malcolm*, 51 Fed. Rep. 734.

1. *Burgess v. Seligman*, 107 U. S. 20.

2. *Douglass v. Pike Co.*, 101 U. S. 677; *Confarr v. Santa Anna Tp.*, 116 U. S. 366; *Rowe v. Runnels*, 5 How.

(U. S.) 134; *Burgess v. Seligman*, 107 U. S. 20, where the court, by Bradley, J., said: "When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt."

In *Anderson v. Santa Anna Tp.*, 116 U. S. 356, the court, by Harlan, J., said: "While the courts of the United States accept and apply the construction of a state constitution or of a local statute, upon which the rights of the parties depend, which has been fixed by the course of decisions in the state court, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the state court; and where such rights have accrued before the state court has announced its construction, the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment."

3. *Burgess v. Seligman*, 107 U. S. 20.

controversies involving questions of real property law, while in matters of a more general, universal character it has little force. Such are cases involving the doctrines of commercial law or general jurisprudence, which are decided by the federal courts independently of the rules previously established by state tribunals.<sup>1</sup>

The same is generally true of questions of interest,<sup>2</sup> insurance,<sup>3</sup> negligence,<sup>4</sup> and general corporation law.<sup>5</sup> Such questions are decided by the federal courts on principle and precedent, independently of the state courts.<sup>6</sup> A succinct statement of the whole matter is given in the note.<sup>7</sup>

(3) *Rule After Cause Removed*.—After a cause has been removed into the federal court, the decisions of a state court made before its removal will ordinarily be followed.<sup>8</sup>

1. *Van Vleet v. Sledge*, 45 Fed. Rep. 749; *Burgess v. Seligman*, 107 U. S. 20; *Swift v. Tyson*, 16 Pet. (U. S.) 1; *Olcott v. Fond Du Lac Co.*, 16 Wall. (U. S.) 678; *St. Louis v. Rutz*, 138 U. S. 226, 250; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666; *Venice v. Murdock*, 92 U. S. 494; *Cromwell v. Sac Co.*, 96 U. S. 51; *Fairfield v. Gallatin Co.*, 100 U. S. 47; *Douglass v. Pike Co.*, 101 U. S. 686; *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 14; *Watson v. Tarpley*, 18 How. (U. S.) 517; *Holt on Concurrent Jurisdiction* (1888), p. 160; *Bank of Edgefield v. Farmers' Co-Operative Mfg. Co.*, 52 Fed. Rep. 98. But where the question is a new one in the federal courts, the state decision will be given great weight. *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. Rep. 191; *O'Connell v. Reed*, 56 Fed. Rep. 531.

2. *Ohio v. Frank*, 103 U. S. 697.

3. *Hening v. U. S. Ins. Co.*, 2 Dill. (U. S.) 26; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495.

4. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 109; *Bank of Ky. v. Adams Express Co.*, 93 U. S. 174; *Hough v. Texas, etc., R. Co.*, 100 U. S. 216; *Indianapolis, etc., R. Co. v. Hest*, 93 U. S. 291.

5. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Clark v. Bever*, 139 U. S. 96, 116.

6. The authorities on this subject are collated in an article entitled, "The Cases in Which the Federal Courts Do or Do Not Follow State Decisions in Matters of Substantive Law," by A. Hollingsworth, *Central Law Journal*, vol. 35, p. 322, and in the note to *Fore-*

*paugh v. Delaware, etc., R. Co.*, 24 W. N. C. (Pa.) 385; 5 L. R. A. 509.

7. The rule has thus been formulated by a distinguished lawyer and jurist: "Statement of cases in which *United States* courts do or do not follow state decisions: *First*. Statutes of states and the construction of them by the highest court of the state are binding and conclusive on the courts of the *United States* in all cases where such statutes so construed are not in conflict with the constitution, etc., and where such decisions can be regarded as the settled and fixed law of the state. *Second*. Whenever, in the judgment of the *United States* courts, such statutes, as construed by state courts, are not in conflict with the Constitution of the *United States*, or whenever they are conflicting so that they cannot be regarded as the settled law of the state, *United States* courts are not bound by them. *Third*. In questions affecting property rights, and especially real property, *United States* courts regard themselves as specially bound to follow decisions of the state court. *Fourth*. These rules are always subject to the qualification that the state statutes and decisions shall violate no right secured by the constitution, laws, and treaties of the *United States*. *Fifth*. In cases which fall under the denomination of general commercial law, and cases involving questions of public policy, or of general equity jurisprudence, *United States* courts are not bound by decisions of state courts." Synopsis of lecture delivered before the law school of Yale University, November, 1892, by Hon. Daniel H. Chamberlain (pamphlet), p. 39.

8. *Lookout Mt. R. Co. v. Houston*,

**8. Process—*a.* FORM—(1) *In General.***—It is provided<sup>1</sup> that all writs and processes issuing from the courts of the *United States* shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof.<sup>2</sup> Those issuing from the supreme court or a circuit court shall bear *teste* of the chief justice of the *United States*,<sup>3</sup> or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear *teste* of the judge, or, when that office is vacant, of the clerk thereof. The seals of the said courts shall be provided at the expense of the *United States*.

All process<sup>4</sup> issued from the courts of the *United States* shall bear *teste* from the day of such issue.

Process issuing from the circuit or district courts may be amended by leave of court, where it can be done without prejudice to the party against whom such process issues.<sup>5</sup> It is not abated nor rendered invalid by an act changing the time of holding court, but is deemed returnable to the term established next after the return day.<sup>6</sup>

The supreme, circuit, and district courts, and the circuit court of appeals have power to issue all writs—whether specifically mentioned in the statutes or not—necessary for the exercise of their

44 Fed. Rep. 449; *Cleaver v. Traders' Ins. Co.*, 40 Fed. Rep. 711; *Davis v. St. Louis, etc., R. Co.*, 25 Fed. Rep. 786; *Milligan v. Lalance, etc., Mfg. Co.*, 21 Blatchf. (U. S.) 407; *Loomis v. Carrington*, 18 Fed. Rep. 97; *Bryant v. Thompson*, 27 Fed. Rep. 881; *Duncan v. Gegan*, 101 U. S. 810.

1. U. S. R. S., §§ 911, 912.

2. They cannot be signed by the judge. *Bowler v. Eldredge*, 18 Conn. 1.

The clerk must sign every summons and notice. *Dwight v. Merritt*, 4 Fed. Rep. 614; *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472.

The deputy clerk cannot lawfully sign a *venditioni exponas* in his own name. The informality, however, can be taken advantage of only in a direct proceeding. *Bragg v. Lorlo*, 1 Woods (U. S.) 209; *Griswold v. Connolly*, 1 Woods (U. S.) 193.

If signed by the clerk and under seal of the court, a writ of summons is valid and regular, although—except as to the signature—entirely in the handwriting of plaintiff's attorney. *Jewett v. Garrett*, 47 Fed. Rep. 625.

A summons is valid, even though signed and sealed in blank and delivered to plaintiff's attorney, who filled up the form. *Jewett v. Garrett*, 47 Fed. Rep. 625.

A rule of state practice which permits an attorney to issue process

without the seal of the court or the signature of the clerk, will not be followed by the federal court. Such process is void and therefore cannot be validated by amendment. *Dwight v. Merritt*, 4 Fed. Rep. 614; *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472; *Chamberlain v. Mensing*, 47 Fed. Rep. 435.

3. A writ of error is void if it bear the *teste* of the clerk of the court to which it is issued, instead of the chief justice of the supreme court. *Wells v. McGregor*, 13 Wall. (U. S.) 188.

4. Including writs of error. *Atherton v. Fowler*, 91 U. S. 143.

5. U. S. R. S., §§ 948, 954; *Eberly v. Moore*, 24 How. (U. S.) 147. But if the process is void, no amendment can give it validity. *Brown v. Pond*, 5 Fed. Rep. 31.

A clerical error in the title of the writ is amendable. *Furniss v. Ellis*, 2 Brock. (U. S.) 15.

Where the mistake is one of fact, not apparent on the record and not to be amended by any matter apparent in any part of the record, the court is not authorized to make an amendment. *Albers v. Whitney*, 1 Story (U. S.) 310.

A *capias* may be amended by inserting the Christian name of the plaintiff. *Birch v. Butler*, 1 Cranch (C. C.) 319.

6. U. S. R. S., §§ 573, 660.

respective jurisdictions and agreeable to the usages and principles of law.<sup>1</sup>

No process may be abated or quashed for any defect or want of form, but the proper amendment may be had.<sup>2</sup>

The forms of *mesne* process in equity and admiralty causes in the circuit and district courts must be according to the principles governing such suits, unless otherwise provided by statute or rules of court.<sup>3</sup> In other cases the forms must conform, as near as may be, to those in the state courts of record in the state where the trial is held.<sup>4</sup>

(2) *Attachments*.—The remedies by attachment in the *United States* courts are similar to those allowed in the states within which the courts are held.<sup>5</sup> The dissolution of attachments also is secured in the same way as in the courts of such states.<sup>6</sup> Special provision is made by statute for garnishment in suits by the *United States* against corporations.<sup>7</sup> Attachments are not affected by the removal of causes from the state into the *United States* courts.<sup>8</sup>

1. U. S. R. S., § 716; 26 St. at L. 829, § 12; *Kentucky v. Dennison*, 24 How. (U. S.) 66.

They can issue writs of *ne exeat re-publica*. *Lewis v. Shainwald*, 48 Fed. 492.

2. U. S. R. S., § 954.

Thus, where a state statute permits a writ of attachment to be amended by the addition of a seal, such a writ may be so amended after removal into the federal court. *Wolf v. Cook*, 40 Fed. Rep. 432.

In actions to enforce forfeitures and penal actions, amendments are not often granted. *U. S. v. Batchelder*, 9 Int. Rev. Rec. 98.

3. U. S. R. S., § 913.

4. U. S. R. S., § 914; *Brown v. Pond*, 5 Fed. Rep. 37; *Brown v. Chesapeake, etc., Canal Co.*, 4 Fed. Rep. 770; *Baltimore, etc., R. Co. v. Hamilton*, 16 Fed. Rep. 181; *Ricard v. New Providence Tp.*, 5 Fed. Rep. 434. But this rule must be construed together with U. S. R. S., § 911. Hence a suit cannot be commenced by summons in the name of the plaintiff's attorney, although authorized by state law. *Martin v. Criscuola*, 10 Blatchf. (U. S.) 211.

It is sufficient if the forms prescribed by the state laws be substantially followed. *Johnson v. Healy*, 9 Ben. (U. S.) 318.

The forms of process (except style) in the *United States* courts, sitting within the thirteen states which originally composed the union, in actions at common law are the same as those

which were employed in the supreme courts of the states, respectively, on May 8th, 1792; except so far as the *United States* courts may have prescribed alterations. *U. S. v. Stevenson*, 1 Abb. (U. S.) 495.

The supreme court may prescribe forms of process for use in the circuit and district courts. U. S. R. S., § 917. It may change them from time to time. *The St. Lawrence*, 1 Black (U. S.) 522.

5. U. S. R. S., § 915. And by this statute similar preliminary affidavits or proofs, and similar security, as required by such state laws, must be first furnished by the party seeking such attachment or other remedy.

But an attachment against the property of a person not residing in the district cannot be had unless he be first served with process. *Ex p. Des Moines R. Co.*, 2 Morr. (Iowa) 303; *Hollingsworth v. Adams*, 2 Dall. (U. S.) 396; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Chaffee v. Hayward*, 20 How. (U. S.) 208; *Day v. Newark India-Rubber Mfg. Co.*, 1 Blatchf. (U. S.) 628; *Sadler v. Hudson*, 2 Curt. (U. S.) 6; *Picquet v. Swan*, 5 Mason (U. S.) 35; *Richmond v. Dreyfous*, 1 Sumn. (U. S.) 131.

But money in the hands of the clerk of a *United States* court is not liable to attachment. *The Lottawanna*, 20 Wall. (U. S.) 201. As to attachments in postal suits, see U. S. R. S., §§ 924, 932.

6. U. S. R. S., § 933.

7. U. S. R. S., §§ 935-937.

8. 18 St. at L. 470.

Where writs of attachment against the same defendant issue from both state and *United States* courts, the one under which the property is first actually taken into custody will hold it irrespective of the dates of the writs. A joint levy cannot be made under the writs, nor can the property be attached upon one subject to the prior levy of the other.<sup>1</sup>

*b. SERVICE—(1) By Whom Made.*—The service of process is ordinarily made by the marshal, who is the general executive officer of the court, or by his deputy.<sup>2</sup> The officer should act in substantially exact compliance with the requirements of law or the order of court which he is executing. His return should show this compliance, when it will be sufficient proof of the service.<sup>3</sup> By a rule of practice in equity, the service of process may be made by a person especially appointed by the court as well as by the marshal or his deputy. Such person must, however, make affidavit to the fact of service,<sup>4</sup> a formality which the marshal or his deputy need not observe.<sup>5</sup>

*(2) How Made.*—The mode of service of process issuing from the circuit and district courts in causes other than those in equity and admiralty follows the practice in the courts of the state where the causes are tried.<sup>6</sup> This applies to service on

1. *Adler v. Roth*, 2 McCrary (U. S.) 445.

2. *Schwabacker v. Reilly*, 2 Dill. (U. S.) 127. But a subpoena may be served by a private person. *Russell v. Ashley*, Hempst. (U. S.) 546. If the service is by a deputy marshal, he must make his return in the name of his principal. *Spafford v. Goodell*, 3 McLean (U. S.) 97. The return, however, is amendable. *International Grain Ceiling Co. v. Dill*, 10 Ben. (U. S.) 92.

In case of the death of the marshal, his deputies continue in office, unless otherwise specifically removed, and execute process in the name of the deceased until a successor is appointed and qualifies. U. S. R. S., § 789. If the marshal or his deputy be removed, or if the marshal's term expires, such officer may execute all process remaining in his hands at the time of such renewal or expiration of term. U. S. R. S., § 790.

The execution of process includes the returning of process, service under which has already been made. Thus the marshal may amend his return after going out of office. *Cushing v. Laeid*, 4 Ben. (U. S.) 70.

Such service or amendment may be made after the qualification of a successor. *Stewart v. Hamilton*, 4 McLean (U. S.) 534.

If the marshal or his deputy is a

party in a cause, a disinterested party is appointed by the court or judge to make service. U. S. R. S., § 922.

A marshal may be ordered by the supreme court to return a writ directed to him for service upon a state, and, in case of default, to show cause therefor by affidavit. *Oswald v. New York*, 2 Dall. (U. S.) 402.

If personal service is made on a defendant, and return is made in the name of a special deputy marshal instead of in the name of the marshal, strangers cannot object to the judgment because of the irregularity. *Hill v. Gordon*, 45 Fed. Rep. 276.

3. The marshal's return on a treasury distress warrant that he had levied on lands is *prima facie* evidence that there were no goods and chattels subject to levy. *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

4. Equity Rule, No. 15; *Deacon v. Sewing Mach. Co.* (Pa. 1882), 14 Rep. 43.

5. *Von Roy v. Blackman*, 3 Woods (U. S.) 98; *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775.

6. U. S. R. S., § 914; *Amy v. Watertown*, 130 U. S. 301; *Shampeau v. Connecticut River Lumber Co.*, 37 Fed. Rep. 771; *Wilson v. Fine*, 38 Fed. Rep. 789; *Miller v. Norfolk, etc., R. Co.*, 41 Fed. Rep. 431; *Albright v. Empire Transp. Co.*, 18 Alb. L. J. 313;



both individuals and corporations.<sup>1</sup> The matter of service on non-residents in certain cases is especially regulated by *United States* statute given in the notes.<sup>2</sup> These provisions cover both legal and equitable writs. In equity, in cases other than those against non-residents, the service must be made by the delivery of a copy of the process to the defendant personally, or by leaving a copy thereof, at his dwelling-house or usual place of abode, with some adult person who is a member or resident in the family.<sup>3</sup>

*Brownell v. Troy, etc., R. Co.*, 3 Fed. Rep. 761; *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 666.

A rule adopted by the *United States* Court regulating the method of service is binding on the marshal, if the state method of service is uncertain. *Lowry v. Story*, 31 Fed. Rep. 769.

1. *Amy v. Watertown*, 130 U. S. 301.

2. When in any suit commenced in any circuit court of the *United States*, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant or defendants, without appear-

ance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; provided, however, "that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein, on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." 18 St. at L. 472.

An order, in accordance with the above provision, may be obtained on filing the bill, by making proof by affidavit that the defendant does not dwell within the district, and cannot be found or served therein. *Forsyth v. Pier-son*, 9 Fed. Rep. 801.

Publication can avail only on proof by affidavit that personal service is impracticable. *Batt v. Procter*, 45 Fed. Rep. 515; *Bronson v. Keokuk*, 2 Dill. (U. S.) 498.

Mere expensiveness of service does not constitute impracticability. *Batt v. Procter*, 45 Fed. Rep. 515.

The affidavit should state the residence, so far as known, and make it appear that diligence had been used to locate the others. *Batt v. Procter*, 45 Fed. Rep. 515.

A suit to determine the title to a patent right does not come within the terms of the above provision. *Non-magnetic Watch Co. v. Association Horlogere Suisse*, 44 Fed. Rep. 6.

8. Equity Rule No. 13.

Process in admiralty must be served by the marshal or his deputy, or where he or they are interested by some discreet and disinterested person appointed by the court.<sup>1</sup>

(3) *Territorial Limitations*.—Process can ordinarily be issued only to the marshal of the district where the court sits.<sup>2</sup> It may be issued into another district, however, if especially authorized by express act of Congress.<sup>3</sup>

(4) *Waiver*.—Service may be waived either expressly or by appearance.<sup>4</sup> Either form of waiver cures any irregularity in the writ,<sup>5</sup> or the mode of service,<sup>6</sup> or the return.<sup>7</sup>

9. *Pleading*.—(See also PLEADING, vol. 18, p. 467; EQUITY PLEADING, vol. 6, p. 724)—*a*. IN ACTIONS AT COMMON LAW.—In common-law actions, the pleadings in the circuit and district courts must conform, as near as may be, to those used in like causes in the courts of record of the state within which the court is held,<sup>8</sup> except in matters covered by federal stat-

1. Admiralty Rule No. 1.

2. *In re Manning*, 44 Fed. Rep. 275;

U. S. v. Crawford, 47 Fed. Rep. 561.

3. *Ex p. Graham*, 3 Wash. (U. S.) 462.

4. U. S. v. Crawford, 47 Fed. Rep.

561; *Patterson v. U. S.*, 2 Wheat. (U.

S.) 221; *Maxwell v. Stewart*, 22 Wall.

(U. S.) 77; *Sage v. Central R. Co.*, 96

U. S. 712; *Toland v. Sprague*, 12 Pet.

(U. S.) 300.

5. *Knox v. Summers*, 3 Cranch (U.

S.) 496; *Farrar v. U. S.*, 3 Pet. (U. S.)

459.

6. *Pollard v. Dwight*, 4 Cranch (U.

S.) 421. But no such waiver results

from a special appearance for the pur-

pose of moving to set the service aside.

*Harkness v. Hyde*, 98 U. S. 476.

7. *Wood v. Lide*, 4 Cr. (U. S.) 180;

*Sage v. Railroad Co.*, 96 U. S. 712.

8. U. S. R. S., § 914.

*Oscanyan v. Winchester Repeating*

*Arms Co.*, 15 Blatchf. (U. S.) 87; *Dex-*

*ter v. Sayward*, 51 Fed. Rep. 729; *Perry*

*v. Mechanics' Mut. Ins. Co.*, 11 Fed.

Rep. 478; *Taylor v. Brigham*, 3 Woods

(U. S.) 377; *Lewis v. Gould*, 13 Blatchf.

(U. S.) 216; *Edison General Electric*

*Co. v. Johnstown Electric Co.*, 32 W.

N. C. 327.

The use of the phrase "as near as may be," which occurs in the statute, has been held to give the courts power to reject unimportant provisions of state statutes, which could not be wisely and conveniently adopted as a part of the federal procedure. *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 301; *Phelps v. Oaks*, 117 U. S. 239.

Federal courts are not bound by a state statute prescribing a rule of prac-

tice for a single state court, nor by local practice dividing jurisdiction between courts of law and equity. *Johnson v. Merry Mount Granite Co.*, 53 Fed. Rep. 569.

But a state statute providing that the husband is not a necessary or proper party to an action for damages to the person, estate, or character of his wife, is applicable in the federal courts for the state in actions at law. *Morning Journal Assoc. v. Smith*, 1 U. S. App. 270; 56 Fed. Rep. 141.

But the federal courts are not always restricted to the remedies provided by the laws of the state, and in proceedings to enforce a recognizance bond taken in a criminal case, they may resort to any of the common-law remedies, including *scire facias*, and a final judgment against the principals and sureties, on its return duly served. *U. S. v. Insley*, 54 Fed. Rep. 221.

Nor does this section apply to a motion to set aside a default and vacate a decree in an equity cause after the term at which it was rendered. *Austin v. Riley*, 55 Fed. Rep. 833.

Nor does it adopt a rule established by state statute regulating the time which must elapse before a deposition duly taken and filed can be read. *Walker v. Collins*, 59 Fed. Rep. 70.

State statutes regulating the manner of bringing in absent defendants by publication are not applicable to the federal courts, but the act of Congress governs in such cases. *Bracken v. Union Pac. R. Co.*, 56 Fed. Rep. 447.

But the practice, pleadings, forms, and modes of proceedings in garnish-

utes.<sup>1</sup> Thus the state practice will be followed in determining the proper time to file the declaration,<sup>2</sup> the right of amendment as of course,<sup>3</sup> the defects that may be taken advantage of by demurrer,<sup>4</sup> and the sufficiency of the pleadings.<sup>5</sup> The pleadings in actions for the infringements of patents and copyrights are expressly regulated by the legislation of Congress.<sup>6</sup>

*b. IN EQUITY.*—The pleadings in equitable actions are substantially uniform throughout the *United States*. They are regulated by rules framed by both the supreme court and the court where the suit is brought, in accordance with powers granted by Congress.<sup>7</sup> As to the rules in detail and the decisions, reference is had to another part of this work.<sup>8</sup>

**10. Appeals and Writs of Error**—(See *APPEAL*, vol. 1, p. 616; *ERROR, WRIT OF*, vol. 6, p. 810).—The subjects of appeals and writs of error are naturally treated under the heads of the separate courts. There are some provisions, however, common to all.

*a. WRITS OF ERROR*—(1) *Issuance*.—A writ of error issues from the clerk's office of the appellate court to which it is returnable. If it is to review the judgment of a circuit court, it may issue from the office of the clerk of that court as well as from the office of the clerk of the highest court.<sup>9</sup> It is, however, still the

ment, must conform as nearly as possible to the state statutes in force at the time of the trial. *Citizens' Bank v. Farwell*, 56 Fed. Rep. 570.

The liability of a stockholder in a corporation, for which a special remedy is provided by the statutes of the state creating the corporation and imposing such liability, can be enforced in no other manner in a federal court. *Bank of North America v. Rindge*, 57 Fed. Rep. 279.

If in a state statute legal and equitable modes of procedure are confounded, the fact that the mode of procedure adopted by a claimant does not conform strictly to the requirements of the state statute, will not defeat the action, since the federal courts will enforce the right, but will preserve the distinction between law and equity. *Leighton v. Young*, 10 U. S. App. 298; 3 C. C. A. 176; 52 Fed. Rep. 439.

1. *Easton v. Hodges*, 7 Biss. (U. S.) 324; *Wear v. Mayer*, 6 Fed. Rep. 660; *McNutt v. Bland*, 2 How. (U. S.) 17; *Dwight v. Merritt*, 4 Fed. Rep. 614; *Beardsley v. Littell*, 14 Blatchf. (U. S.) 102.

2. *Ricard v. New Providence Tp.*, 5 Fed. Rep. 434.

3. *Rosenbach v. Dreyfuss*, 1 Fed. Rep. 393; *West v. Smith*, 101 U. S. 263; *Whitaker v. Pope*, 2 Woods (U.

S.) 463; *Lewis v. Gould*, 13 Blatchf. (U. S.) 216.

4. *Chemung Canal Bank v. Lowrey*, 93 U. S. 72.

5. *Castro v. De Uriarte*, 12 Fed. Rep. 250; *U. S. v. Tilton*, 7 Ben. (U. S.) 306.

6. U. S. R. S., §§ 4920, 4969. As to the allegations necessary to charge interference, see *Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co.*, 46 Fed. Rep. 72.

7. U. S. R. S., §§ 917, 918.

Legal and equitable claims cannot be blended, nor are equitable defenses in actions at law permitted in conformity to state practice. *Scott v. Armstrong*, 146 U. S. 499.

A state statute, allowing married women to sue alone, is not applicable to suits in equity in the federal courts, but they must appear by next friend. *Wills v. Paulay*, 51 Fed. Rep. 257.

Federal courts sitting in equity will comply with the Statutes of Limitations governing courts of law in such cases. *Percy v. Cockrill*, 10 U. S. App. 574; 53 Fed. Rep. 872.

8. See *EQUITY PLEADINGS*, vol. 6, p. 724.

9. "Writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the supreme court. When so issued

writ of the appellate court,<sup>1</sup> and its form cannot be changed otherwise than by authority of the justices of the supreme court.<sup>2</sup>

It issues as of course and need not be allowed by any judge;<sup>3</sup> it bears the *teste* of the chief justice of the *United States*, or in case of the vacancy of that office, then the *teste* of the associate justice who has been longest in office;<sup>4</sup> the *teste* may be from the date of issue;<sup>5</sup> it is signed by the clerk and is under the seal of the court.<sup>6</sup>

It must be made returnable not exceeding thirty days from the date of serving the citation, whether the return day fall in vacation or in term time. It must be served before the return day.<sup>7</sup> It may be amended at the discretion of the court.<sup>8</sup>

There must be annexed to the writ an authenticated transcript

they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the supreme court, in pursuance of section nine of the act of May eight, seventeen hundred and ninety-two, chapter thirty-six." U. S. R. S., § 1004.

The same rule applies to the circuit courts of appeal. 26 St. at L. 826, § 11.

1. *Mussina v. Cavazos*, 6 Wall. (U. S.) 355. *Contra*, *West v. Barnes*, 2 Dall. (U. S.) 401.

2. *Barton v. Forsyth*, 5 Wall. (U. S.) 190.

3. *Davidson v. Lanier*, 4 Wall. (U. S.) 447; *E\* p. Virginia Com'rs*, 112 U. S. 177.

But it is the practice to file a petition for the writ, and to have it allowed by a judge of the court to which it is addressed, or a judge of the court of review. 2 *Foster's Federal Practice* (2d ed.), § 484, p. 1042. And see Supreme Court Rule 36, for the practice in obtaining writs of error to review judgments in capital cases. See 25 St. at L. 656.

4. U. S. R. S., §§ 911, 674.

5. U. S. R. S., § 912; *Atherton v. Fowler*, 91 U. S. 143.

6. U. S. R. S., §§ 911, 1004; *Washington v. Dennison*, 6 Wall. (U. S.) 495. For approved forms of writs of error, see 2 *Foster's Federal Practice* (2d ed.), pp. 1153-1155.

7. Supreme Court Rule 8; Circuit Court of Appeals Rule 14.

The time allowed for returning writs of error issuing from the supreme court to the courts of *California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming,*

*North Dakota, South Dakota, Alaska* and *Idaho* is extended to sixty days by Supreme Court Rule 9.

8. "The supreme court may, at any time in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error when there is a mistake in the *teste* of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form, provided the defect has not prejudiced, and the amendment will not injure the defendant in error." U. S. R. S., § 1005; 26 St. at L. 826, § 11.

The right of amendment rests upon the statutory authority above. *Porter v. Foley*, 21 How. (U. S.) 393; *Insurance Co. v. Mordecai*, 21 How. (U. S.) 195; *Hodge v. Williams*, 22 How. (U. S.) 87; *Washington v. Dennison*, 6 Wall. (U. S.) 495. Under the authority above, almost all defects are curable. *Curtis on Jurisdiction of U. S. Courts* 87. But the whole matter is in the discretion of the court. *Pearson v. Yewdall*, 95 U. S. 294.

A writ may always be amended if there is sufficient on the record to amend by. *Course v. Stead*, 4 Dall. (U. S.) 22.

If the names of the parties are not set forth in the writ, it will be dismissed for irregularity, but a new one in due form may be brought. *Deneale v. Archer*, 8 Pet. (U. S.) 526. If an appeal be taken in the name of a firm,

of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.<sup>1</sup>

(2) *Service*.—The writ and citation must be served, the former upon the clerk of the court to which it is directed,<sup>2</sup> the latter upon the defendants in error.<sup>3</sup> The service of the latter may be waived either by express agreement,<sup>4</sup> or by entering a general appearance without moving to dismiss.<sup>5</sup>

(3) *Bond*.—The Revised Statutes<sup>6</sup> provide as follows: Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the *United States* or by direction of any department of the government,<sup>7</sup> take good and

the writ may be amended if the record shows who are parties. *Moore v. Simonds*, 100 U. S. 145.

A wrong return day may be corrected. *National Bank v. National Bank*, 99 U. S. 608; *Hampton v. Rouse*, 15 Wall. (U. S.) 684. So, if the return day be left blank. *Mossman v. Higginson*, 4 Dall. (U. S.) 12.

1. U. S. R. S., § 997; 26 St. at L. 826, § 11. The omission of the name of the jurors from the transcript does not invalidate the proceedings. *Owens v. Hanney*, 9 Cranch (U. S.) 180.

The transcript must be signed by the clerk or by his deputy in the name of his principal, and bear the seal of the court. *Garmeau v. Dozier*, 100 U. S. 7; *The Rio Grande*, 19 Wall. (U. S.) 178; *Wilson v. Daniel*, 3 Wall. (U. S.) 401.

Upon writ of error, no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record. *Claassen v. U. S.*, 142 U. S. 140.

Where the assignment of error is based on allegations of fact which the record shows to be untrue, the judgment or decree will be affirmed. *Cheney v. Bacon*, 49 Fed. Rep. 305; *Mussina v. Cavazos*, 6 Wall. (U. S.) 355. And so also where it is evident that the writ is sued out merely for delay, and by rule of court damages will be added. *M'Neil v. Holbrook*, 12 Pet. (U. S.) 84; *Barrow v. Hill*, 13 How. (U. S.) 54; *Kilbourne v. State Sav. Inst.*, 22 How. (U. S.) 503; *Jenkins v. Banning*, 23 How. (U. S.) 455; *Campbell v. Wilcox*, 10 Wall. (U. S.) 421.

It is sufficient if the above requirements be substantially complied with. *Mussina v. Cavazos*, 6 Wall. (U. S.) 355.

The citation is simply notice to the opposite party that the record is transferred into another court, where he may appear or decline to appear, as he

may see fit. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 411.

It is usually prepared by counsel and presented to the judge for his signature. *Tiernan v. Booth*, 4 Fed. Rep. 620. For the authorities showing the practice under Rev. Stat., § 997, see *Bump's Federal Procedure*, p. 693.

2. *Davidson v. Lanier*, 4 Wall. (U. S.) 447.

3. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264; *Dayton v. Lash*, 94 U. S. 112.

The service may be upon the party's attorney or counsel, *Bacon v. Hart*, 1 Black (U. S.) 38; *Bigler v. Waller*, 12 Wall. (U. S.) 142, although he has ceased to act as such. *U. S. v. Curry*, 6 How. (U. S.) 106.

A failure to appear in answer to the citation does not entitle the plaintiff in error to judgment. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264.

4. *U. S. v. Gomez*, 1 Wall. (U. S.) 690.

5. *Radford v. Folsom*, 123 U. S. 725; *Buckingham v. McLean*, 13 How. (U. S.) 150; *Pierce v. Cox*, 9 Wall. (U. S.) 786.

6. U. S. R. S., § 1000.

7. Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from, or is brought up to the supreme court, or a circuit court, either by the *United States*, or by direction of any department of the government, no bond, obligation, or security shall be required from the *United States*, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or cost. In case of an adverse decision, such costs as by law are taxable against the *United States* or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose direction the proceedings were instituted. U. S. R. S., § 1001.

sufficient security<sup>1</sup> that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid.

This provision is, however, directory only, and a failure to observe it does not avoid the writ of error.<sup>2</sup> The taking of the bond and the issuing of the citation are generally simultaneous acts,<sup>3</sup> but further time may be allowed for the former.<sup>4</sup> The statutes do not prescribe any particular form of bond;<sup>5</sup> the practice is to give a bond in the usual form. The party himself need not sign the bond.<sup>6</sup> The bond when executed may be lodged in the court below.<sup>7</sup>

(4) *Supersedeas*.—"A *supersedeas* is a stay of proceedings upon a judgment or decree to which a writ of error is issued, or upon which an appeal is taken."<sup>8</sup> In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions may not issue until the expiration of ten days.<sup>9</sup>

1. The bond must be approved by the judge or justice, not by the clerk. *Freeman v. Clay*, 48 Fed. Rep. 849; *O'Reilly v. Edrington*, 96 U. S. 724; *National Bank v. Omaha*, 96 U. S. 737.

The sureties need not reside within the district. *Ex p. Milwaukee, etc., R. Co.*, 5 Wall. (U. S.) 188.

The bond may be approved by the judge at chambers. *Hudgins v. Kemp*, 18 How. (U. S.) 530.

The obligors must become bounden for costs. *Seward v. Corneau*, 102 U. S. 161.

The judge may approve a bond with a penalty for less than double the amount, if the writ is not a *supersedeas*, where judgment is for a large amount and where bond is to operate merely as a stay. *Hatch v. Coddington*, 5 Blatchf. (U. S.) 523. He alone is to judge of the sufficiency. *Black v. Zacharie*, 3 How. (U. S.) 495; *Ex p. French*, 100 U. S. 1; *Jerome v. McCarter*, 21 Wall. (U. S.) 17; *Martin v. Hazard Powder Co.*, 93 U. S. 302.

2. *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Davidson v. Lanier*, 4 Wall. (U. S.) 447; *Seymour v. Freer*, 5 Wall. (U. S.) 822; *Edmondson v. Bloomshire*, 7 Wall. (U. S.) 311; *Anson v. Blue Ridge R. Co.*, 23 How. (U. S.) 1.

3. *Tiernan v. Booth*, 4 Fed. Rep. 620.

4. *Anson v. Blue Ridge R. Co.*, 23 How. (U. S.) 1; *Brobst v. Brobst*, 2 Wall. (U. S.) 96; *Seymour v. Freer*, 5 Wall. (U. S.) 822; *Shepherd v. Pepper*, 133 U. S. 644.

5. *Seymour v. Phillips, etc., Construction Co.*, 7 Biss. (U. S.) 460.

6. *Brockett v. Brockett*, 2 How. (U. S.) 238.

7. *Martin v. Hunter*, 1 Wheat. (U. S.) 304.

8. 2 Foster's Federal Practice (2d ed.), § 487. It is a statutory remedy and can only be obtained by a strict compliance with the statute. *Sage v. Central R. Co.*, 93 U. S. 412.

9. U. S. R. S., § 1007. A writ of error becomes a *supersedeas per se* on com-

A *supersedeas* bond must be taken with good and sufficient surety that the plaintiff shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good. In general, the bond must be for the amount of the judgment, costs and interest, but where the property necessarily follows the event of the suit, as in real actions, replevin, suits on mortgages or suits over property in the custody of the court, the bond need cover only the damages recovered for use and detention, costs and interest.<sup>1</sup>

If, after acceptance of the bond, the security becomes insufficient, the appellate court will make such orders as justice requires.<sup>2</sup> A *supersedeas* operates as a stay of proceedings, not affecting the previous action of the court, but merely keeping matters *in statu quo*.<sup>3</sup>

(5) *Return*.—The writ with the authenticated transcript, the assignment of errors, the prayer for reversal, and the citation must be returned on the return day.<sup>4</sup>

(6) *Subsequent Steps*.—On the return of the writ to the appellate court the matter is ready for hearing. If, on account of informalities or lack of jurisdiction, the writ is not properly before the court, it may be dismissed on motion;<sup>5</sup> if not so dismissed, it proceeds to final hearing. The conclusions of the appellate court are announced in a mandate sent down to the court whose proceedings have been reviewed by the writ.<sup>6</sup> If judgment is reversed, the court adjudges to the respondent in error just damages for his delay and single or double costs in its discretion.<sup>7</sup>

(7) *Errors Considered*.—The writ reaches errors of law only; not errors of fact.<sup>8</sup> The error must have been committed otherwise than in ruling upon a plea in abatement.<sup>9</sup>

pliance with the statute. *Tiernan v. Booth*, 4 Fed. Rep. 620.

1. Supreme Court Rule 29; Circuit Court of Appeals Rule 13. The judge has the sole discretion as to the sufficiency of the bond, but he cannot vary from the rule prescribed as to its amount. *Stafford v. Union Bank*, 16 How. (U. S.) 135; 17 How. (U. S.) 275; *Catlett v. Brodie*, 9 Wheat. (U. S.) 553.

2. *Jerome v. McCarter*, 21 Wall. (U. S.) 17; *Martin v. Hazard Powder Co.*, 93 U. S. 302; *Williams v. Claflin*, 103 U. S. 753. But the lower court cannot. *Keyser v. Farr*, 105 U. S. 265. And so also where the approval of the bond has been obtained by fraud or perjury. *Florida Cent. R. Co. v. Schulte*, 100 U. S. 644.

For a form of *supersedeas* bond, see *Gay v. Parpart*, 101 U. S. 391.

3. *Foster v. Kansas*, 112 U. S. 201; *Hovey v. McDonald*, 109 U. S. 159.

4. U. S. R. S., § 997.

5. *Hilton v. Dickinson*, 108 U. S. 165.

On dismissal of a writ of error, on motion of defendant in error he is entitled to judgment for the costs arising on the motion to dismiss. *Bradstreet Co. v. Higgins*, 114 U. S. 262; *Patten v. Cilley*, 50 Fed. Rep. 337.

6. 2 *Foster's Federal Practice* (2d ed.), § 495.

7. There can be no damages awarded other than for the delay. *Colton v. Wallace*, 3 Dall. (U. S.) 302.

8. U. S. R. S., § 1011; *Generes v. Campbell*, 11 Wall. (U. S.) 193; *Cohens v. Virginia*, 6 Wheat. (U. S.) 264; *U. S. v. Goodwin*, 7 Cranch (U. S.) 110; *Wiscart v. D'Auchy*, 3 Dall. (U. S.) 327. Nor of judgment in a matter in the discretion of the court. *Earnshaw v. U. S.*, 13 Sup. Ct. Rep. 14.

9. U. S. R. S., § 1011.

Errors committed by a state supreme court are reviewable by the *United States* Supreme Court only by writ of error.<sup>1</sup>

Writs of error may be issued to review only final judgments or decrees, with the single exception in the circuit court of appeals of an interlocutory decree granting or continuing an injunction.<sup>2</sup>

A final judgment or decree is thus defined in a leading modern case:<sup>3</sup>

"A judgment or decree, to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court would have nothing to do but to execute the judgment or decree it has already rendered."

*b. APPEALS.*—The rules and regulations governing appeals are in the main similar to those regulating writs of error, and most of the above provisions laid down as applicable to writs of error apply as well to appeals.

An appeal, however, unlike a writ of error, must be allowed by a judge,<sup>4</sup> who may be compelled to allow it by *mandamus*.<sup>5</sup> If the appeal is taken in open court at the term at which the decree

1. U. S. R. S., § 709. See *infra*, this title, *Supreme Court*.

2. 26 St. at L. 828, § 7; *McLish v. Roff*, 141 U. S. 661; *Chicago, etc., R. Co. v. Roberts*, 141 U. S. 690.

3. *Bostwick v. Brinckerhoff*, 106 U. S. 3, opinion by Waite, C. J. To the same effect are *Whiting v. Bank of U. S.*, 13 Pet. (U. S.) 15; *Forgay v. Conrad*, 6 How. (U. S.) 204; *St. Clair Co. v. Lovington*, 18 Wall. (U. S.) 628; *Parcels v. Johnson*, 20 Wall. (U. S.) 654; *North Carolina R. Co. v. Swasey*, 23 Wall. (U. S.) 409; *Crosby v. Buchanan*, 23 Wall. (U. S.) 453; *Tippecanoe Co. v. Lucas*, 93 U. S. 113; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429; *St. Louis, etc., R. Co. v. Southern Express Co.*, 108 U. S. 24; *Ex p. Norton*, 108 U. S. 237; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180; *Mower v. Fletcher*, 114 U. S. 127.

The mere fact that accounts remain to be adjusted, or that the court retains the fund in controversy for the purpose of distributing it as decreed, does not rob the decree of its final and appealable character. *Lewisburg Bank v. Sheffield*, 140 U. S. 445; *Hill v. Chicago, etc., R. Co.*, 140 U. S. 52.

"When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court

for its final decision, it is a final decree." *Wayne, J.*, in *Beebe v. Russell*, 19 How. (U. S.) 285.

4. *Barrell v. Propeller Mohawk Co.*, 3 Wall. (U. S.) 424; *Pierce v. Cox*, 9 Wall. (U. S.) 786; *Sage v. Central R. Co.*, 96 U. S. 712; *Richards v. Mackall*, 113 U. S. 539.

Any judge who can sign a citation may allow it. *Sage v. Central R. Co.*, 96 U. S. 712.

The order allowing appeal, may be set aside at any time during the term on motion of appellant. *Goddard v. Ordway*, 101 U. S. 745.

This allowance may, however, be implied, as by the approval of a bond on appeal. *Washington, etc., R. Co. v. Washington*, 7 Wall. (U. S.) 575; *Sage v. Central R. Co.*, 96 U. S. 712; *Brandies v. Cochrane*, 105 U. S. 262.

The allowance may be made at chambers or in vacation. *Hudgins v. Kemp*, 18 How. (U. S.) 530. No appeal will be allowed except to a party to the record or his privy. *Bayard v. Lombard*, 9 How. (U. S.) 530; *Ex p. Cockcroft*, 104 U. S. 578; *Guion v. Liverpool, etc., Ins. Co.*, 109 U. S. 173.

5. *U. S. v. Adams*, 6 Wall. (U. S.) 101; *U. S. v. Gomez*, 3 Wall. (U. S.) 752; *Ex p. South & N. Ala. R. Co.*, 95 U. S. 221; *Ex p. Parker*, 120 U. S. 737. But the *mandamus* must be sued out by an original party to the suit. *Ex p. Cutting*, 94 U. S. 14.



was rendered, no citation is necessary;<sup>1</sup> if at a subsequent term, a citation must issue and be served.<sup>2</sup>

The rules as to bonds on appeal, are the same as those governing bonds on writs of error, and are set out in the section immediately preceding.

It is provided in the revised statutes<sup>3</sup> that, "Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."<sup>4</sup>

These rules and regulations must be complied with. The supreme court has no power to dispense with or modify them,<sup>5</sup> nor to receive an appeal not in accordance with them.<sup>6</sup>

If an appeal is dismissed for informality, a second appeal may be taken within the period allowed for an appeal.<sup>7</sup>

Where an appeal is duly taken by both parties from the judgment or decree of a circuit or district court to the supreme court, a transcript of the record filed in the supreme court by either appellant may be used on both appeals, and both are heard thereon in the same manner as if records had been filed by the appellants in both cases.<sup>8</sup>

Appeals lie only from final judgments.<sup>9</sup> They may be dismissed for informality or lack of jurisdiction;<sup>10</sup> if not so dismissed, they go on to final hearing, and the judgment is either affirmed or reversed, when the court will make such supplementary orders as justice may require.<sup>11</sup>

**11. Evidence**—(See also EVIDENCE, vol. 7, p. 43)—*a.* OF THE RULES OF EVIDENCE IN FEDERAL PRACTICE.—The rules of evidence as applied in federal courts do not differ radically from

1. *Reilly v. Lamar*, 2 Cranch (U. S.) 344; *Brockett v. Brockett*, 2 How. (U. S.) 238; *The San Pedro*, 2 Wheat. (U. S.) 132; *Yeaton v. Lenox*, 7 Pet. (U. S.) 220; *U. S. v. Vigil*, 10 Wall. (U. S.) 423; *Milner v. Meek*, 195 U. S. 252. But the record must show that the appeal was allowed in open court. *Vansant v. Electro-Magnetic Gas Light Co.*, 99 U. S. 213.

2. *Castro v. U. S.*, 3 Wall. (U. S.) 46; *Sage v. Central R. Co.*, 96 U. S. 712. The appeal is not avoided by non-service of citation, but the court may impose terms on the appellant. *Dayton v. Lash*, 94 U. S. 112. It is sufficient that it appear from the record that the appellee had notice. *U. S. v. Gomez*, 1 Wall. (U. S.) 690.

The return day of the appeal is the day named in the citation. 2 *Foster's Federal Practice*, § 488.

3. U. S. R. S., § 1012.

4. This includes the rules as to when

the appeal must be brought, and when it shall operate as a *supersedeas*. The *San Pedro*, 2 Wheat. (U. S.) 132.

5. *U. S. v. Curry*, 6 How. (U. S.) 106.

6. *Villabolas v. U. S.*, 6 How. (U. S.) 81.

7. *Steamer Virginia v. West*, 19 How. (U. S.) 182; *U. S. v. Pacheco*, 20 How. (U. S.) 261; *Edmonson v. Bloomshire*, 7 Wall. (U. S.) 306. But this may not be done on an order allowing a party to perfect an appeal. *U. S. v. Curry*, 6 How. (U. S.) 106.

8. U. S. R. S., § 1013.

9. See *supra*, this title, *Writs of Error*. The authorities on the subject of final judgments are collected in the article FINAL JUDGMENTS AND DECREES, vol. 7, p. 966.

10. 2 *Foster's Federal Practice* (2d ed.), § 489.

11. 2 *Foster's Federal Practice* (2d ed.), § 494.

those enforced in other tribunals. There are, however, certain statutory provisions applicable to federal practice which should be mentioned.

The statute regulating the subject of proof in common-law actions is as follows:<sup>1</sup>

"The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."<sup>2</sup> In regard to equity and admiralty suits, it is provided<sup>3</sup> that, "The mode of proof in causes of equity and admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein specially provided." In such cases, if appealed to the supreme court or circuit court of appeals, no objection may be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.<sup>4</sup>

Certain special rules governing the testimony to be admitted in federal courts exist either by virtue of statute or judicial decisions.

No testimony given by a witness before either house, or before any committee of either house of Congress, can be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.<sup>5</sup>

No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, may be given in evidence, or in any manner used against him or his property or estate, in any court of the *United States*, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; but this provision does not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.<sup>6</sup>

In mining cases for the recovery of mining title or for damage to such title, no possessory action is affected by the fact that the paramount title to the land in which such mines lie is in the *United States*; but each case is adjudged by the law of

1. U. S. R. S., § 861.

2. An examination "in open court" is one "in the presence of the court and jury at the trial, and not before the trial." *Beardsley v. Littell*, 14 Blatchf. (U. S.) 102. This section is a restriction of the rule that state rules of practice govern in trials in the federal courts. *Ex p. Fisk*, 113 U. S. 713.

3. U. S. R. S., § 862.

4. Supreme Court Rule 13. Circuit Court of Appeals Rule 12 extends the rule to translations.

5. U. S. R. S., § 859.

6. U. S. R. S., § 860. But this section does not prevent one from showing that a party who testifies in his own behalf voluntarily appeared in a criminal prosecution against another and testified differently, where such

possession.<sup>1</sup> In cases of seizure under the revenue laws the burden of proof is in general on the claimant of the property; but probable cause must be made to appear for the prosecution, to be judged of by the court.<sup>2</sup>

b. WITNESSES — (1) *Competency*. — It is provided that the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses. No person, however, shall be excluded on account of color or interest.<sup>3</sup> This provision does not allow a husband or wife to become a witness in a suit by or against the other party to the relation where he or she would be excluded by the common law.<sup>4</sup> Whether the husband or wife may testify depends upon the law of the state where the court sits.<sup>5</sup> It applies to testimony, whether oral or by deposition,<sup>6</sup> whether it be given by the party directly in interest or by some witness remotely con-

testimony in itself has no tendency to criminate the party. *U. S. v. Smith*, 47 Fed. Rep. 501.

1. *U. S. R. S.*, § 910.

2. "In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof is upon such claimant; but probable cause must be shown for such prosecution, to be judged of by the court." *U. S. R. S.*, § 909.

"Probable cause means reasonable ground of presumption that the charge is or may be well founded." *Story, J.*, in *Wood v. U. S.*, 16 Pet. (U. S.) 366; *U. S. v. The John Griffin*, 15 Wall. (U. S.) 29. The above rule is to be applied to seizures under laws passed since its adoption. *Cliquot's Champagnes*, 3 Wall. (U. S.) 114.

3. "In the courts of the *United States* no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the *United*

*States* in trials at common law, and in equity and admiralty." *U. S. R. S.*, § 858.

The right of persons of color to give evidence is further secured in *U. S. R. S.*, § 1977. "The opposite party," as used above, is that party against whom the evidence is sought to be used. *Eslava v. Mazange*, 1 Woods (U. S.) 623.

In matters covered by the above provision, the state law is entirely disregarded. *Potter v. Third Nat. Bank*, 102 U. S. 163; *Goodwin v. Fox*, 129 U. S. 631.

As to whether a physician may be compelled to disclose communications made to him in his professional capacity, depends on the statute of the state where the federal court sits. *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250.

*U. S. R. S.*, § 858, quoted above, has no application to criminal trials. *Logan v. U. S.*, 144 U. S. 263. It must be taken subject to the exception thus stated by the court, by Waite, C. J., in *Whitford v. Clark Co.*, 119 U. S. 522: "When the statutes of the *United States* make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the *United States*, and not the laws or the practice of the state in which the court is held when they are different."

4. *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Wooster v. Hill*, 22 Fed. Rep. 830.

5. *North-Western Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528.

6. *Cornett v. Williams*, 20 Wall. (U. S.) 226.

cerned in the suit.<sup>1</sup> It applies to actions to which the *United States* is a party.<sup>2</sup>

The accused in criminal cases is a competent witness, but cannot be compelled to testify.<sup>3</sup>

(2) *How Attendance Is Secured*.—Attendance is secured in the first instance by a writ of subpoena *ad testificandum*.

The common-law rule allowing the names of but four witnesses has been superseded by statute,<sup>4</sup> and now it is the duty of the clerk to insert the names of as many witnesses in a cause in a subpoena as convenience in serving the same will permit.

Subpoenas for witnesses who are required to attend a court of the *United States*, in any district, may run into any other district; provided that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.<sup>5</sup>

If the witness living out of the district where the court is held lives more than one hundred miles from the place of trial, he cannot be subpoenaed.<sup>6</sup>

Witnesses who are required to attend any term of a circuit or district court on the part of the *United States* are subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they must appear before the grand or petit jury, or both, as they may be required by the court or district attorney.<sup>7</sup>

In criminal cases, indigent accused persons may have compulsory process to secure the attendance of witnesses at the expense of the government.<sup>8</sup> The witnesses for the *United States* in

1. *Texas v. Chiles*, 21 Wall. (U. S.) 488; *New Jersey R., etc., Co. v. Pollard*, 22 Wall. (U. S.) 341.

2. *Green v. U. S.*, 9 Wall. (U. S.) 655; *Jones v. U. S.*, 1 Ct. of Cl. 383.

3. "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the *United States* courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the *District of Columbia*, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request, shall not create any presumption against him." 20 St. at L. 30. But this does not remove an incompetency through previous conviction of crime. *U. S. v. Hollis*, 43 Fed. Rep. 248.

4. *Erwin v. U. S.*, 37 Fed. Rep. 490; *U. S. R. S.*, § 829.

5. *U. S. R. S.*, § 876; *Elting v. U.*

*S. Ct. of Cl.* (Feb. 8th, 1892). The distance is determined by the distance by usual routes. *Ex p. Beebee*, 2 Wall. Jr. (C. C.) 127. If a witness living beyond the hundred miles limit voluntarily attends, mileage can be taxed as costs for the hundred miles only. *Eastman v. Sherry*, 37 Fed. Rep. 844.

6. *Henry v. Ricketts*, 1 Cranch (C. C.) 580. Nor can he be compelled to attend by the service of subpoena within the district if he has been enticed there by false pretenses. *Union Sugar Refining Co. v. Mathiesson*, 2 Cliff. (U. S.) 304; *Steiger v. Bonn*, 4 Fed. Rep. 17. Nor while there to attend court or transact public business. *Juneau Bank v. McSpedan*, 5 Biss. (U. S.) 64; *Parker v. Hotchkiss*, 1 Wall. Jr. (C. C.) 269; *Miner v. Markham*, 28 Fed. Rep. 387.

7. *U. S. R. S.*, § 877.

8. *U. S. R. S.*, § 878.

*Procedure*.—The person indicted must make affidavit to the following

criminal prosecutions may, on pain of imprisonment, be required to give recognizance for their appearance at court.<sup>1</sup>

Subpœnas *ad testificandum* are served by the marshal of the court or by an indifferent person.<sup>2</sup>

The attendance of witnesses whose testimony is needed in depositions under a *dedimus potestatem* may be secured by subpœna,<sup>3</sup> or a subpœna *duces tecum* may issue on filing the proper affidavits.<sup>4</sup>

But no such witness can be required to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor may he be

facts: *First.* There are witnesses whose evidence is material to his defense. *Second.* He cannot safely go to trial without them. *Third.* What he expects to prove by each of them. *Fourth.* That they are within the district in which the court is held, or within one hundred miles of the place of trial. *Fifth.* That he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses. U. S. R. S., § 878.

1. U. S. R. S., §§ 879, 881. For special provision for district of *Vermont*, see U. S. R. S., § 880.

2. *Schwabacker v. Reilly*, 2 Dill. (U. S.) 127; *Cummings v. Akron Cement, etc., Co.*, 6 Blatchf. (U. S.) 509; *Power v. Semmes*, 1 Cranch (C. C.) 247.

A party may serve subpœna if authorized by state practice. *Miller v. Allen*, 6 Phila. (Pa.) 484.

A witness who refuses to attend in answer to a subpœna may be punished for contempt. *Voss v. Luke*, 1 Cranch (C. C.) 331; *U. S. v. Williams*, 4 Cranch (C. C.) 372.

But where the witness shows no disposition to treat the subpœna with contempt, and the failure to attend results from sickness of himself or of a member of his family, the court in its discretion will dispense with the usual punishment. *Ex p. Beebe*, 2 Wall. Jr. (C. C.) 127.

The contempt can be punished only by fine or punishment. U. S. R. S., § 725; *Ex p. Robinson*, 19 Wall. (U. S.) 506.

The punishment must be inflicted by a court; the commissioner has no such power. *Elting v. U. S.* (French Spoliation Cl. 5142), Ct. of Cl. (Feb. 8th, 1892).

3. "When a commission is issued by any court of the *United States* for taking the testimony of a witness named

therein at any place within any district or territory, the clerk of any court of the *United States* for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the *United States* may proceed in case of disobedience to process of subpœna to testify issued by such court." U. S. R. S., § 868.

4. U. S. R. S., § 869; *In re Shepard*, 3 Fed. Rep. 12; 18 Blatchf. (U. S.) 226.

A piece of metal in the nature of a form or model is not properly the subject of a subpœna *duces tecum*. *Johnson Steel St. R. Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191. Nor is a pattern for a stove. *In re Shepard*, 18 Blatchf. (U. S.) 226.

The above statute does not refer to testimony before a special commissioner taken in another district under Equity Rule 67. In such case a subpœna may be issued by the clerk of the district within which the testimony is taken without direct order of the court. *Johnson Steel St. R. Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191.

A party by delivering documents, not privileged in his hands, into the hands of his counsel, cannot thereby excuse non-compliance with a subpœna *duces tecum* which commanded him to produce them. *Edison Electric Light Co.*

deemed guilty of contempt for disobeying any subpoena so directed to him, unless his fees for going to, returning from, and one day's attendance at, the place of examination are paid or tendered to him at the time of the service of the subpoena.<sup>1</sup>

Special statutory provisions secure the procuring of the testimony of witnesses found within the *District of Columbia* for use in state, territorial, or foreign courts.<sup>2</sup>

(3) *How Compelled to Testify*.—A witness who refuses to be sworn or to testify may be punished for contempt.<sup>3</sup> It is said also that an action may be brought against him for the damages sustained by his refusal.<sup>4</sup>

A witness cannot, however, be compelled to submit to a surgical examination in advance of the trial when he is also the party suing for damages for an injury to the person.<sup>5</sup>

c. DOCUMENTARY EVIDENCE.—Copies of any books, records, papers, or documents, in any of the executive departments, authenticated under the seals of such departments, respectively, are admitted in evidence equally with the originals.<sup>6</sup>

The documents must, however, be made by the proper officers in the discharge of official duty.<sup>7</sup>

Statutes of the *United States* regulate proof as regards the following documents and records: documents, records, books and papers in the office of the solicitor of the treasury,<sup>8</sup> documents executed by the comptroller of the currency and papers in his office,<sup>9</sup> organization certificates of national banks,<sup>10</sup> books and proceedings of the treasury department,<sup>11</sup> papers in the return offices

*v. U. S. Electric Lighting Co.*, 44 Fed. Rep. 294.

1. U. S. R. S., § 870.

2. U. S. R. S., §§ 871, 874.

3. U. S. R. S., § 725; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; *U. S. v. Caton*, 1 Cranch (C. C.) 150.

A witness on examination before a special examiner will be compelled by proceedings in contempt to answer questions that seem to be material to the issue. *Johnson Steel St. R. Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196. On this point in *Robinson v. R. Co.*, 28 Fed. Rep. 340, the court, by Butler, J., said: "In applications such as this (to compel witnesses before an examiner to answer), the court generally inclines towards the application and requires an answer, whenever it seems probable the testimony may be relevant. Care, however, must be exercised to avoid any unnecessary and improper inquiry into private affairs."

4. 1 *Foster's Federal Practice* (2d ed.), § 277.

5. *Union Pac. R. Co. v. Botsford*, 141 U. S. 250.

The authorities on this subject are collated in an article entitled, "Power to Compel Physical Examination in Case of Injury to the Person," by Edward G. Buckland, *Yale Law Journal*, vol. 1, p. 57.

6. U. S. R. S., § 882.

This provision is especially important in cases against the government in which certified copies must always be produced, it being insufficient to give notice to produce the originals. *Barney v. Schneider*, 9 Wall. (U. S.) 248; *Chadwick v. U. S.*, 3 Fed. Rep. 750.

If the officer having charge of the paper certifies to the truth of the copy, and his official character is certified to by the head of the department, the authentication is complete. *Thompson v. Smith*, 2 Bond (U. S.) 320.

7. *Block v. U. S.*, 7 Ct. of Cl. 406.

8. U. S. R. S., § 883.

9. U. S. R. S., § 884.

10. U. S. R. S., § 885.

11. U. S. R. S., §§ 886, 887. See *U. S. v. Young*, 44 Fed. Rep. 168.

of the department of the interior,<sup>1</sup> post office records,<sup>2</sup> records and papers in the general land office,<sup>3</sup> records of the patent office,<sup>4</sup> extracts from the journals of Congress,<sup>5</sup> documents in the offices of consuls and commercial agents,<sup>6</sup> lost records generally,<sup>7</sup> public and judicial records of foreign governments, the several states and territories<sup>8</sup> and *United States* statutes.<sup>9</sup>

But records may often be admitted, even though not especially allowed by a statute.

In general, the rule seems to be as follows: official registers or records are admissible in evidence in federal courts, if they are kept by a person exercising a public office, in which he is required, either by statute or by the nature of his office, to write down particular transactions or events occurring in the course of his official duty or under his personal observation. On this ground the records of the *United States* signal stations are admissible.<sup>10</sup>

The rules as to the admission of documentary evidence are more liberal in admiralty than in common-law or equity proceedings.<sup>11</sup>

d. DEPOSITIONS—(See also DEPOSITIONS, vol. 5, p. 581; BILL DE BENE ESSE, vol. 2, p. 285)—(1) *Depositions de Bene Esse*.—Provision is made in the *United States* statutes for depositions *de bene esse*. They apply to both equity and common-law actions,<sup>12</sup> and allow a party to directly attain the same result as by a bill in equity to take testimony *de bene esse*.<sup>13</sup> The provisions of the statute on the subject are given in the note.<sup>14</sup>

1. U. S. R. S., § 888.

2. U. S. R. S., §§ 889, 890.

3. U. S. R. S., § 891.

4. U. S. R. S., §§ 892-894.

5. U. S. R. S., § 895.

6. U. S. R. S., § 896.

7. U. S. R. S., §§ 899-904.

8. U. S. R. S., §§ 905, 906, 907.

9. U. S. R. S., § 908; 18 St. at L. 52; 18 St. at L. 113; 21 St. at L. 380; 26 St. at L. 50.

10. *Evanston v. Gunn*, 99 U. S. 660.

11. *The Bockenna Bay*, 22 Fed. Rep. 662.

12. *Stegner v. Blake*, 36 Fed. Rep. 183.

13. 1 *Foster's Federal Practice*, § 280.

14. "The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the *United States*, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposi-

tion may be taken before any judge of any court of the *United States*, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or a superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the *United States*, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of the deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall

(2) *Depositions Under a Dedimus Potestatem and in Perpetuam.*  
—In any case where it is necessary, in order to prevent a failure

be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose, as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. U. S. R. S., § 863. See also Equity Rule 67.

This section has no application to the taking of depositions in foreign countries. *Cortes Co. v. Tannhauser*, 18 Fed. Rep. 667; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1.

A notice that the plaintiff will take depositions of witnesses in three different cities on the same day, is not such reasonable notice as is required by U. S. R. S., § 863, and such depositions will be suppressed. *Uhle v. Burnham*, 44 Fed. Rep. 729.

If the notice provided for is not given, the adverse party, on making affidavit of the fact, may cross-examine the witnesses, either under a commission, or by new deposition, if the court or a judge thereof deem it reasonable. Equity Rule 68.

Notice must be given by the magistrate before whom the deposition is to be taken. Notice by the party is not sufficient. *Young v. Davidson*, 5 Cranch (C. C.) 515.

The liability of a witness in government employ to be ordered out of the reach of the court, is not sufficient ground for taking a deposition *de bene esse*. Depositions *de bene esse* must be taken strictly in accordance with statutory requisites. Otherwise they are not admissible. *The Samuel*, 1 Wheat. (U. S.) 9; *Evans v. Eaton*, 7 Wheat. (U. S.) 356; *Evans v. Hettick*, 3 Wash. (C. C.) 408; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Harris v. Wall*, 7 How. (U. S.) 693; *Carrington v. Stimson*, 1 Curt. (U. S.) 437. "Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent." U. S. R. S., § 864.

The witness must be sworn to tell the whole truth, as far as he knows, touching the matter in controversy between the parties. *Shutte v. Thompson*, 15 Wall. (U. S.) 151; *Pendleton v. Forbes*, 1 Cranch (C. C.) 507; *Garrett v. Woodward*, 2 Cranch (C. C.) 190; *Rainer v. Haynes*, Hempst. (U. S.) 689; *Wilson Sewing Mach. Co. v. Jackson*, 1 Hughes (U. S.) 295. A certificate stating that witness was cautioned, examined, and sworn is sufficient. *Edmonson v. Barrell*, 2 Cranch (C. C.) 228.

"Every deposition taken under the two preceding sections shall be retained by the magistrate taking it until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid, of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the *United States*, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause." U. S. R. S., § 865.

If, at the time of trial, the attendance of the witness can be secured, the deposition may not be read. *Whitford v. Clarke Co.*, 119 U. S. 522; *The Samuel*, 1 Wheat. (U. S.) 9; *Weed v. Kellogg*, 6 McLean (U. S.) 44; *Park v. Willis*, 1 Cranch (C. C.) 357.

The party seeking to read a deposition taken *de bene esse* must show that he has diligently sought to procure the attendance of the witness: otherwise it may not be used. *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Jones v. Greenolds*, 1 Cranch (C. C.) 339; *Penn. v. Ingraham*, 2 Wash. (U. S.) 487; *Banert v. Day*, 3 Wash. (U. S.) 243; *Pettibone v. Derringer*, 4 Wash. (U. S.) 215; *Read v. Bertrand*, 4 Wash. (U. S.) 558.

For the formal requisites of depositions *de bene esse*, see 1 *Foster's Federal Practice* (2d ed.), § 287; 2 *Foster's Federal Practice* (2d ed.), p. 1121.



or delay of justice,<sup>1</sup> any of the courts of the *United States* may grant a *dedimus potestatem* to take depositions according to common usage,<sup>2</sup> and any circuit court upon application<sup>3</sup> to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the *United States*. And the provisions of the three sections of the statute immediately preceding have no application to any deposition to be taken under the authority of this section.<sup>4</sup>

Any court of the *United States* may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.<sup>5</sup>

(3) *Letters Rogatory*.—The testimony of witnesses in foreign countries is taken under letters rogatory.<sup>6</sup>

(4) *Miscellaneous Provisions*.—For the rules governing depositions other than as above given, reference is made to another part of this work.<sup>7</sup>

12. *Trial and Its Incidents*<sup>8</sup>—*a. IN GENERAL*.—The mode of conducting trials in civil causes, other than those in equity and admiralty, is that adopted in the courts of the state where the federal court is sitting.<sup>9</sup> The practice of the state courts thus regulates the general conduct of the suit from its commencement to its close, except so far as modified by national legislation.<sup>10</sup> But the rule above must not be pushed so far as to interfere with the proper discretion of the court, and its power to direct the proceedings in accordance with such discretion. Thus it does not apply to the personal conduct and administration of the judge in the discharge of his functions.<sup>11</sup> In equity and admiralty pro-

1. Sufficient cause must be shown by affidavit as a prerequisite to the granting of the *dedimus potestatem*. *U. S. v. Parrott, McAll.* (U. S.) 447; *Sutton v. Mandeville*, 1 Cranch (C. C.) 115. The provisions, being in derogation of the common law, are strictly construed. *U. S. v. Parrott, McAll.* (U. S.) 447.

2. "Common usage" has reference both to the usage at law and in equity. *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1. It refers to the usage in the state courts. *Buddicum v. Kirk*, 3 Cranch (U. S.) 293; *Sutton v. Mandeville*, 1 Cranch (C. C.) 115.

3. *Peters v. Prevost*, 1 Paine (U. S.) 64. A party who unites in asking for a commissioner to be appointed can not afterward object. *Sergeant v. Bidle*, 4 Wheat. (U. S.) 508; *Ridgeway v. Ghequier*, 1 Cranch (C. C.) 4.

4. U. S. R. S., § 866. An examiner

under this section may be appointed either within or without the jurisdiction. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 692. But not in a foreign country. *Stein v. Bowman*, 13 Pet. (U. S.) 209.

5. U. S. R. S., § 867.

6. U. S. R. S., § 875. See *LETTERS ROGATORY*, vol. 13, p. 266.

7. See *DEPOSITIONS*, vol. 5, p. 581. See also *Equity Rule 67*.

8. See also *infra*, this title, *Practice and Procedure*.

9. U. S. R. S., § 914.

10. *Lamaster v. Keeler*, 123 U. S. 376.

11. *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Es. p. Chateaugay Ore, etc., Co.*, 128 U. S. 544.

In *Nudd v. Barrows*, 91 U. S. 426, it was held that a state statute requiring a judge to instruct a jury only as to the law of the case, and providing that the written instructions of the court

ceedings the trial is conducted according to the ancient rules governing such cases, as modified by federal legislation and rules of court.<sup>1</sup>

In criminal prosecutions the accused is guaranteed the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime was committed, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.<sup>2</sup> In all cases, however, parties may manage their cases personally.<sup>3</sup> Parties at the trial, on motion and due notice, may be compelled to produce books and writings in their possession.<sup>4</sup>

*b. JURIES—(1) Constitutional Provision.*—Trial by jury is secured by the constitution in criminal cases, and in suits at common law where the value of the matter in dispute exceeds twenty dollars.<sup>5</sup>

*(2) In Civil Cases.*—The trial of issues of fact in the supreme

should be taken by the jury in their retirement, and returned with the verdict, and that papers read in evidence might be carried from the bar by the jury, was not binding upon the federal courts, and that a judge, in charging the jury upon the facts, and in refusing to permit them to take the written instructions, or the papers read in evidence, to the jury room, committed no error. See also *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545; *U. S. v. Philadelphia, etc., R. Co.*, 123 U. S. 113; *Rucker v. Wheeler*, 127 U. S. 93; *Lovejoy v. U. S.*, 128 U. S. 171.

A state statute prescribing that the judge shall require the jury to answer special interrogatories, in addition to finding a general verdict, does not apply to the courts of the *United States*. *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291.

It may be said in general that questions of the power and authority of the court are independent of the state law. *Lyons v. Lyons Nat. Bank*, 8 Fed. Rep. 373.

The presiding judge of a *United States* court doubtless may, in a proper case, direct the verdict for the defendant and order judgment entered thereon. *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24.

Neither a state constitution nor a state law prohibiting judges from charging juries with regard to matters of fact affect *United States* courts. *St. Louis, etc., R. Co. v. Vickers*, 122 U. S. 360.

1. U. S. R. S., § 913.

2. 6th amendment to *United States* Const. Where the accused wrongfully keeps witnesses away, he waives his right to be confronted with them. *Reynolds v. U. S.*, 98 U. S. 145.

He may waive their presence by agreeing that they would give certain testimony if present. *U. S. v. Sacramento*, 2 Mont. 239; 25 Am. Rep. 742.

3. U. S. R. S., § 747.

4. U. S. R. S., § 724.

5. Art. 3, § 2, amendments 6 and 7. The right of trial by jury is not suspended by war. *Ex p. Milligan*, 4 Wall. (U. S.) 3, 123.

All suits not of equity or admiralty jurisdiction, brought to settle legal rights, though of a peculiar form not known to the common law, are within the meaning of the term here used, "suits at common law." *Parsons v. Bedford*, 3 Pet. (U. S.) 446; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. (U. S.) 258; *U. S. v. La Vengeance*, 3 Dall. (U. S.) 297; *The James and Catherine, Baldw.* (U. S.) 554. But a suit against the government is not included. *McElrath v. U. S.*, 12 Ct. of Cl. 312.

The constitutional provisions require a jury as it existed at common law. The requirement of unanimity must be preserved. *Kleinschmidt v. Dunphy*, 1 Mont. 118.

The right of trial by jury in civil cases may be waived. *U. S. v. Rathbone*, 2 Paine (U. S.) 578; *U. S. v. One Hundred Barrels of Distilled Spirits*, 14 Wall. (U. S.) 44.

court in all actions at law against citizens of the *United States* is by jury.<sup>1</sup>

In the circuit and district courts the trial in common-law cases is by jury.<sup>2</sup> This rule is absolute, except that in the former court the parties or their attorneys of record may file with the clerk a stipulation in writing waiving a jury. The cause may then be tried by the court, whose finding, whether general or special, will have the same effect as the verdict of the jury.<sup>3</sup> In such a trial the rulings of the court may be excepted to, and reviewed upon writ of error or appeal. If the finding is special, the review may extend to the determination of the sufficiency of the facts to support the judgment.<sup>4</sup>

There are special provisions giving a right to jury trial in certain admiralty and patent causes.<sup>5</sup>

(3) *Choosing of Jurors and Conduct of Jury Trials.*—The qualifications, exemptions and mode of choosing jurors correspond with those which obtain in the state where the court sits.<sup>6</sup> But no person is disqualified to serve in a federal court as juror because of race, color or previous condition of servitude.<sup>7</sup> The *per diem* pay of jurors is two dollars. No person may serve as a petit juror more than one term in any one year, nor as a grand juror more than once in two years.<sup>8</sup> The method of drawing

The constitutional provision does not require a jury in preliminary criminal inquiries not involving a trial on the merits. *Ez p. Martin*, 2 Paine (U. S.) 348.

A compulsory nonsuit against the plaintiff in civil cases where the constitution secures a jury trial cannot be granted. *Doe v. Grymes*, 1 Pet. (U. S.) 469; *D'Wolf v. Rabaud*, 1 Pet. (U. S.) 476; *Castle v. Bullard*, 23 How. (U. S.) 172; *Crane v. Morris*, 6 Pet. (U. S.) 598; *Foote v. Silsby*, 1 Blatchf. (U. S.) 445.

The case cannot be committed to a referee save by the consent of both parties. *Howe Sewing Mach. Co. v. Edwards*, 15 Blatchf. (U. S.) 402.

The above constitutional provisions extend the guaranty of jury trial to the *District of Columbia* equally with the states. *Callan v. Wilson*, 127 U. S. 540.

1. U. S. R. S., § 689.

2. U. S. R. S., §§ 566, 648.

3. U. S. R. S., § 649. The finding may be filed at a subsequent term. *Ætina Ins. Co. v. Boon*, 95 U. S. 117. Whether the court will make a general or special finding lies in its own discretion. No exception can be taken from a refusal to make a special finding of facts. *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. (U. S.) 237.

A jury trial may be waived without a stipulation in writing. The latter is necessary to enable the court above to review the judgment. *Kearney v. Case*, 12 Wall. (U. S.) 275; *Lyons v. Lyons Nat. Bank*, 8 Fed. Rep. 371; *Phillips v. Preston*, 5 How. (U. S.) 278; *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603; *Bond v. Dustin*, 112 U. S. 606; *Campbell v. Boyreau*, 21 How. (U. S.) 223; *Spalding v. Manasse*, 131 U. S. 65; *Andes v. Slawson*, 130 U. S. 435.

4. U. S. R. S., § 700. This section and section 649 (note 5), refer only to trials in the circuit court. *Howard v. Crompton*, 14 Blatchf. (U. S.) 333. Prior to the passing of the act upon which this section is founded, cases tried by the court could not be reviewed by writ of error. *Guild v. Frontin*, 18 How. (U. S.) 135; *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Campbell v. Boyreau*, 21 How. (U. S.) 223.

If the findings are fairly susceptible of two constructions, the one upholding and the other overthrowing the general verdict, the former will be accepted as the true construction. *Larkin v. Upton*, 144 U. S. 19.

5. U. S. R. S., § 566; 18 St. at L. 315.

6. U. S. R. S., § 800.

7. 18 St. at L. 336; 21 St. at L. 43.

8. 21 St. at L. 43; U. S. R. S., § 812.

jurors is covered by a statute of the *United States*,<sup>1</sup> as is also that of issuing and serving the venire and the returning of the jury.<sup>2</sup>

The grand jury consists of not less than sixteen, nor more than twenty-three persons;<sup>3</sup> their foreman is appointed by the court, who is also required to administer the oath.<sup>4</sup> The venire to the grand jury must be issued by the judge of the circuit or district court.<sup>5</sup> Grand juries may be discharged by the court in its discretion.<sup>6</sup> The juries of circuit and district courts may be used interchangeably.<sup>7</sup> The accused, in treason, is entitled to twenty peremptory challenges, and the *United States* to five; in felony, he is entitled to ten and the *United States* to three; in other criminal and in all civil cases, each party is entitled to three peremptory challenges.<sup>8</sup> There are other provisions of a special nature which are referred to in the notes.<sup>9</sup> All proceedings in the case must be had in the presence of the jury, including the noting of exceptions to the charge or the refusal to charge.<sup>10</sup>

**13. Judgments, Decrees, and Executions—***a. JUDGMENTS AND DECREES—*(1) *In General.*—The practice as to granting judgments and decrees is that of the common-law and equity practice respectively, except as modified by acts of Congress and by rules of court adopted in accordance therewith.

Their effect as liens depends upon the law of the state within which the court is held.<sup>11</sup>

1. 21 St. at L. 43. The provisions of the statute, as to drawing, are mandatory only, and the fact that the name of a grand juror, contained in the venire, was not drawn, will not affect the validity of the indictment. U. S. v. Ambrose, 3 Fed. Rep. 283.

2. U. S. R. S., §§ 802-805.

3. U. S. R. S., § 808.

4. U. S. R. S., § 809.

5. U. S. R. S., § 810.

6. U. S. R. S., § 811.

7. U. S. R. S., § 813; 25 St. at L. 386.

8. U. S. R. S., § 819; U. S. v. Hall, 44 Fed. Rep. 883.

9. No person shall be a grand or petit juror in any court of the *United States*, upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of title "Civil Rights" and of title "Crimes," for enforcing the provisions of the fourteenth amendment to the constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said title set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing or trial, take and subscribe an oath, in open court, that he has never, directly or indirectly, counseled, advised, or volun-

tarily aided any such combination or conspiracy. U. S. R. S., § 822; *Arkansas*, U. S. R. S., § 814; *Colorado*, 21 St. at L. 76, 290; *District of Columbia*, 25 St. at L. 749; *Georgia*, 21 St. at L. 62, 63; *Indiana*, U. S. R. S., § 815; *Kentucky*, U. S. R. S., § 815; *New York*, U. S. R. S., § 806; 22 St. at L. 32; *North Carolina*, U. S. R. S. 816; *Ohio*, 20 St. at L. 102; 21 St. at L. 63; *South Carolina*, U. S. R. S., § 817; *Tennessee*, 21 St. at L. 175; *Vermont*, U. S. R. S., §§ 807, 818.

10. *Phelps v. Mayer*, 15 How. (U. S.) 160.

11. "Judgments and decrees rendered in a circuit or district court of the *United States* within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the State of *Louisiana* before a lien shall attach, this act shall be

Decrees *in rem* exist in the federal equity practice, but are of purely statutory origin.<sup>1</sup>

The form of decrees is prescribed in Equity Rule 86.<sup>2</sup>

Interest is allowed on judgments in civil causes in circuit and district courts, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which the court is held, interest may be levied under such process of execution on judgments recovered in the courts of the state. The rate of interest is the same as that on judgments of state courts. It begins to run from the date of the judgment.<sup>3</sup> The rule above does not apply to cases in equity,<sup>4</sup> nor to judgments against the *United States*.<sup>5</sup>

A judgment has no extraterritorial effect. One rendered in a

applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the *United States* courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state. That the clerks of the several courts of the *United States* shall prepare and keep in their respective offices complete and convenient indices and cross indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public." (Special provision as to *Louisiana*.) 25 St. at L. 357; Act of August 1st, 1888.

Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods, as judgments and decrees of the courts of such state cease, by law, to be liens thereon. U. S. R. S., § 967.

A provision of a state law to the effect that a judgment shall not be a lien unless execution be issued thereon within a certain time, applies to federal courts. *Sellers v. Corwin*, 5 Ohio 398; 24 Am. Dec. 301.

The clerk cannot charge a fee for the inspection of the above indices and records. *In re Chambers*, 44 Fed. Rep. 786.

1. Foster's Federal Practice (2d ed.), vol. 1, § 320; U. S. R. S., § 738.

2. "In drawing up decrees or orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in sub-

stance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be), at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.: ' (Here insert the decree or order.)" When the decree is entered by consent this fact should be recited in the decree. Seton on Decrees (4th ed.) 1535; Foster's Federal Practice (2d ed.), vol. 1, § 325.

If the decree be for the performance of any specific act, as, for example, the execution of a conveyance of land or the delivering of deeds or other documents, the decree must prescribe the time within which the act shall be done. Equity Rule 8.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct. Equity Rule 73.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing. Equity Rule 85.

In foreclosure suits a decree may be rendered for any balance that may be found due the complainant over and above the proceeds of sale. Equity Rule 92.

3. U. S. R. S., § 966.

4. *Perkins v. Fourniquet*, 14 How. (U. S.) 328.

5. *U. S. v. Sherman*, 98 U. S. 565.

certain district has no force in another district except as evidence.<sup>1</sup>

(2) *Correction*.—The correction and vacation of judgments is a matter relating to the authority of the court, and as such is within its discretion. The court is not affected by state laws on the subject.<sup>2</sup>

A judgment may, for cause, be vacated or amended at the term at which it was entered,<sup>3</sup> but not at a later term, unless the motion had been made or noticed within the term,<sup>4</sup> or some material matter of fact had escaped attention, or there had been a clerical error,<sup>5</sup> or the judgment was absolutely void and not voidable only.<sup>6</sup>

Decrees may be corrected if the mistakes are clerical only, or have arisen from accidental slips or omissions at any time before enrollment, upon petition merely.<sup>7</sup> There are also seven other methods of correcting decrees: by petition for rehearing,<sup>8</sup> by bill of review, by bill in the nature of a bill of review, by a supplemental bill in the nature of a bill of review, by a bill to set aside a decree on account of fraud, mistake, accident or surprise, by a bill to suspend or avoid the operation of a decree, and by appeal.<sup>9</sup>

(3) *Special Provisions*.—Statutes have been passed having application to particular suits or special cases which are referred to in the notes.<sup>10</sup>

*b. EXECUTIONS*.—The Revised Statutes provide that the party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted

1. U. S. v. Ingate, 48 Fed. Rep. 251.

2. See *supra*, this title, *Trial and Its Incidents*; Bronson v. Schulten, 104 U. S. 417; *Ex p.* Casey, 18 Fed. Rep. 86.

3. Bronson v. Schulten, 104 U. S. 415. In order to discontinue, a cause cannot be entered after judgment. Ball v. Trenholm, 45 Fed. Rep. 588.

An erroneous sentence, after being partly executed, cannot be revised by the court or a new sentence imposed, even at the same term of court. *Ex p.* Lange, 18 Wall. (U. S.) 163.

4. Amy v. Watertown, 130 U. S. 313; Bronson v. Schulten, 104 U. S. 416.

5. Phillips v. Negley, 117 U. S. 665; Pickett v. Legerwood, 7 Pet. (U. S.) 148; Morgan v. Texas Cent. R. Co., 32 Fed. Rep. 530; Bronson v. Schulten, 104 U. S. 415; Schell v. Dodge, 107 U. S. 629; Cannon v. U. S., 118 U. S. 355.

6. U. S. v. Wallace, 46 Fed. Rep. 570.

7. Equity Rule 85.

8. Equity Rule 88; Easton v. Houston, etc., R. Co., 44 Fed. Rep. 7.

9. Foster's Federal Practice (2d ed.), vol. 1, § 350. See also APPEAL, vol. 1, p. 616, and *supra*, this title, *Appeals*.

A state court cannot enjoin the execution of a decree of the federal court. Dorr v. Rohr, 82 Va. 359.

10. Judgments in suits under postal laws. U. S. R. S., § 958.

Judgments in suits on debentures. U. S. R. S., § 959.

Judgments in suits on bonds for recovery of duties. U. S. R. S., §§ 960, 961.

Judgment for duties. U. S. R. S., § 962.

Judgment for fines. U. S. R. S., §§ 1041, 1042.

Judgment against garnishee in suits by the *United States*. U. S. R. S., § 935.

In every case in any court of the *United States*, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is over-

which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules adopt such state laws as may hereafter be in force in such states in relation to remedies upon judgments, as aforesaid, by execution or otherwise.<sup>1</sup>

All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from, and made returnable to, the court wherein the judgment was obtained.<sup>2</sup>

Execution upon judgments in favor of the *United States* may run into every state and territory.<sup>3</sup> Execution on judgments in a circuit court may be stayed at the discretion of the court,<sup>4</sup> or if allowed by state law, as a matter of right.<sup>5</sup> If the state law requires that goods taken on execution on a writ of *fiery facias* shall be appraised before sale, the state appraisers may appraise goods taken on a like process issuing out of the federal courts. The marshal may summon the appraisers according to the state law, and if they do not attend he may sell the goods without appraisal.<sup>6</sup> The death of a marshal does not affect an execution sale, but his successor may perform the acts necessary to completely vest title.<sup>7</sup>

All money received by the court or its officers may be deposited with the treasurer, an assistant treasurer, or a designated depository of the *United States*, in the name and to the credit of the court, or may be delivered upon security, according to agreement of the parties, under direction of the court.<sup>8</sup>

ruled, the judgment shall be *respondent onster*; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require. U. S. R. S., § 1026.

1. U. S. R. S., § 916. This statute, in so far as it conflicts with the general rule, established in U. S. R. S., § 914, supersedes it. Under section 916 only such remedies can be pursued in the enforcement of judgments as were provided by state law at the time the section was re-enacted, Dec. 11th, 1873, together with such of the subsequent remedies provided by state legislation as have been adopted by rules of the federal courts. *Lamaster v. Keeler*, 123 U. S. 376. See *infra*, this title, *Practice and Procedure*.

2. U. S. R. S., § 985.

3. U. S. R. S., § 986.

4. When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for

the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void. U. S. R. S., § 987.

5. In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the *United States* held therein, shall be entitled to a stay of execution for one term. U. S. R. S., § 988.

6. U. S. R. S., § 993.

7. U. S. R. S., § 994.

8. U. S. R. S., § 99.

While in the hands of the clerk it is exempt from attachment.<sup>1</sup> If deposited, it may be drawn on the signed and recorded order of the judge.<sup>2</sup>

The rules as to taking the body on execution, imprisonment for debt, and release from such imprisonment, are those governing executions issuing from the courts of the state.<sup>3</sup> The matter of executions on judgments for duties<sup>4</sup> and for fines,<sup>5</sup> is regulated by statute.

In suits in equity, final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*.<sup>6</sup>

**14. Practice and Procedure—***a.* IN ACTIONS AT LAW—(1) *The Rule Stated.*—Prior to 1872, the federal courts had generally adhered to common-law forms of actions, pleadings, and procedure. The practice in the states, on the contrary, had been largely codified by statutory provisions abolishing the distinctions between the forms of actions and eliminating the technicalities peculiar to the old law. To obviate the embarrassment following the use of two different systems, and to assimilate the state and federal practice, the act of 1872<sup>7</sup> was passed,<sup>8</sup> which, as incorporated into the Revised Statutes,<sup>9</sup> is as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The rule thus enunciated is, however, subject to two qualifications: *first*, it must, of course, give way before federal legislation on the subject,<sup>10</sup> and it does not apply to the personal conduct of

1. *The Lottawanna*, 20 Wall. (U. S.) 201. In *Tefft v. Sternberg*, 40 Fed. Rep. 2, the court, by Speer, J., said: "The proposition, as settled by an ample and indeed irresistible array of decisions, may be broadly stated as follows: When property is seized and held under *mesne* or final process of either a state or *United States* court, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued for the purposes of the writ, and the possession of the officers having it in control cannot be disturbed by another court of co-ordinate jurisdiction. Such disturbance would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer. Of course this rule is not

applicable in those cases where the courts of the *United States* exercise superior jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the *United States*."

2. U. S. R. S., § 996.

3. U. S. R. S., §§ 989-992.

4. U. S. R. S., § 962.

5. U. S. R. S., §§ 1040, 1041.

6. Equity Rule 8.

7. 17 St. at L., ch. 255.

8. *Nudd v. Burrows*, 91 U. S. 426; *Lamaster v. Keeler*, 123 U. S. 376.

9. U. S. R. S., § 914.

10. *Lamaster v. Keeler*, 123 U. S. 376.

Thus state laws inconsistent with acts of Congress are not adopted. *Walker v. Collins*, 50 Fed. Rep. 737; *O'Neil v. Kansas City, etc., R. Co.*, 31 Fed. Rep. 663; *U. S. v. Train*, 12 Fed. Rep. 852.



the case on the part of the judge, as this is not included in the terms "practice, pleadings, and forms and notes of proceeding."<sup>1</sup>

The phrase "as near as may be," which occurs in the statute, confines the section in its operation to state laws and rules of practice not inconsistent with the objects and customs of the *United States* courts.<sup>2</sup>

Subject to these limitations it is imperative.<sup>3</sup>

It applies to suits prosecuted in behalf of the *United States*.<sup>4</sup>

One of the most common illustrations of the rule is found in the adoption of code forms of pleading and practice. Such forms, if provided by statute for use in the state courts, will be followed in the federal courts,<sup>5</sup> although not to the extent of allowing the union of legal and equitable causes of action and expenses in one proceeding.<sup>6</sup>

(2) *To What Matters of Practice the Rule Applies.*—The section just referred to<sup>7</sup> has been held to apply to the following matters of practice:<sup>8</sup> service of process,<sup>9</sup> joinder of parties,<sup>10</sup> joinder of causes of action,<sup>11</sup> the granting of non-suits and sustaining demur-

1. Nudd v. Burrows, 91 U. S. 426. And see *supra*, this title, *Trial and Its Incidents*.

But the judge may follow the rules of state practice in these matters, although he is not bound to do so. Mitchell v. Harmony, 13 How. (U. S.) 115.

The judge of a *United States* court is not bound by the statute of a state providing that judges direct the finding of special verdicts. Dwyer v. St. Louis, etc., R. Co., 52 Fed. Rep. 87.

2. Hat Sweat Mfg. Co. v. Davis Sewing Mach. Co., 3 Fed. Rep. 294; *Ex p.* Chateaugay Ore. etc., Co., 128 U. S. 544.

Thus, while federal courts will conform "as near as may be" to state statutes, yet they will reject such provisions as tend to incumber the law or defeat justice. Lowry v. Story, 31 Fed. Rep. 769; *In re* Secretary, etc., 45 Fed. Rep. 396; Gould and Tucker's Notes to the Revised Statutes, 285; Phelps v. Oaks, 117 U. S. 239.

3. Amy v. Watertown, 130 U. S. 301.

4. U. S. v. Tetlow, 2 Low (U. S.) 159.

5. U. S. v. Parker, 120 U. S. 89.

Thus, in federal courts held within the State of *New York*, the common-law forms are neither necessary nor admissible, unless they are deemed to be substantially in compliance with the code of procedure, and unless such is the case will be set aside on motion. Lewis v. Gould, 13 Blatchf. (U. S.) 216.

6. Herklotz v. Chase, 32 Fed. Rep.

433; Church v. Spiegelburg, 31 Fed. Rep. 601; Bills v. New Orleans, etc., R. Co., 13 Blatchf. (U. S.) 227; Doe v. Roe, 31 Fed. Rep. 97; Bennett v. Butterworth, 11 How. (U. S.) 669; Montego v. Owen, 14 Blatchf. (U. S.) 324; Buller v. Sidell, 43 Fed. Rep. 116; Thompson v. Central Ohio R. Co., 6 Wall. (U. S.) 134.

7. U. S. R. S., § 914.

8. It applies to rules of practice tacitly adopted by the state court, and acted upon, as well as those existing under the express order of court. U. S. v. Douglass, 2 Blatchf. (U. S.) 207.

9. Amy v. Watertown, 130 U. S. 301; Alexandria v. Fairfax, 95 U. S. 774; Settlemier v. Sullivan, 97 U. S. 444. The constitution of *South Carolina* in article 4, section 31, provides that all "process" shall run in the name of the state. The courts of *South Carolina* having decided that a summons is not "process," within the meaning of its constitution, and, therefore, need not be in the name of the state, a summons issued in that state by the circuit court of the *United States* need not be in the name of the *United States* in order to conform to state procedure. Chamberlain v. Mensing, 47 Fed. Rep. 435. And see *supra*, this title, *Process*.

10. Castro v. Uriarte, 12 Fed. Rep. 250.

11. Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478; Delaware Co. v. Diebold Safe, etc., Co., 133 U. S. 488.

ers to evidence,<sup>1</sup> the practice prevailing in a state by virtue of a statute providing that a verdict given on several counts shall not be set aside or reversed if any one count is sufficient to sustain it,<sup>2</sup> the entering of verdicts on a referee's report without an application to the court,<sup>3</sup> the assessment of damages on default, whether by jury or otherwise,<sup>4</sup> proceedings to quiet title to land,<sup>5</sup> amendments discontinuing suit as to part of the amount sued on,<sup>6</sup> amendments,<sup>7</sup> the right of an assignee to bring suit,<sup>8</sup> the joining of defenses,<sup>9</sup> and condemnation proceedings.<sup>10</sup>

(3) *When the Rule Does not Apply*.—The rule laid down in this section of the statutes has been held not to apply to the following matters: suits *in rem*,<sup>11</sup> patent suits at law,<sup>12</sup> motions for new trials and bills of exceptions,<sup>13</sup> rules of state courts which preclude the plaintiff from bringing suit after a certain time,<sup>14</sup> the mode of commencing actions,<sup>15</sup> the examination of parties and the inspection of books and papers before the trial,<sup>16</sup> compulsory special verdicts,<sup>17</sup> and the means of enforcing judgments.<sup>18</sup>

b. *SUITS IN EQUITY*.—The equity practice is entirely different from the practice at law.<sup>19</sup> It is not affected by the practice of

1. *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24; *Sawin v. Kenny*, 93 U. S. 289; *Ex p. Boyd*, 105 U. S. 647.

2. *Bond v. Dustin*, 112 U. S. 604; *Davenport v. Paris*, 136 U. S. 580.

3. *Fourth Nat. Bank v. Neyhardt*, 13 Blatchf. (U. S.) 393.

4. *Raymond v. Danbury, etc., R. Co.*, 43 Conn. 596.

5. *Parker v. Overman*, 18 How. (U. S.) 137.

6. *Nussbaum v. Northern Ins. Co.*, 40 Fed. Rep. 337, which involved the practice under section 3479 of the *Georgia Code*.

7. *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. Rep. 7.

8. *Dexter v. Sayward*, 51 Fed. Rep. 729.

9. In *Roberts v. Lewis*, 144 U. S. 657, the court, by Gray, J., said: "All defenses are open to a defendant in the circuit court of the *United States*, under any form of plea, answer, or demurrer which would have been open to him under like pleading in the courts of the state within which the circuit court is held." The above decision annuls rules of court requiring matter in abatement to be pleaded in a special plea or answer. *Dexter v. Sayward*, 51 Fed. Rep. 732.

10. *U. S. v. Engeman*, 45 Fed. Rep. 546. But the practice followed will be the general state practice, and not that of special and excepted cases, such as that used in the condemnation of land

for school sites under the *New York Laws of 1888*, ch. 91. *In re Secretary, etc.*, 45 Fed. Rep. 396.

11. *Coffey v. U. S.*, 117 U. S. 233, which held that the section being confined by its terms to the regulation of "like causes," in the federal courts, did not extend to such suits, which have no parallel in state practice.

12. *Robinson on Patents*, vol. 3, § 992, note; *Myers v. Cunningham*, 44 Fed. Rep. 346; *Marvin v. Aultman*, 46 Fed. Rep. 339.

13. *Fishburn v. Chicago, etc., R. Co.*, 137 U. S. 60; *Preble v. Bates*, 40 Fed. Rep. 745; *In re Chateaugay Ore, etc., Co.*, 128 U. S. 544; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128.

14. *Mutual Bldg. Fund v. Bossieux*, 1 Hughes (U. S.) 386.

15. *Martin v. Criscuola*, 10 Blatchf. (U. S.) 211, which held that an action in a federal court sitting within the State of *New York* could not be brought by serving a summons issued in the name of the plaintiff's attorney, according to the practice in the *New York* state courts.

16. *Easton v. Hodges*, 7 Biss. (U. S.) 324.

17. *U. S. Mut. Accident Assoc. v. Barry*, 131 U. S. 100.

18. *Ex p. Chateaugay Ore, etc., Co.*, 128 U. S. 544; *Lamaster v. Keeler*, 123 U. S. 376.

19. *U. S. v. Ingate*, 48 Fed. Rep. 251; *Scott v. Neely*, 140 U. S. 106.

the state courts,<sup>1</sup> and follows the precedents of the English courts of chancery, save as the practice is regulated by rules of courts and national legislation.<sup>2</sup>

c. CRIMINAL CASES.—The practice in criminal prosecutions is that of the state in which the court is held as it existed at the time of the passage of the Judiciary Act of 1789, except so far as it has been since changed by act of Congress. No law of a state, however, passed since 1789 can affect it.<sup>3</sup>

The practice thus followed in the states at that time was that of the common law as it had been brought from *England*, with a few modifications. We may say, therefore, with but slight inaccuracy, that our criminal practice is that of the common law.<sup>4</sup>

d. COSTS.—Costs in actions at law in the federal courts follow the event of the suit and are given to the successful party; in equity they rest in the sound discretion of the judge, who will take into consideration the circumstances of the case and the situation and conduct of the parties, and award costs in accordance with that discretion. Such award of costs, however, cannot be capriciously made, but must be according to the rules as established by precedents.<sup>5</sup>

In suits to adjust claims against the *United States*, costs are allowed to the claimant only in case the government puts in issue the right of the plaintiff to recover, and then only at the discretion of the court.<sup>6</sup> In the supreme court and the circuit court of appeals no costs are awarded, either for or against the government.<sup>7</sup> The costs allowed under the fee bill apply only to those

1. *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Beers v. Haughton*, 9 Pet. (U. S.) 329; *White v. Bower*, 48 Fed. Rep. 186; *Noonan v. Lee*, 2 Black (U. S.) 509; *Neves v. Scott*, 13 How. (U. S.) 268; *Boyle v. Zacharie*, 6 Pet. (U. S.) 658; *Robinson v. Campbell*, 3 Wheat. (U. S.) 223. But when a new mode of procedure is authorized in the courts of a state, which is appropriate to the exercise of such jurisdiction, the circuit court will adopt such mode of procedure. *Lannon v. Clark*, 4 McLean (U. S.) 18.

2. U. S. R. S., § 913; *Boyle v. Zacharie*, 6 Pet. (U. S.) 648; *Poultney v. La Fayette*, 12 Pet. (U. S.) 472; *Barber v. Barber*, 21 How. (U. S.) 592; *Payne v. Hook*, 7 Wall. (U. S.) 425; *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; *Lorman v. Clarke*, 2 McLean (U. S.) 568; *Gordon v. Hobart*, 2 Sumn. (U. S.) 401; *Meade v. Beale*, Taney's Dec. (U. S.) 339.

3. U. S. v. Reid, 12 How. (U. S.) 366; U. S. v. Nye, 4 Fed. Rep. 890; *Erwin v. U. S.*, 37 Fed. Rep. 470.

4. *Erwin v. U. S.*, 37 Fed. Rep. 470, Rule 31.

where the court, by Speer, J., approving the case of *United States v. Nye*, 4 Fed. Rep. 890, said: "In the administration of criminal law, unless there be an express statute to the contrary, we are governed by the general common-law procedure. In the administration of criminal law and in criminal jurisprudence, we go to the common law for the purpose of ascertaining the modes of practice, the modes of procedure, the rights of the defendant, the duty of the court and the duty of the jury, and we administer it according to that."

5. *Foster's Federal Practice* (2d ed.), § 326; *Bartels v. Redfield*, 47 Fed. Rep. 708. In suits in admiralty, where costs accrue because of the taking of a vast amount of irrelevant testimony, the responsibility for which cannot be apportioned, they will be divided between the parties. *The Sarah v. Bellais*, 52 Fed. Rep. 233.

6. 24 St. at L. 508, § 15. See on the construction of this section, *Harmon v. U. S.*, 43 Fed. Rep. 567.

7. Sup. Ct. Rule 24; C. C. of App. Rule 31.

chargeable as between party and party, and not to those between solicitor or attorney and client.<sup>1</sup> The amount of their fees will be found elsewhere.<sup>2</sup>

**15. Parties**—*a.* THE UNITED STATES.—The *United States* may appear in the federal courts either as plaintiff or defendant.<sup>3</sup>

Many suits may, and certain classes of suits must, be brought in its name.<sup>4</sup> In such suits, if against individuals, no credits are allowed, unless they have previously been disallowed by the treasury department, except in the case of credits not so presented because of absence or accident.<sup>5</sup> The *United States* cannot be barred by state statutes of limitations.<sup>6</sup>

It can only be brought in as defendant by virtue of a waiver of its exemptions from suit by statute.<sup>7</sup> Once in court, however, as plaintiff, it can be made defendant to a counter claim, without express waiver.<sup>8</sup>

The question of suits against the *United States* is treated under the heads of the several courts. In general, if a right to sue exists, the assignee of the claim which is the subject of the litigation can bring suit in his own name.<sup>9</sup>

*b.* STATES.—(See also STATES, vol. 23, p. 86).—The federal courts have jurisdiction of controversies between different states, and between states and citizens of other states, with the exception of suits brought against states by such citizens.<sup>10</sup> The grant

1. *International Imp. Fund v. Greenough*, 105 U. S. 527.

2. See *supra*, this title, *Clerks and Attorneys*; SHERIFF, vol. 22, p. 564; UNITED STATES COMMISSIONER. See also Rules of Supreme Court; Equity and Admiralty Rules; and the rules of the several inferior courts.

**Security for Costs.**—Security for costs will be required, on motion, of complainants in equity who do not reside within the district. *Lyman Ventilating, etc., Co. v. Southard*, 12 Blatchf. (U. S.) 405; *Bliss v. Brooklyn*, 10 Blatchf. (U. S.) 217.

3. *United States Const.*, art. 3, § 2.

4. U. S. R. S., § 919, provides that all suits for the recovery of any duties, imposts or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imposts or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue or direct taxes, and all suits arising under the postal laws shall be brought in the name of the *United States*.

A writ of error does not lie in behalf of the *United States* in a criminal case. *U. S. v. Sanges*, 144 U. S. 310.

5. U. S. R. S., § 951.

This applies also to the defendant in

a suit brought by the *United States*. He can offset a claim only when it has been submitted and rejected, unless it comes within the exception of the statute. *U. S. v. Giles*, 9 Cranch (U. S.) 214.

6. *U. S. v. Thompson*, 98 U. S. 486; *U. S. v. Nashville, etc., R. Co.*, 118 U. S. 120; *U. S. v. Beebe*, 127 U. S. 338; *U. S. v. Insley*, 130 U. S. 263. But see *U. S. v. Wallamet, etc., Wagon Road Co.*, 42 Fed. Rep. 358, where Deady, J., says: "The Statute of Limitations does not ordinarily run against the *United States*. But this suit is required by the act of Congress to be tried and adjudicated as a suit between private parties, and therefore, in my judgment, the lapse of time or the bar of the Statute of Limitations is to have the same effect as in a suit between such parties."

7. *U. S. v. Clarke*, 8 Pet. (U. S.) 436; *The Siren*, 7 Wall. (U. S.) 152.

The exemption cannot be waived by one of its officers. *Carr v. U. S.*, 98 U. S. 433.

8. *Foster's Federal Practice* (2d ed.), § 36.

9. *Emmons v. U. S.*, 48 Fed. Rep. 43.

10. *United States Const.*, art. 3, § 2; Eleventh Amendment to *United States Constitution*. And see *supra*, this title, *Jurisdiction*.

of jurisdiction over suits between different states extends only to controversies over property rights, and not over political rights.<sup>1</sup>

c. INDIVIDUALS AND CORPORATIONS.—The common-law principles prevail in the determination of the question as to who are proper or necessary parties to suits in federal courts.

As a general rule, joining merely nominal parties has no effect, either in the way of conferring or excluding jurisdiction.<sup>2</sup>

A non-resident cannot be sued unless by personal service; mere attachment of property does not give jurisdiction.<sup>3</sup> His exemption from suit, however, is a mere personal privilege which he may waive,<sup>4</sup> as by a general appearance, and pleadings in bar.<sup>5</sup>

A corporation created by act of Congress may be sued in the federal courts in any district where it is doing business, and has an agent upon whom service of process can be made, notwithstanding its principal office is in another state.<sup>6</sup>

Suits are not defeated by the non-joinder of, or the fact that service cannot be gotten upon all who are, according to the rules of law, necessary parties, but judgment will be entered against those made parties, but without prejudice to the interests of others.<sup>7</sup> The question of whether or not a right of action survives is determined by the local state law.<sup>8</sup>

1. *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Georgia v. Stanton*, 6 Wall. (U. S.) 50; *Georgia v. Grant*, 6 Wall. (U. S.) 241.

2. *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Wood v. Davis*, 18 How. (U. S.) 467; *Foss v. First Nat. Bank*, 1 McCrary (U. S.) 474; 3 Fed. Rep. 185; *Brown v. Strode*, 5 Cranch (U. S.) 303. But trustees and executors are not such nominal parties. *Knapp v. Troy*, etc., R. Co., 20 Wall. (U. S.) 117.

3. *Curtis on Jurisdiction of United States Courts*, p. 105; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Day v. New India-Rubber Mfg. Co.*, 1 Blatchf. (U. S.) 628; *Sayles v. Northwestern Ins. Co.*, 2 Curt. (U. S.) 212; *Saddler v. Fallen*, 2 Curt. (U. S.) 579.

4. *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465.

5. *Lockett v. Rumbaugh*, 45 Fed. Rep. 23; *McBride v. Grande de Tour Plow Co.*, 40 Fed. Rep. 162.

6. *Van Dresser v. Oregon R. & Nav. Co.*, 48 Fed. Rep. 202.

7. U. S. R. S., § 737.

8. *Warren v. Furstenheim*, 35 Fed. Rep. 691; *Hatfield v. Bushnell*, 1 Blatchf. (U. S.) 393; *Barker v. Ladd*, 3 Sawy. (U. S.) 44; *Green v. Watkins*, 6 Wheat. (U. S.) 260; *Clarke v. Mathewson*, 12 Pet. (U. S.) 164; *Trigg v. Conway, Hempst.* (U. S.) 711; *Jones v. Vanzandt*, 4 McLean (U. S.) 604;

*Mellus v. Thompson*, 1 Cliff. (U. S.) 125; *Witters v. Foster*, 23 Blatchf. (U. S.) 457; 26 Fed. Rep. 737.

**Procedure on Death of a Party to a Suit.**—When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the *United States*, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court. U. S. R. S., § 955.

If there are two or more plaintiffs or defendants, in a suit where the cause

**16. Remedies—***a.* IN GENERAL.—The ordinary legal and equitable remedies sufficiently appear in other portions of this title. The extraordinary remedies granted by other courts, may be obtained by suit in the federal courts.

*b.* MANDAMUS—(See also MANDAMUS, vol. 14, p. 88).—The supreme court may issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the *United States*, or to persons holding office under the authority of the *United States*, where a state or an ambassador, or other public minister, or a consul or a vice consul is a party.<sup>1</sup> It cannot, however, issue a writ—even though authorized by act of Congress—to an officer of the government.<sup>2</sup>

The supreme court, the circuit court of appeals, the circuit and district courts may issue writs of *mandamus* which are ancillary to cases of which they have jurisdiction.<sup>3</sup> The circuit courts can also by *mandamus* compel officers of the *United States* to file bonds, make returns and perform certain other duties.<sup>4</sup> Both they and the district court may issue a *mandamus* to compel compliance with the Interstate Commerce Act.<sup>5</sup>

The supreme court of the *District of Columbia* has power also in proper cases to issue writs of *mandamus*.<sup>6</sup>

*c.* PROHIBITION—(See also PROHIBITION, vol. 19, p. 263).—The supreme court has power to issue writs of prohibition to the district courts,<sup>7</sup> when proceeding as courts of admiralty and maritime jurisdiction.<sup>8</sup> It has been held that this power is confined to admiralty and maritime cases, and that in other matters the district court cannot be so restrained.<sup>9</sup>

*d.* QUO WARRANTO—(See also QUO WARRANTO, vol. 19, p. 660).—The circuit and district courts may issue writs of *quo warranto* against any person holding office, except as a member of Congress or of some state legislature, contrary to the provisions of the third section of the Fourteenth Amendment to the constitu-

of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant. U. S. R. S., § 956.

Where a party dies after final judgment or decree, no revivor is necessary, but the representative of the deceased may prosecute the appeal. 18 St. at L. 473.

1. U. S. R. S., § 688.

2. *Marbury v. Madison*, 1 Cranch (U. S.) 137.

3. U. S. R. S., § 716; 26 St. at L. 826, ch. 517, § 12; *Rosenbaum v. Bauer*, 120 U. S. 450; *Labette Co. v.*

U. S., 112 U. S. 217; *Smith v. Jackson*, 1 Paine (U. S.) 453; the *Steamboat New England*, 3 Sumn. (U. S.) 495; the *Enterprise*, 3 Wall. Jr. (C. C.) 58; *In re Green*, 141 U. S. 325; *Greene Co. v. Daniel*, 102 U. S. 187; *Davenport v. Dodge Co.*, 105 U. S. 237; *Louisiana v. Jumel*, 107 U. S. 727.

4. 18 St. at L. 333.

5. 25 St. at L. 862.

6. 9 St. at L. 253.

7. Including the court for the district of *Alaska*. *In re Cooper*, 138 U. S. 404.

8. U. S. R. S., § 688.

9. *Ex p. Graham*, 10 Wall. (U. S.) 541. Thus, the supreme court has no power to issue a writ of prohibition to the district court deciding cases in bankruptcy. *Ex p. City Bank*, 3 How.

tion.<sup>1</sup> The Revised Statutes extend the jurisdiction by *quo warranto* to cases of deprivation of office through denial of the rights secured by the Fifteenth Amendment.<sup>2</sup>

*e.* HABEAS CORPUS.—(See HABEAS CORPUS, vol. 9, p. 161.)

*f.* LIMITATIONS.—(See also LIMITATION OF ACTIONS, vol. 13, p. 667).—The practice of following state statutes of limitations prevails in both legal and equitable suits.<sup>3</sup> The equity courts do not consider themselves bound by them and will not regard them when they would work injustice and wrong.<sup>4</sup> State statutes of limitations do not bar the *United States*, even though the *United States* be specially named therein.<sup>5</sup>

The *United States* may, however, pass statutes of limitations binding upon both federal and state courts<sup>6</sup>—a right which has been frequently exercised.

Thus, suits on a marshal's bond must be begun within six years after the right of action accrues, or, in case of plaintiffs under the disabilities of infancy, coverture, or insanity, within three years after the disability is removed.<sup>7</sup>

In prosecution for crimes—excepting willful murder and crimes under the slave-trade laws—the indictment must be found or the information instituted within three years after the commission of the criminal act.<sup>8</sup> This time of limitation does not apply to criminals fleeing from justice.<sup>9</sup> Crimes arising under the *United States* slave-trade laws must be prosecuted within five years after their commission.<sup>10</sup>

Suits against the *United States* are barred in six years.<sup>11</sup>

The general rule in regard to suits or prosecutions for penalties or forfeitures—pecuniary or otherwise—accruing under the laws

(U. S.) 292. But see *In re Balz*, 135 U. S. 403.

1. U. S. R. S., § 1786.

2. U. S. R. S., § 2010.

3. *Wagner v. Baird*, 7 How. (U. S.) 258; *Broderick's Will*, 21 Wall. (U. S.) 503; *Godden v. Kimmell*, 99 U. S. 201; *Meath v. Phillips Co.*, 108 U. S. 553; *Kirby v. Lake Shore, etc.*, R. Co., 120 U. S. 130; *Norris v. Haggin*, 136 U. S. 386; *Cleveland Ins. Co. v. Reed*, 1 Biss. (U. S.) 180; *Reeves v. Vinacke*, 1 McCrary (U. S.) 217; *Copp v. Louisville, etc.*, R. Co., 50 Fed. Rep. 164; *Leffingwell v. Warren*, 2 Black (U. S.) 599.

4. *Fogg v. St. Louis, etc.*, R. Co., 17 Fed. Rep. 873; *Story's Eq. Jur.* (12th ed.), § 1521; *Stevens v. Sharp*, 6 Sawy. (U. S.) 113.

5. *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *U. S. v. Thompson*, 98 U. S. 490; *U. S. v. Beebe*, 127 U. S. 338; *U. S. v. Insley*, 130 U. S. 263; *U. S. v. Wallamet Wagon Road Co.*, 42 Fed. Rep. 351; *U. S. v. Nashville, etc.*, St. Louis R. Co., 118 U. S. 120.

6. See LIMITATION OF ACTIONS, vol. 13, p. 667.

7. U. S. R. S., § 786. This statute does not apply to suits by the *United States*. *U. S. v. Rand*, 4 Sawy. (U. S.) 272; *U. S. v. Godbold*, 3 Woods (U. S.) 550.

8. U. S. R. S., §§ 1043, 1944; 19 St. at L. 32; 23 St. at L. 122.

The accused may take advantage of the above statutes under the plea of not guilty. *U. S. v. Cook*, 17 Wall. (U. S.) 168; *U. S. v. White*, 5 Cranch (C. C.) 368; *U. S. v. Brown*, 2 Low. (U. S.) 267; *Parsons v. Hunter*, 2 Sumn. (U. S.) 426.

9. U. S. R. S., § 1045. Fleeing from justice is the leaving of home or abode to avoid the detection of the crime. *U. S. v. O'Brian*, 3 Dill. (U. S.) 381.

After flight, if the criminal openly and publicly returns, the three years begin to run. *U. S. v. White*, 5 Cranch (C. C.) 368.

10. U. S. R. S., § 1046.

11. 24 St. at L. 505.

of the *United States* is, that they must be commenced within five years, if the person or property of the offender liable for the penalty or forfeiture shall be found within the *United States*.<sup>1</sup>

**17. Judicial Districts.**—The territory of the *United States* has been divided into judicial districts. To ascertain the respective boundaries of the districts the revised statutes must be consulted.

**II. SUPREME COURT—1. Authority and Organization.**—The supreme court—the only court expressly provided for by the constitution—was organized by the Judiciary Act of 1789. Various judiciary acts since passed—the last being that of March 3d, 1891—have given it its present form.

**2. Officers.**—(See also COURTS, vol. 4, p. 447).—The duties and powers of the justices and clerks have been already enumerated.<sup>2</sup>

The rule as to the admission of attorneys is as follows: It shall be requisite to the admission of attorneys or counsellors to practise in this court that they shall have been such for three years past in the supreme courts of the states to which they respectively

1. U. S. R. S., § 1047. But actions to recover pecuniary penalties and forfeitures, under the *United States* customs revenue laws, must be commenced within three years, the time of the defendant's absence from the *United States* or of the concealment or absence of property not being counted. 18 St. at L. 186, ch. 391, § 22.

2. See *supra*, this title, *United States Courts in General—Officers*.

**Provision in Case of Death of Clerk.**—“In case of the death of the clerk, his duty or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate, and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.” U. S. R. S., § 678.

**“Undertaking for Fees.**—In all cases, except in capital criminal cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.” Supreme Court Rule 10; 25 St. at L. 656.

**Official Residence.**—The clerk must reside and keep his office at the seat of

the national government. Supreme Court Rule 1, § 1.

**Care of Records.**—“The clerk shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court, except as provided in Rule 10 [to the printer for preparing record].” Supreme Court Rule 1, § 2.

**Fee Bill.**—By act of March 3d, 1883, 22 St. at L. 631, the supreme court was authorized to prepare a table of clerk's fees, which was accordingly done. As to such fees, see Supreme Court Rules 23 and 38.

In addition to the fees allowed by these Rules the clerk is allowed one per cent. as commission upon money paid into court. *Florida v. Anderson*, 91 U. S. 683. As to fees of clerk for copies of record for printer, see Amendment to Rules, 108 U. S. 1, 4. The clerk may demand his fees in advance. *Steever v. Rickman*, 109 U. S. 74. Each party is liable to the clerk for the fees due from him. *Caldwell v. Jackson*, 7 Cranch (U. S.) 276. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees. Supreme Court Rule No. 10, § 8.

As to the salary of the clerk of the



belong, and that their private and professional character shall appear to be fair.<sup>1</sup>

This rule embraces all the requirements, and it is immaterial that the applicant for admission was stricken off the roll of the *United States* district court for misconduct, so long as he is in good standing as a member of the state supreme court.<sup>2</sup> Before being admitted, the attorney must take and subscribe the oath of office.<sup>3</sup> The other officers are elsewhere considered.<sup>4</sup>

3. **Seat and Sessions.**<sup>5</sup>—(See COURTS, vol. 4, p. 455.)

4. **Jurisdiction**—*a*. ORIGINAL.—In all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party,<sup>6</sup> the supreme court has original jurisdiction.<sup>7</sup>

These words are held to exclude all cases not embraced within their terms. Such cases, if within the jurisdiction of the supreme court at all, are within its appellate jurisdiction.<sup>8</sup>

Supreme Court of the *United States*, see Act of March 3d, 1883 (22 St. at L. 631); U. S. R. S., § 844.

1. Supreme Court Rule 2.

2. *Ex p. Tillingham*, 4 Pet. (U. S.) 108.

3. For the form of the oath, see Supreme Court Rule 2.

4. As to the marshal, see SHERIFF, vol. 22, p. 525; as to reporter, see U. S. R. S., §§ 677, 681, 682, 683; 22 St. at L. 219.

5. As to the matter of adjournments, see U. S. R. S., § 4799.

6. The settlement of disputed boundaries may be accomplished by original suits between states in the supreme court. *New Jersey v. New York*, 3 Pet. (U. S.) 461; 5 Pet. (U. S.) 284; 6 Pet. (U. S.) 323; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 755; *Rhode Island v. Massachusetts*, 13 Pet. (U. S.) 23; *Virginia v. West Virginia*, 11 Wall. (U. S.) 39.

Where a state is a party in an original suit in the supreme court, the practice in equity is followed generally. Curtis on Jurisdiction of *United States* Courts (1880); *Georgia v. Brailsford*, 2 Dall. (U. S.) 402; *Kentucky v. Dennison*, 24 How. (U. S.) 66.

The supreme court has original jurisdiction of a suit in equity brought in the *United States* against a state, to determine the boundary between that state and a territory of the *United States*, and that question is susceptible of judicial determination. *U. S. v. Texas*, 143 U. S. 621.

A citizen of a state cannot sue the state in the supreme court, neither can

a citizen or subject of a foreign state. Eleventh Amendment to U. S. Const. As to the effect of the amendment, see *Ex p. Ayers*, 123 U. S. 443.

7. *United States* Const., art. 3, § 2.

The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice consul is a party. U. S. R. S., § 687.

The clerk of the supreme court enters all suits under its original jurisdiction in a separate docket, called "the original docket." Every step in such cases must be taken on motion first made and granted and entered on the docket. Curtis on Jurisdiction of *United States* Courts, p. 23.

8. *Marbury v. Madison*, 1 Cranch (U. S.) 137; Curtis on Jurisdiction of *United States* Courts (1880), p. 8; *Ex p. Hung Hang*, 108 U. S. 552; *Cohens v. Virginia*, 6 Wheat. (U. S.) 264; *New Jersey v. New York*, 5 Pet. (U. S.) 284; *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Ex p. Vallindigham*, 1 Wall. (U. S.) 243. See also *Ex p. Yerger*, 8 Wall. (U. S.) 85.

In certain specified cases, the supreme court may issue writs of *mandamus*,<sup>1</sup> prohibition,<sup>2</sup> and *habeas corpus*.<sup>3</sup>

In exercising the original jurisdiction of the supreme court in common-law cases, issues of fact are determined by the jury.<sup>4</sup>

*b. APPELLATE*—(1) *Prior to the Act of March 3d, 1891*—(a) *In General*.—Prior to the passage of this act, known as the Evarts Act, the supreme court was the general court of appeal, and had a very wide jurisdiction, as will appear from the notes.<sup>5</sup> As to

1. U. S. R. S., § 688.

2. U. S. R. S., § 688.

3. U. S. R. S., § 751; *HABEAS CORPUS*, vol. 9, p. 161.

But it may grant the writ only in cases affecting ambassadors, other public ministers or consuls. *Ex p. Hung Hang*, 108 U. S. 552; *Ex p. Barry*, 2 How. (U. S.) 65, in this case it was held that the supreme court could not grant the writ on the petition of a private individual to bring up the body of his infant daughter.

4. U. S. R. S., § 689.

5. An outline of the jurisdiction before the Evarts Act, is given, as it is necessary in determining the effect of the provisions of that law.

All final judgments of any circuit court, or of any district court acting as a circuit court in civil actions, brought there by original process, or removed there from courts of the several states, and all final judgments of any circuit court in civil actions removed there from any district court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, may be re-examined and reversed or affirmed in the supreme court, upon a writ of error. U. S. R. S., § 691. But see 26 St. at L. 826, § 14.

An appeal shall be allowed to the supreme court from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and the supreme court is required to receive, hear, and determine such appeals. U. S. R. S., § 692; 18 St. at L. 316.

An appeal shall be allowed to the supreme court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed,

without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance. U. S. R. S., § 695.

An appeal to the supreme court shall be allowed, on behalf of the *United States*, from all judgment of the court of claims adverse to the *United States*, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the *United States* by the judgment of the said court, as provided in section 1089. U. S. R. S., § 707.

This provision was afterward extended to similar suits in the circuit and district courts. 24 St. at L. 506, § 9.

Judgments in capital cases may be reviewed by a writ of error brought by the accused. 25 St. at L. 655, § 6.

A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute.

*First.* Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, or of the supreme court of the *District of Columbia*, or of any territory, in any case touching patent rights or copyrights.

*Second.* Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by the *United States* for the enforcement of any revenue law thereof.

*Third.* Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action against any officer of the revenue for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the treasury.

*Fourth.* Any final judgment at law

cases pending at the time of the passing of the act, and cases in which the writ of error or appeal was sued out or taken prior to July 1st, 1891, the former limits of jurisdiction prevail.<sup>1</sup>

(b) **Amount in Dispute.**—In determining whether the matter in dis-

or final decree in equity, or of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any right, privilege or immunity secured by the Constitution of the *United States*, or of any right or privilege of a citizen of the *United States*.

*Fifth.* Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by any person on account of injury to his person or property by any act done in furtherance of any conspiracy mentioned in section 1980, title, "Civil Rights." U. S. R. S., § 699.

These provisions were afterward extended to violations of the civil-rights laws. 18 St. at L. 335. Also to cases wherein a judgment or decree has been rendered in a circuit court upon a question involving the jurisdiction of the court, but in cases involving less than five thousand dollars, the supreme court considered the question of jurisdiction only. 25 St. at L. 693.

In such cases the party may elect between taking the case to the supreme court on the constitutional question alone, and appealing the whole case to the circuit court of appeals. *Barling v. Bank of British N. A.*, 50 Fed. Rep. 260.

#### **Certification of Difference of Opinion.**

—Any final judgment or decree, in any civil suit or proceeding before a circuit court which was held, at any time, by a circuit justice and a circuit judge or a district judge, or by the circuit judge and a district judge, wherein the said judges certify, as provided by law, that their opinions were opposed upon any question which occurred on the trial of hearing of the said suit or proceeding, may be reviewed and affirmed, or reversed or modified by the supreme court, on a writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error and appeals in regard to bail and *supersedeas*. U. S. R. S., § 693.

When any question occurs on the hearing or trial of any criminal proceeding before a circuit court upon which the judges are divided in opinion and

the point upon which they disagree is certified to the supreme court, according to law, such point shall be finally decided by the supreme court; and its decision and order in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order. U. S. R. S., § 697.

**Judgments and Decrees of the State Courts on Writs of Error.**—A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the *United States*, and the decision is against their validity; or where there is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the *United States*, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the *United States*, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the *United States*.

The supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ. U. S. R. S., § 709. See, as to appeals from territorial supreme courts, U. S. R. S., §§ 702, 704, 1909; 18 St. at L. 254; 23 St. at L. 443. And as to appeals from the supreme court of the *District of Columbia*, U. S. R. S., §§ 705, 706; 23 St. at L. 443; *In re Heath*, 144 U. S. 92.

1. Joint Resolution, No. 17; 26 St. at L. 1115.

pute is of sufficient value to give the court jurisdiction, the court will consider the amount actually and directly involved, and not the remote effects of a judgment.<sup>1</sup>

(c) *Writs of Error to the Highest Court of a State.*—The jurisdiction of the court is limited to the cases for which the statute makes provision. If the decision of the state court is in favor of the title, right, privilege, or immunity claimed under the federal authority, the court has no jurisdiction.<sup>2</sup> The federal question decided in the state court must have been a material one and necessary to the determination of the case.<sup>3</sup>

1. *New England Mortgage, etc., Co. v. Gay*, 145 U. S. 123; *The Sydney*, 139 U. S. 331.

The money value in dispute only will be considered. *Curtis on Jurisdiction of United States Courts*, p. 65.

When in an action for the recovery of a money demand, a counter-claim of the defendant amounting to more than five thousand dollars is disallowed, and judgment is rendered on the plaintiff's claim, the supreme court has jurisdiction of a writ of error sued out by the defendant, without regard to the amount of the plaintiff's judgment. *Block v. Darling*, 140 U. S. 234; *Hilton v. Dickenson*, 108 U. S. 165.

In considering the amount necessary to give the supreme court jurisdiction on writ of error, not only is the amount of the judgment against the plaintiff in error to be regarded, but in addition, the amount of a counter-claim which he would have recovered if his contention setting it up had been sustained. *Clark v. Sidway*, 142 U. S. 682. The amount in dispute may be determined by the evidence. *Sharon v. Terry*, 13 *Sawy.* (U. S.) 387.

Where it appeared that the plaintiff did not claim and could not possibly recover for himself a sum above the necessary five thousand dollars, the supreme court had no jurisdiction. *Miller v. Clark*, 138 U. S. 223.

Whether the "matter in dispute" exceeds five thousand dollars is determined by the amount claimed and sued for. And where this is sought to be recovered out of a fund, jurisdiction cannot be ousted by having an inquiry instituted by the court as to whether the fund will be sufficient to cover that amount. *Clark v. Bever*, 139 U. S. 96.

Where a clerk of court is sued on a bond in the penal sum of more than five thousand dollars, but it can be seen from the face of the record that the amount in controversy is less than five

thousand dollars, the *United States* Supreme Court on error to the circuit court is without jurisdiction. *U. S. v. Hill*, 123 U. S. 681.

An appeal from the decision of the circuit court for the partition of land of uncertain value will be dismissed, unless it appears affirmatively that the land is worth more than five thousand dollars. *Parker v. Morrill*, 106 U. S. 1.

2. *Missouri v. Andriano*, 138 U. S.

497.

3. *Marsh v. Nichols*, 140 U. S. 344; *New Orleans v. New Orleans Waterworks*, 142 U. S. 79; *De Saussure v. Gaillard*, 127 U. S. 216. In *Walter A. Wood Mowing, etc., Mach. Co. v. Skinner*, 139 U. S. 293, the court, by *Brown, J.*, said: "It is well settled by a long series of adjudications that, to give this court jurisdiction by writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the case; and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." See, to the same effect, *Brown v. Atwell*, 92 U. S. 327.

But if a case before a state court necessarily involves the adjudication of a federal question, it is not necessary that it should appear affirmatively in the record, or in the opinion of that court, that such a question was raised and decided. *Kaukanna Water Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254.

The supreme court may refer to an opinion of the state court in determining the ground of judgment of that court. The judgment of the highest court of a state may be supported without deciding a federal question. When it does not appear on what grounds it was decided, the supreme court is without jurisdiction in error. *Walter A.*

(d) **Certification of Division of Opinion to the Supreme Court.**—The question certified from a lower court to the supreme court must be one of law,<sup>1</sup> not a question of fact nor a mixed question of law and fact.<sup>2</sup> The certification must be of a single question or a series of distinct questions,<sup>3</sup> and it must not be too general,<sup>4</sup> nor seek the opinion of the supreme court upon the whole case.<sup>5</sup> It may not be of a matter of mere discretion.<sup>6</sup>

The omission to state in the certificate of division that the question was certified upon request of a party or counsel to the

Wood Mowing, etc., *Mach. Co. v. Skinner*, 139 U. S. 293; *Beaupre v. Noyes*, 138 U. S. 397; *Kennebec, etc., R. Co. v. Portland, etc., R. Co.*, 14 Wall. (U. S.) 23; *Delmas v. Merchants' Mut. Ins. Co.*, 14 Wall. (U. S.) 661; *Crescent City Livestock Co. v. Butchers' Union Slaughter House Co.*, 120 U. S. 141.

The practice in case of causes improperly appealed to the Supreme Court of the *United States* from the highest court of a state is, after the cause has been entered upon the calendar, to file, on a motion day, a motion to dismiss the writ of error, on the ground that it does not disclose any question over which the court has jurisdiction. If no such motion is made, however, the court may, on the hearing on the merits, *ex mero motu* dismiss the writ of error. *Curtis on Jurisdiction of United States Courts* (1880), p. 36.

The decision of the highest state court that punishment by electricity was not cruel, within the meaning of the state constitution, may not be re-examined by the Supreme Court of the *United States*. *In re Kemmler*, 136 U. S. 436.

The matter in dispute must be money or a right capable of being valued in money. *De Krafft v. Barney*, 2 Black (U. S.) 704; *Youngstown Bank v. Hughes*, 106 U. S. 523.

Where the judgment of the state court upholds a license-fee imposed by a city upon insurance companies doing business within the city, as not impairing the obligation of a contract involved in previous legislation affecting the plaintiff corporation, a federal question is presented. *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116.

The supreme court has jurisdiction to review a decision of a state court upholding as constitutional a state statute providing for the election of presidential electors, and it is no objection that political questions are involved in the determination. *McPherson v. Blacker*, 13 Sup. Ct. Rep. 3.

1. *Jewell v. Knight*, 123 U. S. 426.

2. *Williamsport Nat. Bank v. Knapp*, 119 U. S. 357; *Curtis on Jurisdiction of United States Courts*, p. 83.

3. *California Artificial Stone Paving Co. v. Molitor*, 113 U. S. 609.

Where a division of opinion is certified, the supreme court will entertain jurisdiction of the questions, although they are several in number, if they appear to have arisen at one time, at one stage of the cause, and to have involved substantially but one point. *U. S. v. Chicago*, 7 How. (U. S.) 185.

4. *U. S. v. Brewer*, 139 U. S. 278; *U. S. v. Northway*, 120 U. S. 327; *Dublin Tp. v. Milford Five Cent. Sav. Inst.*, 128 U. S. 514; *U. S. v. Hall*, 131 U. S. 50; *U. S. v. Lacher*, 134 U. S. 632.

5. *Weeth v. New England Mortgage Co.*, 106 U. S. 605; *Saddler v. Hoover*, 7 How. (U. S.) 646; *State Bank v. St. Louis Rail Fastening Co.*, 122 U. S. 21; *Fire Ins. Assoc. v. Wickham*, 128 U. S. 426; *Dublin Tp. v. Milford Five Cent. Sav. Inst.*, 128 U. S. 510; *Dennistown v. Stewart*, 18 How. (U. S.) 565. No certificate of division of opinion is authorized upon a question as vague as whether "either of the counts of the indictment charges the defendant with an offense under laws of the *United States*." *U. S. v. Northway*, 120 U. S. 327.

Where it is evident from the record that the whole case has been sent up to the supreme court, upon a certificate of division of opinion in the circuit court, the case must be dismissed for want of jurisdiction. *Nesmith v. Sheldon*, 6 How. (U. S.) 41.

6. *Wiggins v. Gray*, 24 How. (U. S.) 303; *Davis v. Braden*, 10 Pet. (U. S.) 286; *U. S. v. Daniel*, 6 Wheat. (U. S.) 542; *U. S. v. Hamilton*, 109 U. S. 63.

The general question of certification is fully considered and the authorities cited in *Jewell v. Knight*, 123 U. S. 426.

cause is not fatal if the jurisdiction is not challenged.<sup>1</sup> There must be a *bona fide* difference of opinion; the mere novelty or difficulty of the questions involved does not authorize their certification.<sup>2</sup>

(2) *Since the Act of March 3d, 1891*—(a) *In General*.—The Act of March 3d, 1891—commonly known as the Evarts Act—made extensive changes in the jurisdiction of the supreme court.<sup>3</sup> It provides that certain cases not before within its jurisdiction should come before it by appeal; that certain other cases should reach it only after appeal to the circuit court of appeals, and subsequent appeal from that court to the supreme court; it takes still other matters from its cognizance, while as to certain questions the jurisdiction is unaffected.<sup>4</sup>

(b) *Cases Appealable Directly to the Supreme Court from the Circuit and District Courts*.—Appeals or writs of error may be taken from the district or circuit courts direct to the supreme court in the following cases:<sup>5</sup>

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone can be certified to the supreme court from the court below for decision.<sup>6</sup>

From the final sentences and decrees in prize causes.

In cases of conviction of capital or otherwise infamous crime.<sup>7</sup>

In any case that involves the construction or application of the Constitution of the *United States*.

In any case in which the constitutionality of any law of the *United*

1. U. S. v. Harris, 106 U. S. 629.

2. U. S. v. Perrin, 131 U. S. 55; Webster v. Cooper, 10 How. (U. S.) 54.

3. As to the causes leading up to its passage and its effect, see address of President Simeon E. Baldwin to American Bar Association, report for 1891 (vol. 14, p. 164); an article entitled, "Recent Decisions under the Evarts Act," by Roger Foster, Yale Law Journal, vol. 1, p. 95; *In re Woods*, 143 U. S. 202; U. S. v. Sutton, 47 Fed. Rep. 130.

4. 26 St. at L. 826.

5. 26 St. at L., 826, § 5. The writ of error is a matter of right. *In re Claassen*, 140 U. S. 200. But it can be taken away only after final judgment. *McLish v. Roff*, 141 U. S. 661.

6. But this certification must be after final judgment. *McLish v. Roff*, 141 U. S. 668.

Hence an order remanding a case from a federal to a state court cannot be reviewed by writ of error or appeal in the supreme court. *Chicago, etc., R. Co. v. Roberts*, 141 U. S. 690.

The Act of March 3d, 1891, while it does not confer upon one party the right to carry a cause before two appellate courts, at the same time does not confer upon him the power to defeat the right of appeal by the other party to the circuit court of appeals, upon the merits, by taking an appeal or writ of error to the supreme court upon the question of jurisdiction of the trial court; and in the case of such separate appeal, the cause will be continued in the circuit court of appeals to await the decision of the supreme court upon the question of jurisdiction. *Northern Pac. R. Co. v. Glaspell*, 49 Fed. Rep. 482.

7. This is an addition to the jurisdiction of the supreme court. An "infamous crime" is one which may be punished by imprisonment in a state's prison or penitentiary, whether with or without hard labor, *American Bar Assoc. Rep.*, vol. 14, p. 165 (address of President Simeon E. Baldwin, 1891); *In re Claassen*, 140 U. S. 200; *Mackin v. U. S.*, 117 U. S. 348, such as adultery, if punishable by confinement in state's prison. *U. S. v. Sutton*, 47 Fed. Rep. 129.

*States*, or the validity or construction of any treaty made under its authority, is drawn in question.<sup>1</sup>

In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the *United States*.

The act does not affect the jurisdiction of the supreme court in cases appealed from the highest court of a state.

(e) *Cases Coming from the Circuit Court of Appeals*.—(1) BY APPEAL AND WRIT OF ERROR.—An appeal or writ of error or review is allowed from the circuit court of appeals to the supreme court in all cases where the matter in controversy exceeds one thousand dollars, beside costs, except the following: cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the *United States*, or citizens of different states; cases arising under the patent laws; cases arising under the revenue laws;<sup>2</sup> cases arising under the criminal laws; and cases in admiralty.

(2) BY CERTIFICATION.—In cases in which the circuit court of appeals has final jurisdiction, it may at any time certify to the supreme court any questions or propositions of that court for its proper decision. And the statute provides that thereupon the supreme court may either give its instructions on the questions or propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon it will decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.<sup>3</sup>

In any case of which the circuit court of appeals has final jurisdiction, the supreme court may, by *certiorari* or otherwise, require such case to be certified to for review and determination, in which case it has the same power and authority as if the case had been carried up by appeal or writ of error.<sup>4</sup>

This provision is intended to be taken advantage of only in case of questions of gravity and importance arising.<sup>5</sup>

5. *Practice and Procedure*.—a. IN GENERAL.—The matter of practice, pleading, and procedure has been already treated under

1. If a constitutional question is raised, the court will review all the questions in the case and not merely the constitutional questions. *Ekin v. U. S.*, 142 U. S. 651; *Horner v. U. S.*, 143 U. S. 570; *Lan Ow Bew, Petitioner*, 141 U. S. 583.

2. A judgment of a circuit court on an appeal from the board of general appraisers, is not reviewable in the supreme court, but in the circuit court of appeals. *U. S. v. Hopewell*, 51 Fed. Rep. 798.

3. 26 St. at L. 826, § 5; *Farmers'*

etc., *State Bank v. Armstrong*, 49 Fed. Rep. 600.

4. *By Certiorari*.—26 St. at L. 826, § 5; *Lan Ow Bew v. U. S.*, 144 U. S. 47.

5. *Lan Ow Bew, Petitioner*, 141 U. S. 583, which holds that the question whether the Chinese restriction acts, in the light of the treaties between the *United States* and *China*, apply to a Chinese merchant, domiciled in the *United States*, who temporarily leaves the country for the purpose of business or pleasure, with the intention of returning, is such a question.

other headings of this title. A few special matters, however, remain.

*b. APPEALS—(1) Time for Appeal.*—In prize cases, the appeal must be taken within thirty days after the rendering of the decree; the supreme court may, however, allow the appeal, if the notice of appeal was filed in the office of the clerk of the district court within thirty days next after the rendition of the decree.<sup>1</sup>

Appeals from the court of claims must be taken within ninety days after judgment or decree is entered.<sup>2</sup>

No judgment, decree or order of a circuit or district court, in any civil action, at law or in equity, may be reviewed in the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree or order; provided, that where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or is imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree or order, exclusive of the term of such disability.<sup>3</sup>

Writs of error to, and appeals from, the circuit court of appeals must be taken or sued out within one year after the entry of the order, judgment or decree sought to be reviewed.<sup>4</sup>

(2) *Practice on Appeal.*—This matter has been treated in a former part of this article.<sup>5</sup>

**III. CIRCUIT COURT OF APPEALS—1. Authority and Organization.**—The circuit court of appeals owes its origin to the Act of March 3d, 1891, above referred to. The first meeting of the court was appointed by law for the third Tuesday in June, 1891.<sup>6</sup>

1. U. S. R. S., § 1009; U. S. v. Nu-  
estra Senora De Regla, 17 Wall. (U.  
S.) 29.

2. U. S. R. S., § 708. But see U. S.  
v. Davis, 131 U. S. 39.

3. U. S. R. S., § 1008. But disability  
happening after the statute has run  
does not suspend its operation. Mc-  
Donald v. Hovey, 110 U. S. 619.

The day of entering the judgment or  
decree is excluded in the computation.  
Smith v. Gale, 137 U. S. 577.

The limitation applies to appeals  
from the supreme court of the *District  
of Columbia*. U. S. R. S., § 705.

4. 26 St. at L. 826, § 6.

5. See *supra*, this title, *Appeals and  
Writs of Error*. The supreme court  
may affirm, modify, or reverse any  
judgment, decree, or order of a circuit  
court, or district court acting as a cir-  
cuit court, or of a district court in prize  
causes, lawfully brought before it for  
review, or may direct such judgment,  
decree, or order to be rendered, or such  
further proceedings to be had by the  
inferior court as the justice of the case

may require. The supreme court shall  
not issue execution in a cause removed  
before it from such courts, but shall  
send a special mandate to the inferior  
court to award execution thereon. U.  
S. R. S., § 701.

6. 26 St. at L. 1115.

But the right of appeal to the court  
existed from the passage of the act cre-  
ating it; hence, an appeal taken June  
24th was not dismissed. New York,  
etc., R. Co. v. Bennett, 49 Fed. Rep.  
598.

The court has the right to review  
judgments entered after the date of the  
passage of the act, but before the date  
set for the organization of the court.  
Northern Pac. R. Co. v. Amato, 49  
Fed. Rep. 881.

The same point was ruled in an unre-  
ported case in the sixth circuit. "Re-  
cent Decisions under the Evarts Act,"  
by Roger Foster, 1 Yale Law Journal,  
p. 98. See also Courtney v. Insurance  
Co. of N. A., 49 Fed. Rep. 309; Balti-  
more, etc., R. Co. v. Andrews, 50 Fed.  
Rep. 728.



Congress on its creation prescribed that nothing in the act should be construed in any wise to impair the jurisdiction of the supreme court, or of any circuit court in any case then pending.<sup>1</sup>

It was held, in construing this clause, that making a case reviewable was not impairing the jurisdiction of the circuit court, and hence that a cause pending at the time of the passage of the act could be appealed to the circuit court of appeals, although it was not appealable before the act, as the jurisdictional amount was not involved.<sup>2</sup>

**2. Officers.**—The portions of the act providing for officers for the court are given in the notes.<sup>3</sup>

If a quorum of judges does not attend on any day appointed for court, any judge who does attend, or if none attend, the clerk, may adjourn the court from day to day.

If during the term on any day there is not a quorum, a judge may adjourn from day to day or without day.

1. 26 St. at L. 1115.

2. *In re Claassen*, 140 U. S. 200; followed in *Northern Pac. R. Co. v. Amato*, 49 Fed. Rep. 881; *Northern Pac. R. Co. v. Amato*, 144 U. S. 465; *The Mattam*, 52 Fed. Rep. 876.

3. "There shall be appointed by the President of the *United States* by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications; and shall have the same power and jurisdiction therein that the circuit judges of the *United States*, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the *United States* in their respective circuits.

"Sec. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum. . . . It shall have the appointment of the marshal of the court, with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the *United States*, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the *United States*, so far as the same may be applicable. The salary of the marshal shall be \$2,500 a year, and the salary of the clerk of the court shall be \$3,000 a year, to be paid in

equal proportions quarterly. . . .

"Sec. 3. That the chief justice and the associate justices of the supreme court assigned to each circuit, and the circuit judges within each circuit and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the chief justice or an associate justice of the supreme court should attend at any session of the circuit court of appeals, he shall preside, and the circuit judges in attendance upon the court, in the absence of the chief justice or associate justice of the supreme court, shall preside in the order of seniority of their respective commissions. In case the full court any time shall not be made up by the attendance of the chief justice or an associate justice of the supreme court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court.

"*Provided*, that no justice or judge before whom a cause or question may have been tried or heard shall sit on the trial or hearing of such cause or question in the circuit court of appeals. . . . The marshals, criers, clerks, bailiffs and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts." 26 St. at L. 826.

If no quorum be present, any judge attending may make preparatory orders.<sup>1</sup>

The clerk may not practice law; he must take the oath of office, and give bond. He may not permit any original record or paper to be taken from his office without an order of court.<sup>2</sup>

The marshal and deputies must take the oath of office and give bond.<sup>3</sup>

All attorneys and counsellors admitted to practice in the supreme court or in any circuit court may be admitted in the circuit court of appeals without fee.<sup>4</sup>

**3. Seats and Terms.**—Terms of the court are held annually in the several judicial districts at places designated by statute.

Terms may also be held at such other places as the court may designate from time to time.<sup>5</sup>

**4. Jurisdiction.**—The jurisdiction of the circuit court of appeals is best determined by excluding from the sum total of appealable cases those of which the supreme court has cognizance. As said in a recent case, the Act of March 3d, 1891, "provides for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the *United States* and the circuit court of appeals therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction."<sup>6</sup>

Section 5 of the Act provides that certain cases may be appealed directly from the circuit and district courts to the supreme court. Then follows section 6, which reads as follows: "The circuit court of appeal established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision<sup>7</sup> in the district court and the existing circuit courts, in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."<sup>8</sup>

It has been held that there is no jurisdictional limit on account of the amount involved, but that if a case is otherwise within the appellate jurisdiction, the value of the matter in controversy is immaterial.<sup>9</sup> The court in appeals in admiralty cases may review questions of both law and fact.<sup>10</sup>

The supreme court has held that the words above, "unless otherwise provided by law," were inserted in order to guard against

1. Circuit Court of Appeals Rule 4.

2. Circuit Court of Appeals Rule 5.

3. Circuit Court of Appeals Rule 6.

4. Circuit Court of Appeals Rule 7.

5. 26 St. at L. 826; Circuit Court of Appeals Rule 3.

6. *McLish v. Roff*, 141 U. S. 664, by Lamar, J. To the same effect is *Lan Ow Bew v. U. S.*, 144 U. S. 47.

7. As to what is a final decision see *New York Cent. Trust Co. v. Marietta*, etc., R. Co. 48 Fed. Rep. 850.

8. 26 St. at L. 826. Under act March 3d, 1891, the circuit court of appeals has no jurisdiction of a writ of error from the district court, when the jurisdiction of such court is the question for review, but it must be taken direct to the supreme court. *U. S. v. Sutton*, 47 Fed. Rep. 129.

9. *Northern Pac. R. Co. v. Amato*, 49 Fed. Rep. 881.

10. *The Havilah*, 48 Fed. Rep. 684; 1 Circuit Court of Appeals Rep. 1.

implied repeals, and are to be construed as referring only to laws in force at the time of the passage of the act.<sup>1</sup>

The act further provides, "Where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals."<sup>2</sup>

"The circuit court of appeals, in cases in which the judgments of the circuit court of appeals are made final by this act, shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by order of the supreme court, to be made from time to time, be assigned to particular circuits."<sup>3</sup>

**5. Practice and Procedure—***a. IN GENERAL.*—The court may make rules, prescribe the form and style of its seal, and the form of its writs and other process.

Costs and fees are the same as those in the supreme court at the time of the passage of the act. The judges have the same powers and duties as to the allowance of appeals and writs of error, and the conditions of such allowance, as the justices and judges in the other courts of the *United States*, as then existing.

Whenever on appeal, writ of error, or otherwise, a case comes from a district or circuit court, and is reviewed and determined finally, it is remanded to such circuit or district court for further proceedings. The modes of review and regulations as to bonds on appeal are those in force at the passage of the act.<sup>4</sup>

A writ of error from a circuit court of appeals for the review of the judgment of a circuit court may issue from the clerk's office of such circuit court, under the seal of such circuit court, and the signature of the clerk thereof. It need not bear the seal or signature of the clerk of the circuit court of appeals.<sup>5</sup> The court has

1. *Lan Ow Bew v. U. S.*, 144 U. S. 47.

2. 26 St. at L. 826, § 7.

3. 26 St. at L. 826, § 15. As to appeals from the *Indian Territory*, see § 13.

The appellate jurisdiction of the circuit court of appeals over territories, etc., excepting the *Indian Territory*, is limited to a "review of the judgments, orders and decrees of the supreme courts of the several territories" assigned to the circuit. *In re Boles*, 48 Fed. Rep. 75.

4. 26 St. at L. 826. The Act of March 3d, 1891, establishing the circuit courts

of appeals, declares that "all provisions of law now in force regulating the methods and system of appeals and writs of error" shall regulate appeals and writs of error to that court, yet the act of 1875 does not apply to appeals in admiralty from the existing circuit courts to that court, and the same may be heard without separate findings of fact and of law, and without bills of exceptions, as in appeals from the district court to the circuit court. *The Havilah*, 48 Fed. Rep. 684.

5. *Pacific R. Co. v. Amato*, 49 Fed. Rep. 881.

no power to review a decision refusing to grant a new trial on the ground that the verdict was against the evidence, and was for excessive damages.<sup>1</sup>

It is provided by rule of court that the practice shall be the same as in the Supreme Court of the *United States*, as far as the same shall be applicable.<sup>2</sup> Process is in the name of the President of the *United States*, and is in like form and tested in the same manner as process of the supreme court.<sup>3</sup> All motions must be in writing.<sup>4</sup> A number of miscellaneous matters of practice are considered in the note.<sup>5</sup>

*b. TIME FOR APPEAL.*—Appeals from decrees of the district or circuit court granting or continuing interlocutory decrees, must be taken within thirty days from the entering of the order or decree. Other appeals must be taken within six months, unless a lesser time were prescribed by law at the time of the passage of the act.<sup>6</sup>

**IV. CIRCUIT COURTS**—1. *Authority and Organization.*—The circuit court system originated in the Judiciary Act of 1789,<sup>7</sup> was slightly changed in 1844, again altered in 1867, and underwent more radical changes in 1891.<sup>8</sup> The *United States* is now divided into nine circuits,<sup>9</sup> each of which is within the jurisdiction of a circuit court. Each court sits within each district in its circuit at times appointed by law.

1. *New York, etc., S. S. Co. v. Anderson*, 50 Fed. Rep. 462.

2. Circuit Court of Appeals Rule 8.

3. Circuit Court of Appeals Rule 9.

4. Circuit Court of Appeals Rule 21.

5. The rules cover the following matters: Bills of exceptions, rule 10; assignment of errors, rule 11; objections to evidence in the record, rule 12; *supersedeas* and cost bonds, rule 13; writs of error, appeals, return and bond, rule 14; translations, rule 15; docketing cases, rule 16; docket, rule 17; *certiorari*, rule 18; death of a party, rule 19; dismissing case, rule 20; motions, rule 21; parties not ready, rule 22; printing record, rules 23, 26 and 35; briefs, rules 24 and 26; oral argument, rule 25; copies of records and briefs, rule 27; opinions, rule 28; rehearing, rule 29; interest and costs, rules 30 and 31; mandate, rule 32; *habeas corpus*, rule 33; exhibits, etc., rule 34; duties of clerk as to moneys, rule 36.

Where an appeal pending in the supreme court and a cause before the circuit court of appeals can, by reason of their connection, be heard together, and the district and perhaps the circuit court judges are, under Act of March 3d, 1891, disqualified to pass on the case from having heard the same or similar questions in the court below, it is a

proper exercise of discretion to certify the questions involved to the supreme court, under section six of the act. *Farmers', etc., State Bank v. Armstrong*, 49 Fed. Rep. 600.

Where courts' findings are special, the circuit court of appeals cannot inquire whether the evidence supports the special findings of facts, but only whether the facts found are sufficient to support the judgment. *Hill v. Woodberry*, 49 Fed. Rep. 138.

In the circuit court of appeals, dismissals are provided for if no counsel appears, or no brief is filed for appellant or plaintiff in error, "when the case is called for trial" (rule 23); and also if record has not been printed, "when the case is reached in the regular call of the docket" (rule 23). It is held that the time meant in each rule is not the time of going through the docket to arrange the business of the court, but the time of actual call for trial, and no motion to dismiss on the grounds mentioned can be entertained before that time. *Lem Hing Dun v. U. S.*, 49 Fed. Rep. 145.

6. 26 St. at L. 826.

7. 1 St. at L., p. 73.

8. 26 St. at L., p. 826.

9. See *COURTS*, vol. 4, p. 457, for the districts in the several circuits.

2. **Officers.**<sup>1</sup>—(See also COURTS, vol. 4, p. 461.)

The Evarts Act provided for an additional circuit judge in each circuit.<sup>2</sup> The clerks of the several circuits are appointed by the circuit judges thereof.<sup>3</sup> Deputy clerks may be appointed, whose compensation shall be paid and allowed in the same manner as other expenses of the clerk's office.<sup>4</sup>

3. **Seats and Sessions.**—The terms of the various circuit and district courts are fixed by law. If a term is appointed to begin on a date which falls on Sunday it shall commence on the day following.<sup>5</sup> If neither of the judges be present at the opening of the term, the court may be adjourned by a written order of either of them.<sup>6</sup>

4. **Jurisdiction.**<sup>7</sup>—The circuit court formerly exercised both appellate and original jurisdiction. The former, however, was taken away by the Circuit Court of Appeals Act.<sup>8</sup> The original jurisdiction embraces both legal and equitable suits.<sup>9</sup>

The classes of cases over which jurisdiction is given by various statutes of the *United States* are as follows:

The act of 1887,<sup>10</sup> as amended in 1888,<sup>11</sup> provides, "That the circuit courts of the *United States* shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in

1. See also *supra*, this title, *Officers*.

2. 26 St. at L., p. 826.

3. 25 St. at L., p. 655.

U. S. R. S., § 638, provides as follows: "The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning *mesne* and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing upon their merits of all causes pending therein. And any judges of a circuit court may, upon reasonable notice to the parties, make and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court."

4. U. S. R. S., §§ 624, 626.

Special statutes, however, slightly vary the matter of the appointment in the different states.

Where no limitation has been placed upon the expenditures of the clerks of the circuit courts for clerk hire, they are not liable to account for sums necessarily paid out for that purpose, out of the emoluments of their office, when the attorney general has approved such

payments. *Selby v. U. S.*, 47 Fed. Rep. 800.

5. U. S. R. S., § 658.

6. See COURTS, vol. 4, p. 461; U. S. R. S., § 672.

The above provision refers to any day on which the court is appointed to sit, whether by provision of statute, by adjournment, or by special appointment. *Pitman v. U. S.*, 45 Fed. Rep. 159.

7. The jurisdiction of the circuit courts has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a state. *Southern Pac. Co. v. Denton*, 146 U. S. 202.

8. 26 St. at L., p. 826.

9. 24 St. at L., p. 552; 25 St. at L., p. 433; *Ball v. Tompkins*, 41 Fed. Rep. 486.

10. 24 St. at L., p. 552.

**Mandamus.**—Circuit courts can only issue writs of *mandamus* as ancillary to some other proceeding which shall have established a demand or reduced it to judgment, for the purpose of executing such judgment or enforcing rights sought to be protected in the suit, notwithstanding state statutes make the proceeding for *mandamus* a civil action between private parties for the redress of private wrongs. *Gaves v. Northwest, etc., Assoc.*, 55 Fed. Rep. 209.

11. 25 St. at L., p. 433.

dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,<sup>1</sup> and arising under the constitution or laws of the *United States*, or treaties made or which shall be

1. In determining the amount necessary to give the court jurisdiction, the amount directly in dispute is alone considered. The fact that the judgment may thereafter act as an estoppel is immaterial. *Ross v. Prentiss*, 3 How. (U. S.) 772; *Elgin v. Marshall*, 106 U. S. 578; *Bruce v. Manchester, etc., R. Co.*, 117 U. S. 514. That the proper amount is involved, must appear affirmatively, in order that the court may have jurisdiction. *U. S. v. Pratt Coal, etc., Co.*, 18 Fed. Rep. 708; *Oleson v. Northern Pac. R. Co.*, 44 Fed. Rep. 1; *Elgin v. Marshall*, 106 U. S. 578. But it may so appear by amendment. *Davis v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 863.

The amount in dispute is the amount claimed by the plaintiff in good faith, and not that recovered. *Peeler v. Lathrop*, 48 Fed. Rep. 780; *Hilton v. Dickinson*, 108 U. S. 165; *Barry v. Edmunds*, 116 U. S. 550.

But where on the face of the pleadings it is evident that a recovery cannot be had of the whole amount of the claim, the amount that could be recovered, and not that claimed, is the matter in dispute. *Barry v. Edmunds*, 116 U. S. 561. Although where the fact of a valid defense is apparent on the face of the petition, it does not reduce the amount claimed or determine what is the matter in dispute. *Schunk v. Moline, etc., Co.*, 147 U. S. 500.

Where, although more than the jurisdictional amount was originally claimed, it appears that the plaintiff has no right, interest, or title to the claims sued upon, so as to reduce the sum involved to less than the jurisdictional amount, the circuit court will not retain jurisdiction. *Chicago Cheese Co. v. Fogg*, 53 Fed. Rep. 72.

An admission by the defendant that a part of the demand is due will not affect the jurisdiction. *Fuller v. Metropolitan L. Ins. Co.*, 37 Fed. Rep. 163.

An exception to the usual rule has been made in case of suits concerning rights, undoubtedly valuable, and yet incapable of exact determination. Thus, the circuit court has been held to have jurisdiction to cancel a contract of marriage which, if allowed to stand, would give the wife an inchoate right

of dower in real property of great value, other valuable property rights, and a right to support, even though the amount of its value be neither directly alleged nor ascertainable. *Sharon v. Terry*, 13 Sawy. (U. S.) 387. But see *Elgin v. Marshall*, 106 U. S. 578.

An objection on demurrer that the amount involved is not sufficient to give the circuit court jurisdiction is not well taken, if on its face the bill shows the amount to be sufficient. *Hat-Sweat Mfg. Co. v. Porter*, 46 Fed. Rep. 757.

In a suit to enjoin the use of a trademark and compel an account of profits, the criterion is not the amount of the profits sued for. *Symonds v. Greene*, 28 Fed. Rep. 834.

In a suit to set aside the award of arbitrators under policies of insurance issued by different companies, the amount involved is the whole amount of the award, and not the proportionate liability of the several companies, under a provision of the policies limiting such liability to such proportion of the entire loss as the amount of the policy bears to the whole amount of insurance. *Hartford Fire Insurance Co. v. Bonner Mercantile Co.*, 56 Fed. Rep. 378.

Where the object of a suit is to restrain the use of property by a party other than the owner, the right to use such property is the "matter in dispute," and its value determines the question of jurisdiction. *Oleson v. Northern Pac. R. Co.*, 44 Fed. Rep. 1.

Where, although the entire matter in dispute in the suit exceeds the jurisdictional limit, there are several and separate interests in that sum, each less than the jurisdictional amount, belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, there is no jurisdiction. *Elgin v. Marshall*, 106 U. S. 578.

Where, in a suit by the holder of county bonds, the amount is less than two thousand dollars, jurisdiction will not be conferred by the transfer to the plaintiff of other bonds not disputed by the county, and for the redemption of which funds have been provided and notice given; and this is especially so

where the real ownership of the bonds is probably in a third person, and they are only transferred for the purpose of obtaining jurisdiction in regard to the other bonds, and the latter are held void by the state courts. *Edwards v. Bates Co.*, 55 Fed. Rep. 436.

The value of the land is the "matter in dispute," under act of Congress, August 13th, 1888 (25 St. at L., p. 434, §1), in a federal court proceeding to set aside certain conveyances as fraudulent and a cloud upon the plaintiff's title. *Simon v. House*, 46 Fed. Rep. 317.

In ejectment against a city and a street railway company for land claimed as a street, the value of the whole street, and not that part occupied by the railway, is the amount in controversy, especially where the company does not disclaim as to any part of the premises, but defends for the whole. *Greene v. Tacoma*, 53 Fed. Rep. 562.

In an action on a penal bond to secure the faithful performance of a contract, the amount in controversy is not determined by the amount named as the penalty in the bond, but is the sum actually due by reason of the breach of its condition. *Cabot v. McMasters*, 61 Fed. Rep. 129.

To determine jurisdiction depending on the amount in dispute, the united interests of several claiming under the same title, and having a common interest in the relief sought, and uniting in the suit to enforce their right, are taken, and not each one of such interests. *Shields v. Thomas*, 17 How. (U. S.) 3; *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Prince v. Towns*, 33 Fed. Rep. 161; *Davies v. Corbin*, 112 U. S. 36; *Estes v. Gunter*, 121 U. S. 183. But see *King v. Wilson*, 1 Dill. (U. S.) 555; *Woodman v. Latimer*, 2 Fed. Rep. 842. But where the interests of complainants in a suit in equity in the *United States* courts are so far separate that any number of them can proceed with the litigation without joining the others, the interest of each must exceed two thousand dollars to give the circuit court jurisdiction. *Rich v. Bray*, 37 Fed. Rep. 273; *King v. Wilson*, 1 Dill. (U. S.) 568; *Seaver v. Bigelow*, 5 Wall. (U. S.) 210; *Terry v. Hatch*, 93 U. S. 44; *Chatfield v. Boyle*, 105 U. S. 234.

Where, in an amended bill, it is alleged that the land is worth \$3,000, and that the damages are not less than that amount, the suit for specific performance is within the jurisdiction of the

circuit courts. *Johnston v. Trippe*, 33 Fed. Rep. 530.

In a suit to foreclose as a mortgage a deed absolute in form given to secure a note for \$1,000, the amount involved is not the amount of the note alone, where a prior mortgage for \$4,000, which one of the defendants seeks by a cross-bill to have foreclosed, is sought to be canceled by the plaintiff. *Wolcott v. Sprague*, 55 Fed. Rep. 545.

A declaration is sufficient on demurrer to give the circuit court jurisdiction when it contains three counts—one for money had and received for \$875, one on a note for \$875, and a third for work and labor done for \$875—as the aggregate amount alleged to be in dispute exceeds \$2,000. *Armstrong v. Ettlesohn*, 36 Fed. Rep. 209.

In determining whether the amount involved in a bill by a railroad to restrain a multiplicity of suits for alleged discrimination in rates, is sufficient to give a circuit court jurisdiction, the maintenance of the rates of the company is the real subject in dispute, and the object of the bill and the value of such object must be considered. *Texas, etc., R. Co. v. Kuteman*, 54 Fed. Rep. 547.

Where a suit in equity is brought to enjoin the treasurers and sheriffs of several counties, from issuing executions against plaintiff's property, to enforce the collection of a tax based upon an alleged unconstitutional and void assessment, the circuit court has no jurisdiction, where the amount involved in each county is less than \$2,000. *Walter v. Northeastern R. Co.*, 147 U. S. 370.

But where a suit is brought to enjoin a state board of appraisers from certifying to the several county auditors amounts assessed upon a corporation under a statute alleged to be unconstitutional, the amount involved is the total amount to be certified to all the counties, less the aggregate amount which such company must pay in the various counties under the laws in force, if such statute is valid, and not the amount of the assessment to be certified to any particular county. *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 449; *Adams Express Co. v. Poe*, 61 Fed. Rep. 470.

A bill by a telegraph company to enjoin the collection of a license tax of \$500 per annum, required to be paid for the privilege of doing business in a city, alleging irreparable injury in the destruction of the business of the company,

made, under their authority,<sup>1</sup> or in a controversy in which the *United States* are plaintiffs or petitioners,<sup>2</sup> or in which there shall be a controversy between citizens of different states,<sup>3</sup> in

involves more than \$2,000. *Western Union Tel. Co. v. Charleston*, 56 Fed. Rep. 419.

Each of several choses in action, amounting in the aggregate to more than \$2,000, need not exceed that sum when sued upon by an assignee, where they have never belonged to a citizen of the same state as the defendant. *Chase v. Sheldon Roller Mills Co.*, 56 Fed. Rep. 625.

**Injunction.**—In a bill for an injunction, the value of the object to be gained by the injunction is the amount in dispute. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485; *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Whitman v. Hubbell*, 30 Fed. Rep. 81. And see *Smith v. Bivens*, 56 Fed. Rep. 352. The power to issue an injunction is inherent in the original equity jurisdiction conferred upon the courts by section 629 Rev. Stats., and is not restricted by section 5242, providing that no injunction, attachment or execution shall issue against any national bank or its property before any final judgment in any suit, action or proceeding in any state, county or municipal court. *Hower v. Weiss Malting, etc., Co.*, 55 Fed. Rep. 356.

Where the defendant, in a suit in equity to enjoin a nuisance, files an affidavit stating that a continuance of the injunction will damage him many thousand dollars, the circuit court has jurisdiction. *Herbert v. Rainey*, 54 Fed. Rep. 248. In this case an injunction was sought by an adjoining owner to restrain the erection of coke ovens, and it was held that the suit was brought within the jurisdiction of the circuit court, if the damage to the property might exceed two thousand dollars.

1. Suits come within this clause of the law when their correct decision depends on the construction of the constitution, or *United States* law, or a treaty. *Cohens v. Virginia*, 6 Wheat. (U. S.) 379; *Southern Pac. R. Co. v. California*, 118 U. S. 112; *Starin v. New York*, 115 U. S. 257; *Tennessee v. Davis*, 100 U. S. 264.

Where a city claims a right to erect gas works under a state statute granting it such power, and the plaintiff contends that the statute impairs the obligation of a contract previously made

with the state and city, the circuit court has jurisdiction. *Hamilton Gas Light, etc., Co. v. Hamilton*, 146 U. S. 258.

This clause gives the circuit court jurisdiction of suits by and against corporations chartered by the *United States*, other than national banks. *Farmers' L. & T. Co. v. Denver, etc., R. Co.*, 1 Ry. & Corp. L. J. 584; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 823; 24 St. at L., p. 552; 25 St. at L., p. 433, § 4. See also *supra*, this title, *United States Courts in General*—*Jurisdiction*.

2. The limitation as to amount in dispute necessary to give jurisdiction, does not apply to suits in which the *United States* are plaintiffs or petitioners. Hence, a suit on a postmaster's bond may be maintained, even though on the face of the declaration less than two thousand dollars is involved. *U. S. v. Shaw*, 39 Fed. Rep. 433.

Hence, circuit courts have jurisdiction of suits under revenue laws, although less than two thousand dollars is involved. *Ames v. Hager*, 36 Fed. Rep., p. 129.

It has jurisdiction to pass upon the items of the claim of a *United States* marshal for fees and disbursements disallowed by the first comptroller of the treasury before March 3d, 1887. *U. S. v. Harmon*, 147 U. S. 268.

A receiver of a national bank, appointed by the comptroller of the treasury, is an officer of the *United States*, and as such may sue in a circuit court without regard to citizenship or the amount involved. *Armstrong v. Ettlesohn*, 36 Fed. Rep. 209; *Armstrong v. Trautman*, 36 Fed. Rep. 275; *Fisher v. Yoder*, 53 Fed. Rep. 565. But the circuit court has no jurisdiction of a bill against an executor for the payment of a legacy, when all the parties are citizens of the same state, although the assets of the estate have gone into the hands of a receiver of a national bank, and it is also sought to recover them. *St. Luke's Church v. Sowles*, 51 Fed. Rep. 609; 21 Wash. L. Rep. 422.

3. A controversy between citizens of different states is one in which all the parties on one side are citizens of different states from all those upon the other side. *Blake v. McKim*, 103 U. S. 336.



which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states,<sup>1</sup> or in a controversy between citizens of a state and foreign states, citizens, or subjects in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the *United States*, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another

And see *Mangels v. Donau Brewing Co.*, 53 Fed. Rep. 513.

Under the Act of March 3d, 1887, the federal courts have no jurisdiction in a suit, where it appears that many of the defendants are from the same state, but have conflicting interests. *Covert v. Waldron*, 33 Fed. Rep. 311.

The federal circuit courts have jurisdiction over the administration of estates, when the requisite citizenship and other conditions exist. *Ball v. Tompkins*, 41 Fed. Rep. 486.

A suit in equity contesting a will after its probate in *Oregon*, is cognizable in the circuit court, where the amount in controversy is sufficient and the requisite citizenship exists. *Richardson v. Green*, 61 Fed. Rep. 423.

The circuit court is not deprived of jurisdiction of a suit for specific performance of a contract for the sale of real estate by the fact that one of the purchasers, who it is claimed should be a defendant, is a resident of the same state as the plaintiff, where he is also one of the vendors, is joined as plaintiff, and is willing to comply with his part of the contract. *Perin v. Megibben*, 6 U. S. App. 348; 3 C. C. A. 443; 53 Fed. Rep. 86.

Under the *Louisiana Code*, a proceeding to foreclose a mortgage is a civil suit in equity *inter partes*, and within the jurisdiction of the circuit court, where the parties are citizens of different states. *Fleitas v. Richardson*, 147 U. S. 538.

A corporation is conclusively presumed to be a citizen of the state which created it, whatever may be the citizenship of the members. *National S. S. Co. v. Tugman*, 106 U. S. 118; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

As to the citizenship of corporations

generally, see the authorities collated in the article CORPORATIONS, vol. 4, p. 184.

As regards the jurisdiction of the circuit court, a national bank is deemed a citizen of the state where it is located. 24 St. at L. 552; 25 St. at L. 433, § 4.

Thus, federal courts have jurisdiction of an action between a national bank located in one state and a citizen of another state. *First National Bank v. Forest*, 40 Fed. Rep. 705.

Since the enactment of this statute, the jurisdiction of circuit courts over suits by or against national banks can no longer be asserted on the ground of their federal origin, as they are placed in the same category with banks not organized under the laws of the *United States*. *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 781; *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527.

Where jurisdiction attaches only because of diversity of citizenship, suit may be brought in the district of either plaintiff or defendant. 24 St. at L. 552; 25 St. at L. 433.

A circuit court in *Illinois* has jurisdiction to remove a cloud upon the title to lands in *Iowa*, where the citizenship of the parties and the amount involved are sufficient. *Renser v. McKay*, 54 Fed. Rep. 432.

Where the requisite citizenship does not exist, jurisdiction cannot be conferred by the defendant voluntarily appearing and pleading to the merits. *Central Trust Co. v. Virginia, etc., Steel Co.*, 55 Fed. Rep. 769. See also, on suits between citizens of different states, *supra*, this title, *United States Courts in General—Jurisdiction*; *Foster's Federal Judiciary Acts of 1875 and 1887*, p. 11.

1. See *supra*, this title, *United States Courts in General—Jurisdiction*.

in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceedings in any other district than that whereof he is an inhabitant. But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;<sup>1</sup> nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee, or of

1. *Cramer v. Singer Mfg. Co.*, 59 Fed. Rep. 74; *Central Trust Co. v. Virginia, etc.*, *Steel Co.*, 55 Fed. Rep. 769; *Fairbank v. Cincinnati, etc.*, R. Co., 54 Fed. Rep. 420.

A defendant suing in the wrong district waives his right to object by appearing and pleading to the merits. *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127; *Ex p. Schollenberger*, 96 U. S. 378; *Jones v. Andrews*, 10 Wall. (U. S.) 327; *Betzoldt v. American Ins. Co.*, 47 Fed. Rep. 705; *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465. The Act of March 3d, 1887 (24 St. at L. 552), does not oust the circuit court of jurisdiction of a suit against a *New Jersey* corporation brought in *Massachusetts*, which agreed, on condition of being allowed to transact business in *Massachusetts*, to submit to be sued there, since the right given by this statute is a personal one and can be waived. *Consolidated Store Service Co. v. Lamson Consolidated Store Service Co.*, 41 Fed. Rep. 833. But the fact that a corporation has agreed that process may be served on its officer or agent engaged in its business in a certain estate, does not estop it to set up want of jurisdiction when sued in a federal court by reason of its citizenship and residence in another state. *Southern Pac. Co. v. Denton*, 146 U. S. 202. See *Dinzy v. Illinois Cent. R. Co.*, 61 Fed. Rep. 49. State laws respecting venue do not affect the jurisdiction of circuit courts. *East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co.*, 49 Fed. Rep. 608.

"Inhabitant," as used in the Act of March 3d, 1887, ch. 373, § 1, as corrected by Act of August 13th, 1888, ch. 866, is synonymous with "resident," and means the dwelling place where one maintains his fixed and legal settlement, not the casual and temporary abiding place required by the necessities of

present surrounding circumstances. *Bicycle Stepladder Co. v. Gordon*, 57 Fed. Rep. 529.

Where the suit depends on diverse citizenship, the complaint must show that either the plaintiff or the defendant resides within the district. *Laskey v. Newtown Mining Co.*, 50 Fed. Rep. 634.

Under the Act of March 3d, 1887, a suit is properly brought in the district of *Vermont* when the plaintiff is a citizen of *Ohio*, and the defendants are citizens of *Vermont*, *New York*, and *Maine*, the object claimed being property in *Vermont*. *Carpenter v. Talbot*, 33 Fed. Rep. 537.

And under U. S. Rev. Sta., § 738, giving federal courts jurisdiction of suits to enforce a legal or equitable lien against real or personal property within the district, by publication against a non-resident defendant, a circuit court has jurisdiction of a bill for specific performance of a contract to convey real estate situated within the district, where the parties are citizens of different states, but not of such district. *Single v. Scott Paper Mfg. Co.*, 55 Fed. Rep. 553; 30 Ohio L. J. 3.

A federal court will take jurisdiction when the plaintiff is a resident of the district wherein he brings suit, and the defendant a corporation created by the laws of a foreign state. *Rawley v. Southern Pac. R. Co.*, 33 Fed. Rep. 305.

A bill to restrain the infringement of a patent filed in *Missouri* against a citizen of *Indiana* cannot be maintained. *Reinstadler v. Reeves*, 33 Fed. Rep. 308.

A circuit court in *Missouri* has no jurisdiction against a corporation created by and having its principal office in the State of *Mississippi*, for damages for acts violating the interstate commerce law, though the defendant had an office and agent in *Missouri* and the plaintiff resides there, and though the petition shows a cause of action at

any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."<sup>1</sup>

common law. *Connor v. Vicksburg, etc., R. Co.*, 36 Fed. Rep. 273.

In a suit to enforce a claim to real property within the jurisdiction of the court, the provision as to citizenship in the district is waived by the voluntary appearance of the defendants and their submission to the jurisdiction. *Hatch v. Ferguson*, 57 Fed. Rep. 966.

A citizen of *Mexico* cannot sue a *Connecticut* corporation in the circuit court for the southern district of *California*, though the corporation has an office and managing agent in that district. *Denton v. International Co.*, 36 Fed. Rep. 1.

A steamship company incorporated abroad and having its principal office in a foreign country, and whose piers are in *New Jersey*, where is also its office for the transaction of its industrial operations in *America*, while its monetary and financial operations are conducted at its agents' office in New York City, which office is advertised as its New York office, is not suable in *New York*. *Hohorst v. Hamburg American Packet Co.*, 38 Fed. Rep. 273.

The circuit court of *New Jersey* has no jurisdiction over the commissioner of patents, whose official residence is in the *District of Columbia*. *Illingworth v. Atha*, 42 Fed. Rep. 141.

A suit by two persons on a contract entered into by them as partners cannot be maintained in a district of which the defendant and one of the plaintiffs are non-residents. *Smith v. Lyon*, 38 Fed. Rep. 53.

One who has his business in a judicial district, remaining therein six months in the year, having a house in which he lives and domestics by whom he is served, and leaving during the unhealthy season for health only, is a resident of the district for the purposes of the jurisdiction of a federal court. *King v. U. S.*, 59 Fed. Rep. 9.

The provision prohibiting suit to be brought against any person "in any other district than that whereof he is an inhabitant," is inapplicable to an alien or a foreign corporation, and they may be sued in any district in which valid service can be made upon the defendant. *Re Hohorst*, 150 U. S. 653.

1. *U. S. Nat. Bank v. McNair*, 56

Fed. Rep. 323. And see *Wachusett Nat. Bank v. Sioux City Stove Works*, 56 Fed. Rep. 321.

The evident object of this provision is to prohibit suits in the federal courts by assignees of choses in action, unless the original assignor might have maintained the suit, in all cases except suits on foreign bills of exchange and the promissory notes of corporations made payable to bearer. *Wilson v. Knox Co.*, 43 Fed. Rep. 481; *Hudson v. Bishop*, 38 Fed. Rep. 680.

The nominal indorser of a negotiable note, who is in reality the maker for whose accommodation it was made, is not an assignor within the meaning of this provision. *Holmes v. Goldsmith*, 147 U. S. 150.

The rule applies where the assignor is a corporation. Thus, if it does not appear of what state the corporation was a citizen, the assignor could not, so far as appears of record, have brought the suit, and it will fail. *Brock v. Northwestern Fuel Co.*, 130 U. S. 341.

In a suit by the assignee of a promissory note payable to the order of the payee, where the circuit court's jurisdiction depends on the citizenship of the parties, it is necessary that the record should show that the payee could have maintained his action. *Parker v. Ormsby*, 141 U. S. 81.

A suit brought by an assignee to recover damages for a refusal to accept and pay for goods purchased under an oral contract with the assignor, is a suit to recover the contents of a "chose in action," within the statute. *Simons v. Ypsilanti Paper Co.*, 33 Fed. Rep. 193.

And a suit upon county warrants payable to a person named "or bearer," and assigned to the plaintiff, is within the statute. *Thompson v. Searcy County*, 57 Fed. Rep. 1030.

A note executed for the sole benefit of the payee, by whom it is indorsed to non-residents, who sue the makers thereon, is not within the restriction, as the plaintiffs are payees in fact. *Goldsmith v. Holmes*, 36 Fed. Rep. 484.

The restriction applies to an assignee by indorsement of a city warrant. *Cloud v. Sumas*, 52 Fed. Rep. 177.

The assignee of a contract of reinsurance comes within the prohibition

The jurisdiction of suits to redress the deprivation of the equal rights of citizens is expressly preserved.<sup>1</sup> The court has jurisdiction concurrently with the court of claims of suits brought for the collection of money claims against the *United States*, greater than one thousand and not exceeding ten thousand dollars, and founded upon the constitution or laws of Congress, other than for pensions, or any contract, express or implied, with the government; or for damages in cases not sounding in tort, war claims and claims adversely reported upon or rejected by any authorized court, department or commission prior to March 3d, 1887, excepted.<sup>2</sup>

of the law. *Laird v. Indemnity Mut., etc., Assur. Co.*, 44 Fed. Rep. 712. As does also the assignee of a guardian's bond. *Hudson v. Bishop*, 38 Fed. Rep. 680. And the assignee of a judgment. *Mississippi Mills v. Cohn*, 39 Fed. Rep. 865. Or an account. *Chase v. Sheldon Roller Mills Co.*, 56 Fed. Rep. 625.

But the assignee of a claim for damages for entering on lands and carrying away timber can bring suit, if the requisite citizenship exists. The citizenship of the original parties is immaterial. *Ambler v. Eppinger*, 137 U. S. 480.

The same is true of an assignee of an equitable interest in lands. *Gest v. Packwood*, 39 Fed. Rep. 525. And of the holder of an order drawn on a city by a contractor and accepted. *Repley v. Superior*, 41 Fed. Rep. 113; *affirmed* in 138 U. S. 93.

The restriction does not extend to suits removed from a state court. *Delaware Co. v. Diebold Safe, etc., Co.*, 133 U. S. 473.

A draft drawn in one state on persons living in another state of the *United States* is a "foreign bill of exchange." *Buckner v. Finley*, 2 Pet. (U. S.) 593.

A bill of exchange drawn by a corporation to its own order and indorsed in blank is one payable to bearer. *Bank of British N. A. v. Barling*, 46 Fed. Rep. 357.

A transfer pending suit to a citizen of the same state with the adverse party, of a right of action cognizable in the circuit court only on the ground of diverse citizenship, will not oust jurisdiction. *Jarboe v. Templer*, 38 Fed. Rep. 213.

A purchaser of a promissory note drawn with the name of the payee blank, who subsequently fills in the blank by writing in his own name, is a "subsequent holder," within the mean-

ing of the statute. Hence, if both of the original parties to the transaction are citizens of the same state, such purchaser cannot sue in the federal court. *Steel v. Rathbun*, 42 Fed. Rep. 390.

A suit to compel a transfer of shares on the books of a corporation, is not one to recover the contents of a chose in action, within the meaning of the act. *Jewett v. Bradford Sav. Bank, etc., Co.*, 45 Fed. Rep. 801.

An assignee of a policy of life insurance cannot sue in the federal court, unless his assignor could have done so. *McNulty v. Connecticut Mut. L. Ins. Co.*, 46 Fed. Rep. 305.

1. 25 St. at L. 433, § 5.

2. 24 St. at L. 505, §§ 1, 2.

Where an account for legal services has been approved by the attorney general, adjusted by the first auditor, certified to and approved by the first comptroller, but not paid, the circuit court has jurisdiction of an action to recover its amount. *Bliss v. U. S.*, 34 Fed. Rep. 781.

The circuit court has jurisdiction of a claim by a purchaser of timber land under the Act of 1878 (20 St. at L. 89), to have a patent issue, the requisite amount being in controversy. *Jones v. U. S.*, 35 Fed. Rep. 561; *Montgomery v. U. S.*, 36 Fed. Rep. 4.

In a suit on a surveying contract with the government, where the field notes had been duly approved and the performance of the work certified to, but the report was not forwarded to Washington, on account of orders not to do so received from the commissioner of the general land office, it was held that the claim had not been rejected or adversely reported on. *Baker v. U. S.*, 34 Fed. Rep. 353; *Perrin v. U. S.*, 34 Fed. Rep. 354.

The circuit court has jurisdiction of a claim exceeding \$1,000 for compensation to a landowner, who, by com-

Under various statutes, the circuit court has jurisdiction of equitable suits to prevent violations of the law as to trusts,<sup>1</sup> actions, civil and criminal, under the contract labor act,<sup>2</sup> actions under the interstate commerce law,<sup>3</sup> applications to review the decisions of the board of general appraisers appointed under the revenue laws,<sup>4</sup> proceedings to condemn land for national uses, proceedings under the act to prevent the unlawful occupancy of public lands.<sup>5</sup>

The original jurisdiction of the court under the revised statutes is given in the note.<sup>6</sup>

The effect of the acts of 1875 and 1887 (as amended in 1888)

mand of the Lighthouse Board, under authority of Congress, has been prevented from using his land between two range lights. *Chappell v. U. S.*, 34 Fed. Rep. 673.

The word "claims," as used in the act, embraces a claim to a patent to lands earned by a land-grant railroad company, and the *United States* circuit court has jurisdiction of an action to determine the right to a patent under the grant. *Southern Pac. R. Co. v. U. S.*, 38 Fed. Rep. 55.

1. 26 St. at L. 209.

2. 26 St. at L. 1084. See IMMIGRATION, vol. 9, p. 938.

3. 24 St. at L. 379; 25 St. at L. 855; 26 St. at L. 743.

It is immaterial that the same rights may have existed at common law. Toledo, etc., R. Co. *v. Pennsylvania Co.*, 54 Fed. Rep. 730; 53 Am. & Eng. R. Cas. 307; 29 Ohio L. J. 227; 48 Alb. L. J. 184.

In acting on complaints from the interstate commerce commission, the circuit court has jurisdiction, although all the parties are citizens of one state, there being a federal question involved. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567; *Connor v. Vicksburg, etc., R. Co.*, 36 Fed. Rep. 273.

The principal office of a railroad company whose charter does not declare where it shall be, is where its stockholders' and directors' meetings are held, and the office of the president, vice-president, secretary, and treasurer is located, and the stock certificates, books and records of the stockholders' and directors' meetings are kept, for the purpose of jurisdiction of a petition under the interstate commerce act, to enforce an order of the interstate commerce commission. *Interstate Commerce Commission v. Texas, etc., R. Co.*, 57 Fed. Rep. 948.

4. 26 St. at L. 131.

5. 25 St. at L. 357; 23 St. at L. 321.

6. U. S. R. S., § 629, provides that the circuit courts shall have original jurisdiction as follows:

*First.* Of all suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state; provided, that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

*Second.* Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the *United States* are petitioners.

*Third.* Of all suits at common law where the *United States*, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs.

*Fourth.* Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws.

*Fifth.* Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels.

*Sixth.* Of all proceedings for the condemnation of property taken as a

upon the jurisdiction defined in the revised statutes, has not been very fully determined. It has been held, however, that the circuit courts still have jurisdiction, irrespective of the amount involved, of suits under the patent, copyright, and revenue laws.<sup>1</sup>

**5. Practice and Procedure—*a*. IN GENERAL.**—The several circuit courts have power to make, from time to time, rules of practice not inconsistent with the laws of the *United States* or the rules prescribed by the supreme court under the authority granted to it in the revised statutes.<sup>2</sup> Such rules have been adopted in the various circuits.

***b*. DIVISIONS OF OPINION.**—The Revised Statutes provide as

prize, in pursuance of section fifty-three hundred and eight, title "Insurrection."

***Seventh.*** Of all suits arising under any law relating to the slave trade.

***Eighth.*** Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture

***Ninth.*** Of all suits at law or in equity arising under the patent or copyright laws of the *United States*.

***Tenth.*** Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

***Eleventh.*** Of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "The National Banks," to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by said title.

***Twelfth.*** Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the *United States* for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the *United States* to vote in the several states.

***Thirteenth.*** Of all suits to recover possession of any office, except that of elector of President or Vice President, representative or delegate in Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of

servitude; *provided*, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the *United States*, and secured by any law to enforce the right of citizens of the *United States* to vote in all the states.

***Fourteenth.*** Of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a state legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the *United States*.

***Fifteenth.*** Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the *United States* to vote in the several states.

1. *Miller-Magee Co. v. Carpenter*, 34 Fed. Rep. 433; *Ames v. Hager*, 36 Fed. Rep. 129. The circuit courts of the *United States* have exclusive jurisdiction to try cases involving validity of patents issued by the *United States*. *Marvin v. Aultman*, 46 Fed. Rep. 339; *Myers v. Cunningham*, 44 Fed. Rep. 346. As to what is a suit under the patent laws, see *Densmore v. Three Rivers Mfg. Co.*, 38 Fed. Rep. 747.

Circuit courts have jurisdiction of suits for infringement of patents without regard to citizenship, or residence of parties. *Vermont Farm Mach. Co. v. Gibson*, 50 Fed. Rep. 423.

2. See also *supra*, this title, *United States Courts in General*.

The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the *United States*, or with any rule prescribed by the supreme court under the preceding section (§ 917), make rules and orders directing the

follows: Whenever, in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit judge, or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.<sup>1</sup>

**V. DISTRICT COURTS—1. Authority and Organization.**—(See COURTS, vol. 4, p. 458.)

**2. Officers.**—(See also COURTS, vol. 4, p. 458.)

The judges receive salaries of five thousand dollars each.<sup>2</sup>

They may always try questions of fact regularly triable by jury, by consent of the parties.<sup>3</sup>

They must generally sit within their own districts, unless otherwise directed by the circuit judge or justice under the statute.<sup>4</sup>

returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. U. S. R. S., § 918.

No rule of the circuit court is of any effect if it is inconsistent with a rule prescribed by the supreme court. Bank of U. S. v. White, 8 Pet. (U. S.) 262.

Under the above section, the circuit court may, by general rule, or special order in a particular case, require parties to a cause submitted to it for decision, to file printed briefs, and may tax the reasonable expense of printing the briefs against the losing party, as a necessary disbursement. Neff v. Pennoyer, 3 Sawy. (U. S.) 495.

The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, *mesme* and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same. Equity Rule 89.

1. U. S. R. S., § 650.

When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge, or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred, upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the

same term, be stated, under the direction of the judges, and certified, and such certificate shall be entered of record. U. S. R. S., § 651.

Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court, upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the supreme court at their next session; but nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed, nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment. U. S. R. S., § 652. See also *supra*, this title, *Supreme Court*.

2. 26 St. at L. 783.

3. U. S. v. One Hundred Barrels of Distilled Spirits, 14 Wall. (U. S.) 53.

4. U. S. R. S., § 591. But a district judge who has, under order of the circuit judge, tried a case in another district, has jurisdiction to pass upon a motion for a new trial in the case, even after he has returned to his own district, where the parties waive his returning to the other district for the purpose of deciding the motion. Cheesman v. Hart, 42 Fed. Rep. 98.

It is only when the office of district judge of one district is vacant that the judge of another district has authority

The duties, rights, liabilities and fees of the other officers of the court have been already given.<sup>1</sup>

**3. Seats and Terms.**—For the terms of court, and the times and places of holding them in the several districts, reference must be had to the statute.<sup>2</sup>

**4. Jurisdiction.**—The provisions of the revised statutes, in reference to this subject,<sup>3</sup> now in force are as follows: The district courts shall have jurisdiction:

*First.* Of all crimes and offenses cognizable under the authority of the *United States*, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, title, "Crimes."<sup>4</sup>

*Second.* Of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.

*Third.* Of all suits for penalties and forfeitures incurred under any law of the *United States*.<sup>5</sup>

*Fourth.* Of all suits at common-law brought by the *United States*, or by any officer thereof, authorized by law to sue.<sup>6</sup>

*Fifth.* Of all suits in equity to enforce the lien of the *United States*, upon any real estate for any internal-revenue tax, or to subject to the payment of any such tax, any real estate owned by the delinquent, or in which he has any right, title, or interest.

*Sixth.* Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety, title, "Debts Due by or to the *United States*;" and such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.

*Eighth.* Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and

to discharge judicial duties in the former district, and leave granted by the judge of another district to sue a receiver, the judge of the district being out of the state, is void. *American L. & T. Co. v. East, etc.*, R. Co., 40 Fed. Rep. 182.

The provisions in case of disability are given in U. S. R. S., §§ 589-603.

1. See *supra*, this title, *United States Courts in General—Officers*.

2. U. S. R. S., § 572.

3. U. S. R. S., § 563.

4. U. S. R. S., § 5412, refers to frauds upon the *California* surveyor general's office.

5. It has jurisdiction of suits for pen-

alties under the contract labor law. *U. S. v. Whitcomb Metallic Bedstead Co.*, 45 Fed. Rep. 89.

6. U. S. R. S., § 563, gives to the *United States* district court jurisdiction "of all suits at common law brought by the *United States*, or by any officer thereof authorized by law to sue." This includes an action of trover by a marshal to recover money held by him in that capacity, lost by him, and found by the defendant. *Henry v. Sowles*, 28 Fed. Rep. 481.

Under this clause the district court has jurisdiction of an action to enforce the liability of a stockholder in an insolvent national bank, brought by the



seizures is given to the circuit courts, and they shall have original and exclusive cognizance of all prizes brought into the *United States*, except as provided in paragraph six of section six hundred and twenty-nine.<sup>1</sup>

*Ninth.* Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, title, "Insurrection."

*Tenth.* Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

*Eleventh.* Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty-five, title, "Civil Rights."

*Twelfth.* Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the Constitution of the *United States*, or of any right secured by any law of the *United States*, to persons within the jurisdiction thereof.

*Thirteenth.* Of all suits to recover possession of any office, except that of elector of President or Vice President, representative or delegate in Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude; provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office, by reason of the denial of the right guaranteed by the Constitution of the *United States*, and secured by any law, to enforce the right of citizens of the *United States* to vote in all the states.

*Fourteenth.* Of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or

receiver appointed for the bank by the comptroller of the currency. *Stephens v. Bernays*, 41 Fed. Rep. 401.

Where the district attorney of the *United States* filed a bill of information in the district court of the *United States*, to foreclose a mortgage in favor of the *United States*, it was held that the *United States* might be considered the real complainant, and that the court had jurisdiction. *Benton v. Woolsey*, 12 Pet. (U. S.) 27.

1. See ADMIRALTY, vol. 1, pp. 194,

200; *Morrison v. U. S. Dist. Ct.*, 147 U. S. 14.

The territorial district courts also have jurisdiction in admiralty. *The City of Panama*, 1 Wash. (U. S.) 518.

Informations *in rem, qui tam*, as well as others, to enforce forfeitures incurred under the laws of the *United States*, are by this clause of said section within the exclusive original cognizance of the district courts. *U. S. v. La Vengeance*, 3 Dall. (U. S.) 297; *Ketland v. The Cassius*, 2 Dall. (U. S.)

of a state legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the *United States*.

*Sixteenth.* Of all suits brought by any alien for a tort only in violation of the laws of nations, or of a treaty of the *United States*.

*Seventeenth.* Of all suits against consuls or vice-consuls, except for offenses above the description aforesaid.

*Eighteenth.* The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

The jurisdiction has been extended by subsequent legislation. Thus, the court has been given jurisdiction concurrent with the court of claims of suits other than on war claims or claims rejected prior to March 3d, 1887, where the amount in dispute does not exceed one thousand dollars, and founded upon the constitution or any law of Congress, except for pensions, or upon any regulation of an executive department of the government, or upon any contract, express or implied, with the government, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which the party would be entitled to redress against the *United States*, either in a court of law, equity or admiralty, if the *United States* were suable.<sup>1</sup> It may take cognizance also of suits to condemn land within the district for national park purposes.<sup>2</sup> Its criminal jurisdiction now embraces crimes committed upon the Great Lakes,<sup>3</sup> and crimes against Indian police and Indian deputy marshals.<sup>4</sup> Its jurisdiction of violations of the Civil Rights Act is exclusive.<sup>5</sup> It also has jurisdiction of causes, civil and criminal, arising under any of the provisions of the Immigration Act.<sup>6</sup>

The court may not take jurisdiction of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by a corporation, unless such suit might have

365; *Evans v. Bollen*, 4 Dall. (U. S.) 342. And these courts, having jurisdiction of seizures, have likewise jurisdiction of the question, who are entitled to the proceeds, as informers, or otherwise. The principal jurisdiction being exclusive, the question who is informer is also exclusive. *Robinson v. Hook*, 4 Mass. (U. S.) 139.

Matters of account are not within the jurisdiction of admiralty. The H. E. Willard, 52 Fed. Rep. 387.

1. 24 St. at L. 505. See *infra*, this title, *Court of Claims*.

It has jurisdiction of an action against the *United States* for services and ex-

penses of a chief supervisor of elections, on a claim within the jurisdictional amount, which had been refused by the accounting officer of the treasury department. *Gayer v. U. S.*, 33 Fed. Rep. 625.

2. 25 St. at L. 357.

3. 26 St. at L. 424.

4. 24 St. at L. 449.

5. 18 St. at L. 336.

6. 26 St. at L. 1084.

The jurisdiction of the district courts in an action for a penalty under the contract labor law of February 26th, 1885, is not defeated by the clause of § 3, providing for suits "as debts of like

been prosecuted in such court to recover the said contents if no assignment or transfer had been made.<sup>1</sup>

5. **Practice.**—The practice in the court has been considered in a former part of the article.<sup>2</sup>

**VI. COURT OF CLAIMS**—(See COURTS, vol. 4, p. 461)—1. **Its Nature.**—The court of claims was “established in 1855, for the triple purpose of relieving Congress and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims.”<sup>3</sup> “It is required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the *United States*,”<sup>4</sup> and to exercise such other jurisdiction as Congress may confer upon it.

2. **Authority and Organization.**—This court was originally created by statute, February 24th, 1855, and consisted of three judges,<sup>5</sup> but by the Act of March 3d, 1863, two additional judges were provided for and its jurisdiction enlarged,<sup>6</sup> and by the Acts of March 3d, 1883,<sup>7</sup> and of March 3d, 1887,<sup>8</sup> and of March 3d, 1891, its jurisdiction was still further extended.<sup>9</sup> It has power to establish rules for its government and to regulate its practice and procedure, and may punish for contempt in the manner prescribed by common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted it by law.<sup>10</sup>

3. **Officers**—*a.* **JUDGES.**—The judges number five, appointed by the President, with the advice and consent of the Senate, to hold their offices during good behavior.<sup>11</sup> From this number of five a chief justice is appointed.<sup>12</sup> Each of them is required to take an oath to support the Constitution of the *United States* and to discharge faithfully the duties of his office. They receive an annual salary of forty-five hundred dollars, payable quarterly.<sup>13</sup> Three judges constitute a quorum, but a concurrence of three is necessary to the decision of a case.<sup>14</sup> The judges may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.<sup>15</sup>

*b.* **CLERKS.**—The court appoints a chief clerk, an assistant

amount are now recovered in the circuit court.” *Lees v. U. S.*, 150 U. S. 476.

1. 25 St. at L. 433.

2. See *supra*, this title, *Practice*.

3. *U. S. v. Klein*, 13 Wall. (U. S.) 144, by Chase, C. J.

4. *U. S. v. Klein*, 13 Wall. (U. S.) 144.

5. 10 St. at L. 612. The statute creating the court of claims is remedial and must be liberally construed. *Brown v. U. S.*, 6 Ct. of Cl. 171.

6. 12 St. at L. 765.

7. 22 St. at L. 485.

8. 24 St. at L. 505.

9. 26 St. at L. 537; Supp. U. S. R. S. (2d ed.), p. 913.

10. U. S. R. S., § 1070.

11. Act of March 3d, 1863 (18 St. at L. 765), *amending* Act of February 24th, 1855 (10 St. at L. 12).

12. Act of March 3d, 1863 (18 St. at L. 765).

13. U. S. R. S., § 1049.

14. Act of June 23d, 1874 (18 St. at L. 252, ch. 468); Supp. U. S. R. S. (2d ed.), p. 47.

15. U. S. R. S., § 1071.

clerk, if deemed necessary, a bailiff, and a messenger.<sup>1</sup> The clerks take an oath of office, and may be removed for misconduct or incapacity.<sup>2</sup> The chief clerk shall give bond,<sup>3</sup> and when he has done so he has authority to disburse, under direction of the court, the contingent fund, which may from time to time be appropriated to the court's use.<sup>4</sup> On the first day of December of each session a full statement of all judgments rendered by the court must be transmitted to Congress, and a copy of the court's decision must be sent to all officers charged with the adjustment of claims against the *United States*.<sup>5</sup> The clerks may administer oaths and affirmations, take acknowledgments of instruments of writing, and give certificates of the same.<sup>6</sup> The salary of the chief clerk is three thousand dollars a year, and of his assistant clerk, two thousand dollars a year.<sup>7</sup>

c. OTHER OFFICERS.—The court appoints a bailiff and a messenger; the bailiff holds office for four years, unless sooner removed for cause. His salary is fifteen hundred dollars a year.<sup>8</sup> The messenger receives an annual salary of eight hundred and forty dollars.<sup>9</sup>

Special rules have been passed concerning the admission of attorneys.<sup>10</sup>

d. COMMISSIONERS.—The court of claims has power to appoint commissioners to take testimony to be used in the investigation of claims, to prescribe fees, and to issue commissions to take such testimony, whether at the instance of the claimant or of the government.<sup>11</sup>

4. **Seat and Terms.**—(See COURTS, vol. 4, p. 461.)

5. **Jurisdiction.**—The jurisdiction is best considered by studying the provisions of the Revised Statutes, and then the effect of the few amendatory laws passed subsequently to the adoption of the Revised Statutes.

a. PROVISIONS OF THE REVISED STATUTES. — It is provided<sup>12</sup> that the jurisdiction shall extend to the following cases :

*First.* All claims founded upon any law of Congress,<sup>13</sup> or upon

1. COURTS, vol. 4, p. 461.

2. U. S. R. S., § 1053, which provides that the court must report such removals with the cause thereof to Congress, if in session; or if not, at the next session.

3. U. S. R. S., § 1055.

4. U. S. R. S., § 1056.

5. To the heads of departments; to the solicitor, comptroller, and auditors of the treasury; to the commissioner of the general land office and of Indian affairs; to the chiefs of bureaus; and to other officers who adjust claims against the *United States*. U. S. R. S., § 1057.

6. U. S. R. S., § 1071.

7. U. S. R. S., § 1054.

8. U. S. R. S., §§ 1053, 1054.

9. U. S. R. S., § 1054.

10. Court of Claims Rules 1-6.

11. U. S. R. S., § 1075; 26 St. at L. 851.

It is provided, in U. S. R. S., § 1085, that when testimony is taken for the claimant, the fees of the commissioner and the cost of the commission and notice shall be paid by the claimant; but when taken at the instance of the government, such fees, together with the postage incurred by the attorney general, shall be paid out of the contingent fund provided for the court of claims, or other appropriation made by Congress for that purpose.

12. U. S. R. S., §§ 1059, 1060, 1061.

13. See 24 St. at L. 505. In *Alire v.*

any regulation of an executive department,<sup>1</sup> or upon any contract, express or implied, with the *United States* government,<sup>2</sup>

U. S., 1 Ct. of Cl. 233, and *Bogert v. U. S.*, 3 Ct. of Cl. 18, it is held that the decision of an accounting officer does not bar the right to trial in this court.

The court may entertain a suit for a demand arising under an act of Congress prosecuted by a state against the *United States*. *U. S. v. Louisiana*, 123 U. S. 32. Also a suit on a claim for a bounty land warrant, notwithstanding the claim had been presented at the pension bureau and denied. *Alire v. U. S.*, 1 Ct. of Cl. 233.

An officer may prosecute a claim for salary allowed by an act of Congress. *Moore's Case*, 4 Ct. of Cl. 139.

An owner of bonds assumed by the *United States* may maintain an action in the court of claims to collect the amount of the bonds. *Morrell v. U. S.*, 7 Ct. of Cl. 422.

If Congress recognizes the validity of a claim and appropriates money for its payment, and authorizes an officer to pay it, a suit for payment may be maintained in the court of claims. *Blount v. U. S.*, 21 Ct. of Cl. 274; *Huffman v. U. S.*, 17 Ct. of Cl. 55.

A person who has attended as a witness before Congress, cannot recover compensation in an action before the court of claims, *Lilley v. U. S.*, 14 Ct. of Cl. 539; neither can a pension agent for services rendered in that capacity, *Knapp v. U. S. Dev. Ct. of Cl.* 132; neither can the owner of lands taken by the *United States* under a treaty with the Indians and as trustee for them. *Langford v. U. S.*, 12 Ct. of Cl. 338.

Where an officer is directed by statute to examine claims, and to report to Congress, no suit can be maintained on the basis of his report. *Huffman v. U. S.*, 17 Ct. of Cl. 55.

This section and also Act of March 3d, 1887 (24 St. at L. 505), give to the court of claims jurisdiction of "all claims" founded on laws of Congress, but this means all money demands. *U. S. v. Jones*, 131 U. S. 1; *U. S. v. Drew*, 131 U. S. 21.

A suit may be maintained to recover the amount of an award under a statute giving a share of the penalty to the informer. *Ramsay v. U. S.*, 21 Ct. of Cl. 443; *U. S. v. Ramsay*, 120 U. S. 214.

A suit may be maintained to recover the claims of a naval officer for expenses

incurred in traveling under orders, *U. S. v. McDonald*, 128 U. S. 471; or upon an allowance made by an internal revenue commissioner to a judgment creditor, under U. S. R. S., § 3220, if the collector does not object and set up a claim himself, and provided the commissioner has kept within his jurisdiction. *Seat v. U. S.*, 18 Ct. of Cl. 458.

A suit may be maintained in the court of claims to recover money exacted illegally by a government officer, when payment was necessary to prevent stopping the claimant's business. *Swift Co. v. U. S.*, 111 U. S. 22. See *New York Consolidated Card Co. v. U. S.*, 20 Ct. of Cl. 174.

1. Such regulations embrace rules made by the heads of departments under an act of Congress. *Harvey v. U. S.*, 3 Ct. of Cl. 38.

An order assigning a clerk to duty is not such a regulation. *Harvey v. U. S.*, 3 Ct. of Cl. 38.

The army regulation providing a method for compensating squatters on military reservations for valuable improvements is such a regulation. *Mad-dux v. U. S.*, 20 Ct. of Cl. 193.

A mere order of the president or the head of a department is not such a regulation. *Harvey v. U. S.*, 3 Ct. of Cl. 38.

2. Jurisdiction is limited to cases of contracts, express or implied, with the government. *U. S. v. Smoot*, 15 Wall. (U. S.) 36.

An action for secret service during the war, on a contract made with the claimant by the president, is not maintainable. *Totten v. U. S.*, 92 U. S. 105.

Where a commission has had referred to it a claim of a contractor against the government, has audited it, and the contractor received the amount allowed without objection, he cannot afterward bring an action for a further sum under the same claim. *U. S. v. Justice*, 14 Wall. (U. S.) 535.

A contract to reimburse is implied when the *United States* takes private property for public use. *U. S. v. Russell*, 13 Wall. (U. S.) 623.

A suit may be brought in the court of claims on a special contract with a patentee for the use of his invention by the government at a stipulated price. *Burns' Case*, 4 Ct. of Cl. 113.

Although the *United States* disposes of land in violation of a trust, yet the

holder of a warrant cannot enforce a claim arising from such breach, for the *United States* cannot be sued in the court of claims on equitable grounds only. *Bonner v. U. S.*, 9 Wall. (U. S.) 156.

A claim under the revenue laws based on an implied promise to repay money erroneously taken is within this section. *Schlesinger v. U. S.*, 1 Ct. of Cl. 16.

The *United States* is liable for refusing to receive and to pay for what it had agreed to purchase. *Gibbons v. U. S.*, 8 Wall. (U. S.) 269.

No implied contract arises with the *United States*, upon which an action will lie in the court of claims, unless some consideration moved to the *United States*; or money must have been received, which they are charged with a duty to pay over; or the claimant must have had a lawful right to the money when it was received. No such implied contract arises with respect to money in the *United States* treasury as the proceeds of property taken and sold under the act of June 17th, 1862 (12 St. at L. 589). *Knote v. U. S.*, 95 U. S. 149.

Where a parol contract has been wholly or partly performed on one side, the party performing can recover a fair value for his property or his services on a *quantum meruit*. *Clark v. U. S.*, 95 U. S. 539.

The court of claims has jurisdiction under this provision only in cases *ex contractu*, and an implied contract to pay does not arise where the government's officer, asserting its ownership, commits a tort by taking possession forcibly of the lands of an individual for public use. *Langford v. U. S.*, 101 U. S. 341; *Gibbons v. U. S.*, 8 Wall. (U. S.) 269.

An action by a patentee for a reasonable royalty on his patent, which was used by the ordinance bureau of the government, is an action on an implied contract, and not on a tort, and the court of claims has jurisdiction. *U. S. v. Palmer*, 128 U. S. 262. And the action being on a contract for the use, and not for an infringement, of a patent, it may be brought in the court of claims. *U. S. v. Palmer*, 128 U. S. 262.

Money paid by mistake to the government raises an implied contract by the government to repay it. *Knote v. U. S.*, 95 U. S. 149.

Likewise where the government receives money through the fraud of its agent. *U. S. v. State Bank*, 96 U. S. 30.

Where the officers or agents of the government take property pursuant to an act of Congress, to which the *United States* lays no claim, just compensation must be made, and an action will lie to secure such compensation. *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645.

But the court of claims has no jurisdiction to enforce specific performance. *U. S. v. Jones*, 131 U. S. 1; *U. S. v. Drew*, 131 U. S. 21.

In a case where a government employé using property in his possession belonging to the government, but for a use different from that for which it was given him, but which foreign use was approved by his superior officer, it was held that there was no implied contract of hiring for government use. *Carpenter v. U. S.*, 45 Fed. Rep. 341.

Where the government disputes the claim, and the claimant accepts a sum in full settlement and gives a receipt in full, it is a bar to an action for what he asserts to be still due. *Sweeney v. U. S.*, 17 Wall. (U. S.) 75; *Murphy v. U. S.*, 104 U. S. 464.

The court of claims has jurisdiction of a claim where one has delivered property to the *United States* in pursuance of an express contract which is void. He may recover on a *quantum meruit*. *Heathfield v. U. S.*, 8 Ct. of Cl. 213. Also of a claim where property leased by the government is damaged by voluntary waste, against an implied covenant in the lease, while in its possession. *U. S. v. Bostwick*, 94 U. S. 53.

When Congress specially refers a claim for a breach of contract to the court of claims, the rules of law applicable generally to the adjudication of claims in that court must govern. *Tillson v. U. S.*, 100 U. S. 43.

The court has jurisdiction of an action for royalties which the government contracted to pay for the use of a patented article. *U. S. v. Burns*, 12 Wall. (U. S.) 246. Also of a suit for the use of a patented invention which it adopted with knowledge that the inventor claimed a patent right to the invention. A contract is implied in such a case. *U. S. v. Palmer*, 128 U. S. 262; *McKee v. U. S.*, 14 Ct. of Cl. 396.

The court of claims was not instituted to try cases of nominal damages. *Grant v. U. S.*, 7 Wall. (U. S.) 331.

The court of claims has jurisdiction of an action to recover money taken from a claimant in payment of a fine imposed by a court having no jurisdiction, *Devlin v. U. S.*, 12 Ct. of Cl. 266;

and all claims which may be referred to the court by either house of Congress.<sup>1</sup>

*Second.* All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, on the part of the government against any person making claims against the government in said court.<sup>2</sup>

and of an action by an inventor upon his implied license to the government to manufacture his patented article, *McKeever v. U. S.*, 14 Ct. of Cl. 396; and of a suit to enforce a contract founded on a patent, or of a suit to recover from the government for the use of a patented invention. *Morse Arms Mfg. Co. v. U. S.*, 16 Ct. of Cl. 296.

But the court cannot act where the claimant's rights are incomplete; they must be vested rights. *Daily v. U. S.*, 17 Ct. of Cl. 144.

1. Although either house of Congress may confer on the court of claims jurisdiction of a claim for the proceeds of captured property, yet, unless jurisdiction is so conferred by statute, the claim will not constitute a legal cause of action. The statute (U. S. R. S., § 1059) authorizing either house of Congress to refer money claims to the court of claims, is a consent by the *United States*, that it may be sued in the cases thus referred. The Statute of Limitations (U. S. R. S., § 1069) does not prevent jurisdiction of a captured property case referred by the Senate under Revised Statutes, § 1059. The bar prescribed by the Statute of Limitations is not jurisdictional. *Webb v. U. S.*, 20 Ct. of Cl. 487.

Claims, when thus referred by an act of Congress to the court of claims, are subject to all the limitations and conditions imposed in the act referring them. *De Groot v. U. S.*, 5 Wall. (U. S.) 419; *Roberts v. U. S.*, 92 U. S. 41; *Ex p. U. S.*, 17 Wall. (U. S.) 439.

The court of claims will find facts only in a case where the evidence is submitted, and a finding of facts only is asked for by either House of Congress. 22 St. at L. 485, ch. 116.

When the court has found the facts and reported back to Congress, it will not, on motion of either party, return documents or evidence, but it will, when the committee of Congress that referred the case calls for their return, or when the claim is dismissed for want of jurisdiction. *Ford v. U. S.*, 19 Ct. of Cl. 596.

When a claim is dismissed for want of jurisdiction, the court will not allow

an amended petition to be filed. *Dunbar v. U. S.*, 19 Ct. of Cl. 674.

2. Liquidated or unliquidated demands of every kind may be set off against a claimant. *Allen v. U. S.*, 17 Wall. (U. S.) 207.

The court of claims has jurisdiction to hear and determine a counter-claim by the *United States* for the proceeds of its property wrongfully sold by an insolvent debtor in a suit by his assignee in insolvency on a contract between the insolvent and the *United States*. *Allen v. U. S.*, 17 Wall. (U. S.) 207; *Macauley v. U. S.*, 11 Ct. of Cl. 693.

The *United States* cannot set off a judgment in an action by a firm of three persons when the judgment was against two only. *Boehm v. U. S.*, 20 Ct. of Cl. 142.

The amount due by a surety on a bond may be set off against a claimant. *McKnight v. U. S.*, 98 U. S. 179; *Gratiot v. U. S.*, 15 Pet. (U. S.) 336.

Upon settling his accounts, an officer of the navy claimed that he was not concluded thereby, and after ward brought suit for a balance which he claimed was due him. The court held that the *United States* was not bound by the settlement, and for moneys improperly paid him in pursuance of the settlement, could obtain a judgment. *McElrath v. U. S.*, 102 U. S. 426; *U. S. v. Burchard*, 125 U. S. 176.

The government, having recovered a judgment against A, may take an assignment of a judgment against B from him, and in a suit brought by B upon an award made in his favor by Congress, may set it off. *Macauley v. U. S.*, 11 Ct. of Cl. 693. And if the set-off was acquired before notice of the assignment, this right will exist, though B assigned his award to M, who is the party claimant. *Macauley v. U. S.*, 11 Ct. of Cl. 693.

If before notice of an assignment of a chose in action a counter-claim is acquired by the debtor, it may be set-off against the demand. *Macauley v. U. S.*, 11 Ct. of Cl. 693; *Brashear v. West*, 7 Pet. (U. S.) 608.

Where matters of set-off are pleaded by a defendant in a suit brought by the

*Third.* Claims of disbursing officers for relief from responsibility while discharging their duties.<sup>1</sup>

*Fourth.* Claims for proceeds of captured or abandoned property.<sup>2</sup>

*United States*, the refusal of the court below to direct the jury to certify the amount due is not reviewable in the supreme court. *Schaumburg v. U. S.*, 103 U. S. 667.

If the court of claims dismiss a claim for want of jurisdiction, the counter-claim falls with it. The jurisdiction of the counter-claim depends upon that of the claim. *Boehm v. U. S.*, 21 Ct. of Cl. 290.

A debtor of the government cannot set off a claim for a debt due him, unless it has been submitted and rejected, except in special cases provided for by statute. *U. S. v. Giles*, 9 Cranch (U. S.) 214.

Where the petition to the court of claims contains counts for both liquidated and unliquidated damages, if the court has jurisdiction of the claims for liquidated damages, but has not of the claims for unliquidated damages, the court will not dismiss the case. *Dennis v. U. S.*, 20 Ct. of Cl. 119.

As to judgments in case of counter-claim, etc., see *U. S. R. S.*, § 1061.

1. *U. S. R. S.*, § 1059.

If the court ascertain that the loss was without fault or negligence, it will make a decree setting forth the facts, and the accounting officers will thereupon allow the officer the amount decreed. *U. S. R. S.*, § 1062.

The benefit of this law extends to disbursing officers of the executive departments and is not restricted to the army and navy. *Hobbs v. U. S.*, 17 Ct. of Cl. 189. And the words, "without fault or negligence on the part of such officer," in the above section, mean that there was exercised the care and diligence which a prudent man, under similar conditions, would use in the exercise of a public trust or in matters of private concern. *Prime v. U. S.*, 3 Ct. of Cl. 209; *Murphy v. U. S.*, 3 Ct. of Cl. 212; *Whittlesey v. U. S.*, 5 Ct. of Cl. 99; *Malone v. U. S.*, 5 Ct. of Cl. 486; *Glenn's Case*, 4 Ct. of Cl. 501; *Christian v. U. S.*, 7 Ct. of Cl. 431; *Howell v. U. S.*, 7 Ct. of Cl. 512; *Holman v. U. S.*, 11 Ct. of Cl. 642; *Clark v. U. S.*, 11 Ct. of Cl. 698, *affirmed* in *U. S. v. Clark*, 96 U. S. 37; *Hobbs v. U. S.*, 17 Ct. of Cl. 189; *Scott v. U. S.*, 18 Ct. of Cl. 1; *Hoyle v. U. S.*, 21 Ct. of Cl. 300.

The words "fault" and "negligence,"

as used in the statute, are not technical, but must be taken in their common meaning, the former as error or mistake, and the latter as omission. *Malone v. U. S.*, 5 Ct. of Cl. 486.

The care required under one set of circumstances may be different from that required under other circumstances. *Glenn's Case*, 4 Ct. of Cl. 501; *Malone v. U. S.*, 5 Ct. of Cl. 486.

The provision is intended to be prospective, and give relief where losses may occur, as well as where they have occurred. *Glenn's Case*, 4 Ct. of Cl. 501.

If the officer's responsibility has been discharged, he is not entitled to relief, unless the money at the time of the loss was under his control. *Hall v. U. S.*, 9 Ct. of Cl. 270.

The *United States* is not bound by a settlement of accounts by accounting officers. *McElrath v. U. S.*, 102 U. S. 426.

An acceptance without objection to the amount of an account by the government is a final adjustment. *Murphy v. U. S.*, 104 U. S. 464.

The power given accounting officers to duplicate lost checks is not exclusive, and does not affect the jurisdiction of the court of claims. *Becker v. U. S.*, 26 Ct. of Cl. 172.

If the expenditure of money for a designated purpose without limitations is intrusted by statute to a public officer, and he exercises his discretionary power in the work, his acts cannot be reviewed so long as he acts within the general scope and authority of the statute. *Plummer v. U. S.*, 24 Ct. of Cl. 517.

The failure of a disbursing officer to give a bond, will not prevent him obtaining relief for lost funds. *Wood v. U. S.*, 25 Ct. of Cl. 98.

The Statute of Limitations does not run against a disbursing officer who is charged with funds lost, without his fault or negligence, until an account has been stated by the accounting officers. *Clark's Case*, 96 U. S. 37; *Wood v. U. S.*, 25 Ct. of Cl. 98.

2. "The court of claims shall have jurisdiction to hear and determine the following matters: Of all claims for the proceeds of captured or abandoned property, as provided by the Act of March 12th, eighteen hundred and sixty-



*Fifth. Claims referred by the departments.*<sup>1</sup>*b. SUBSEQUENT STATUTES—(1) Act of 1883.—The Act of*

three, chapter one hundred and twenty, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the *United States*,' or by the Act of July 2d, eighteen hundred and sixty-four, chapter two hundred and twenty-five, being an act in addition thereto. *Provided*, That the remedy given in cases of seizure under the said acts, by preferring claim in the court of claims shall be exclusive, precluding the owner of any property, taken by agents of the treasury department as abandoned or captured, in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said court of claims. *Provided also*, That the jurisdiction of the court of claims shall not extend to any claim against the *United States* growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion." U. S. R. S., § 1059.

Proceeds of property sold and placed in the treasury to the credit of the "abandoned property fund" can be sued against, although the property was captured before the "abandoned and captured property act" was enacted. *Barringer v. U. S.*, 3 Ct. of Cl. 358; *Minor's Case*, 8 Ct. of Cl. 277. But by the Act of July 2d, 1864 (13 St. at L. 375), not further back than the passage of the Act of July 17th, 1862 (12 St. at L. 589). *Moore v. U. S.*, 10 Ct. of Cl. 375; *U. S. v. Pugh*, 99 U. S. 265.

In cases referred by Congress, the court of claims has not jurisdiction of claims for the proceeds of abandoned or captured property. *Vance v. U. S.*, 21 Ct. of Cl. 488.

The "abandoned and captured property act" created the only right which any one could have to the proceeds of such property, and provided the only remedy. *Haycraft v. U. S.*, 10 Ct. of Cl. 95.

Suit to recover the proceeds can be sustained only when the property was seized and sold under the circumstances described in the act. The proceeds must have been paid into the treasury. *Spencer v. U. S.*, 91 U. S. 577.

The claimant must establish by sufficient proof that he was the owner of

the property and entitled to the proceeds. *U. S. v. Ross*, 92 U. S. 281.

It will be presumed that the proceeds in the hands of an officer whose duty it was to send them to the treasury, were so sent. *U. S. v. Pugh*, 99 U. S. 265; *U. S. v. Crussell*, 14 Wall. (U. S.) 1; *Henry v. U. S.*, 6 Ct. of Cl. 389; *Silvey's Case*, 4 Ct. of Cl. 490.

A suit for proceeds may be maintained under this act, although the proceeds were in the treasury before the act was passed. *Jenkins v. U. S.*, 8 Ct. of Cl. 464; *Terry v. U. S.*, 8 Ct. of Cl. 277.

If the secretary of the treasury withholds a part of the amount adjudged due a claimant, the creditor can sue in the court of claims. *Brown v. U. S.*, 6 Ct. of Cl. 171.

"Appropriation" under this act includes all taking and using of property by the army or navy during the rebellion, not authorized by contract with the government. And the manner of appropriation, whether made by force or by consent of the owner, does not affect the question of the court's jurisdiction; the consideration of any claim, whatever its nature, growing out of such appropriation is excluded. *Filor v. U. S.*, 9 Wall. (U. S.) 45.

Where property was taken during the rebellion by officers of the government, under circumstances which raise an implied contract to make a reasonable compensation for the use, the property having been subsequently returned to the owner, it is not such an "appropriation" as is excluded from the jurisdiction of the court of claims in an action founded thereon. *U. S. v. Russell*, 13 Wall. (U. S.) 623.

Under this "appropriation" proviso, the court of claims has been held to have jurisdiction in the following cases:

Where an officer justifiably seized private property for public use. *Grant v. U. S.*, 1 Ct. of Cl. 41; *U. S. v. Russell*, 13 Wall. (U. S.) 623. Where an executive department used private property. *Clark v. U. S.*, 1 Ct. of Cl. 145. A claim for hire for a vessel chartered by the government. *Bogert v. U. S.*, 2 Ct. of Cl. 159. Where the war department took property under an implied lease. *Waters' Case*, 4 Ct. of Cl. 389.

1. *Claims Referred by the Departments.*—"Whenever any claim is made

March 3d, 1883,<sup>1</sup> amplified the provisions<sup>2</sup> relative to jurisdiction of the court over claims referred to it by Congress,<sup>3</sup> and modified the law as to references by the heads of departments.<sup>4</sup>

against any executive department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the *United States*, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant, and the secretary of the treasury may, upon the certificate of any auditor or comptroller of the treasury, direct any account, matter, or claim of the character, amount or class described in this section, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication; *Provided*, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant." U. S. R. S., § 1063.

"All cases transmitted by the head of any department or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the court of claims, and shall in all respects be subject to the same rules and regulations." U. S. R. S., § 1064. See also U. S. R. S., § 1065; 22 St. at L. 485.

When a claim is transmitted by the head of an executive department, the claimant may voluntarily appear and file his petition, or the court, on the defendant's application, will order a citation to issue requiring him to appear and proceed. *Bright v. U. S.*, 6 Ct. of Cl. 118.

On an agreed statement of facts, a case may be heard and determined

when the statement is certified by the secretary of the treasury to be "correct and sufficient," which both parties agree to admit in evidence. *Bronlatour v. U. S.*, 7 Ct. of Cl. 555; *Amoskeag v. U. S.*, 6 Ct. of Cl. 99.

If the accounting officers have certified a balance in favor of a claimant, the claim may be referred by the head of an executive department to the court of claims, in all cases in which the claimant could voluntarily bring the same matter before the court; but such certification is neither conclusive nor *prima facie* evidence of the indebtedness of the government, nor can an action be brought upon accounts or balances so certified. It never could have been intended by Congress that in such cases the *United States* were to assume the burden of proof to establish the errors of their accounting officers, instead of requiring claimants to prove their whole case. *McKnight's Case*, 13 Ct. of Cl. 292; *Winnisimmet Co. v. U. S.*, 12 Ct. of Cl. 319.

1. 22 St. at L. 485.

2. U. S. R. S., §§ 1059, 1060.

3. "Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either house of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims of the *United States*, and the same shall there be proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or house by which the case was transmitted for its consideration." 22 St. at L. 485. But see the amendatory act, 24 St. at L. 505.

4. "When a matter or claim is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and

(2) *Act of 1885*.—The Act of 1885 extended the jurisdiction to include French spoliation claims.<sup>1</sup>

(3) *Act of 1887*.—The Act of 1887<sup>2</sup> repealed all inconsistent acts, and considerably affected the extent of the court's jurisdiction.

It provides that the court shall have jurisdiction to hear and determine :

*First.* All claims founded upon the Constitution of the *United States*, or any law of Congress except for pensions, or upon any

conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted for its guidance and action." 22 St. at L. 485.

There is excepted, however, from the operation of the act, claims growing out of the destruction or damage to property during the rebellion, and claims for the use of land by the forces of the *United States* at that time.

In *Webb v. U. S.*, 20 Ct. of Cl. 493, the court, by Richardson, J., said : "There is no inconsistency between U. S. R. S., § 1059, and the Bowman Act of March 3d, 1883 (22 St. at L. 485, ch. 116). The two were passed for entirely different objects. By the former, the court takes jurisdiction to hear and determine cases on both the facts and the law, enters judgment, with a right reserved to the parties to appeal to the supreme court, and with a provision that any final judgment against the claimant shall forever bar any further claim or demand against the *United States* arising out of the matters involved in the controversy. (R. S., § 1093.) Such cases involve the trial of legal rights, to be settled judicially and never to be returned to Congress. It was found that such jurisdiction did not cover all the claims before Congress, and that Congress needed assistance in another class of cases, in which it must itself determine whether or not it would exercise its legislative discretion by giving relief to meritorious parties who had no strict legal rights to stand upon, and which discretion could not properly be conferred elsewhere. In the history of the court (17 Ct. of Cl. 10), published just before the Bowman Act was introduced into Congress, and which was distributed to members of the committees of Congress, it was said, 'There are still numerous claims pressing upon Congress wherein the petitioners appeal for special relief, which the strict rules of law cannot afford them. Claims of

this kind are increasing and are a source of much embarrassment to both senators and representatives. It is uncertainty as to real facts that gives rise to most of the difficulty. These Congress, by its committees, cannot investigate and ascertain as they are proved and established in a court of justice. It may and probably will soon become necessary, if it has not already become so, to send such cases to the court of claims for findings of fact, to be submitted to Congress for its determination as to the law or the relief which should be applied to them. With the facts judicially determined, Congress would be able to act intelligently, safely, and readily upon the cases presented.' The Bowman Act follows this suggestion. It is entitled 'An act to afford assistance to Congress,' etc., and, so far as Congress is concerned, applies only to the finding of facts. It could not have been intended to increase the business of Congress in relation to claims by taking from this court the jurisdiction which it then had over those which either house might refer to it for judicial determination on both facts and law, never again to appear for Congressional action. The proceedings of the two acts are different. In the Bowman Act no appeal to the supreme court is provided for, and if there had been it is not probable that it would have been regarded as of any force, since no judgment is entered in cases under its provisions. In other respects there are important differences which do not conflict with each other, but relate to different cases, or have different courses of proceeding. . . . To hold that the Bowman Act repeals anything by implication would be 'establishing an incidental and accidental change of the law beyond the contemplation of the legislature,' which is not justifiable, as we held in *Wilcox v. U. S.* (12 Ct. of Cl. 495), which the supreme court affirmed, adopting that very language (95 U. S. 661)."

1. 23 St. at L. 383.

2. 24 St. at L. 505.

regulation of an executive department, or upon any contract, express or implied, with the government of the *United States*, or for damages, liquidated or unliquidated, in cases not sounding in tort,<sup>1</sup> in respect of which claims the party would be entitled to redress against the *United States*, either in a court of law, equity, or admiralty, if the *United States* were suable.<sup>2</sup>

*Second.* All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the *United States* against any claimant against the government in said court.<sup>3</sup>

As to the matters enumerated, the district court has concurrent jurisdiction, if one thousand dollars or less be claimed, and the circuit court, if the claim is more than one thousand and does not exceed ten thousand dollars.<sup>4</sup>

*Third.* Petitions for the adjustment of accounts by debtors of the *United States*.<sup>5</sup>

*Fourth.* Questions submitted by the heads of departments.<sup>6</sup>

*Fifth.* In matters submitted under the Act of 1883, and under judgments and decrees thereon.<sup>7</sup>

(4) *Act of 1891.*—The Act of March 3d, 1891,<sup>8</sup> provided that the court of claims should have jurisdiction to inquire into and finally adjudicate certain claims for Indian depredations.

(5) *Other Legislation.*—Numerous acts special in their character have been passed extending the jurisdiction to individual cases and classes of cases. For them reference is had to the statute at large.<sup>9</sup>

**6. Pleading—*a.* IN GENERAL.**—The court of claims is not bound by special and technical rules of pleading;<sup>10</sup> it recognizes and enforces the general and substantial rules of judicial procedure pur-

1. See *Gibbons v. U. S.*, 8 Wall. (U. S.) 269; *Carpenter v. U. S.*, 42 Fed. Rep. 264; *U. S. v. Smoot*, 15 Wall. (U. S.) 36.

2. See U. S. R. S., § 1059. See *supra*, this title, *Jurisdiction—Provisions of the Revised Statutes*. War claims and claims disallowed by proper authority are excepted from the operation of the statute.

3. Practically the same as the provisions in U. S. R. S., § 1059. See *supra*, this title, *Jurisdiction—Provisions of the Revised Statutes*.

4. 24 St. at L. 505, § 2.

5. 24 St. at L. 505, § 3.

6. 24 St. at L. 505, § 12. This provision differs from that of the Act of 1883 (22 St. at L. 485), mainly in that it requires the reference to be with the consent of the adverse party. See *supra*, this title, *Subsequent Statutes—Act of 1883*.

7. 24 St. at L. 505, § 13. See also U. S. R. S., § 14.

27 C. of L.—43

8. 26 St. at L. 851.

9. *Langford v. U. S.*, 101 U. S. 341.

Cases arising under the revenue laws, as such, are not within the jurisdiction of the court, but they may be the subject of suit if they come within the classes of cases above noted, or by virtue of special legislation on the subject. *Nichols v. U. S.*, 7 Wall. (U. S.) 122; *Doherty v. U. S.*, 6 Ct. of Cl. 90. *Portland Co. v. U. S.*, 5 Ct. of Cl. 441, *following Nichols v. U. S.*, held that in all cases where the internal revenue laws had provided a mode of redress for any wrong, that mode was exclusive, and the court of claims was thereby divested of any jurisdiction it might have had before in the case.

10. In *U. S. v. Burns*, 12 Wall. (U. S.) 246, it was held that the common-law rule that suit must be brought in the name of all joint parties does not apply to the court of claims. *Little v. District of Columbia*, 19 Ct. of Cl. 323.

sued in common-law courts.<sup>1</sup> Defective forms of pleading, therefore, will not preclude a claimant from recovering what is justly due him on the facts stated in his petition,<sup>2</sup> but the court must be governed in estimating damages by the proofs submitted.<sup>3</sup>

The court of claims has enacted rules of pleading to be followed by practitioners before it.<sup>4</sup>

*b. PETITION.*—The claimant must set forth in full in a petition his claim, the action taken thereon, if any, the persons interested, and upon what consideration they acquired interests; that no transfer of claim has been made, except as set forth in the petition; that the claimant is entitled to the amount claimed; that the claimant has at all times borne true allegiance to the *United States*, and has in no way voluntarily aided in rebellion against the *United States*; and that he believes the facts as stated to be true.<sup>5</sup>

1. *Peterson v. U. S.*, 26 Ct. of Cl. 93.

The court of claims seeks to administer justice by forms the most simple and convenient, but the allegations and proofs must so far correspond as to secure to the defendant the benefit of the *res adjudicata*. *Little v. District of Columbia*, 19 Ct. of Cl. 323.

2. *Clark v. U. S.*, 95 U. S. 539.

3. *U. S. v. Smith*, 94 U. S. 214.

4. Ct. of Cl. Rules 7-14, 19-22.

The court of claims will take notice that a claim is barred by the Statute of Limitations when it so appears, although the defense be not specially made. *Finn v. U. S.*, 123 U. S. 227.

An objection to the petitioner's right to maintain his action should be raised by demurrer or plea. If the objection be to the jurisdiction only, it should be taken by plea to the jurisdiction. *Pennsylvania Co. v. U. S.*, 7 Ct. of Cl. 401.

A traverse places upon the petitioner the burden of proving all material allegations. *Calkins v. U. S.*, 1 Ct. of Cl. 382.

5. U. S. R.S., § 1072.

The petition must comply with U. S. R. S., § 1072; and must also set forth: (1) The title of the action with the full Christian and surnames of all the complainants. (2) A plain and concise statement of the facts and circumstances, giving place and date, free from argumentative and impertinent matter. (3) In every case transmitted by the head of a department, by Congress or a committee thereof, a copy of the order of transmission must be set out or annexed. (4) The prayer, in which the claimant must state distinctly the amount for which he demands judgment, or the relief for which he prays. Court of

Claims Rule 7; Court of Claims Rules 7-13, both inclusive; Court of Claims Rules 70-73, both inclusive; Court of Claims Rules 94-97, both inclusive.

For the difference between petitions under the French Spoliation Act, see Court of Claims Rule 105.

The petition must set forth the claimant's case with conciseness, and its averment will be construed against the claimant. *Merchants' Exchange Co. v. U. S.*, 1 Ct. of Cl. 332; *Guttman v. U. S.*, 6 Ct. of Cl. 111.

It must give the names of the parties interested. *White v. U. S.*, Dev. Ct. of Cl. 134.

It must ask relief. *Patterson v. U. S.*, 6 Ct. of Cl. 40.

It must set out the facts on which the petitioner rests his right to recover. *Morgan v. U. S.*, 14 Ct. of Cl. 442; *Brown v. U. S.*, 1 Ct. of Cl. 377; *Baird v. U. S.*, 5 Ct. of Cl. 348; *Monk v. U. S.*, 12 Ct. of Cl. 293.

If founded on an act of Congress, it must refer to the act. *Noble v. U. S.*, Dev. Ct. of Cl. 84.

When money is paid for duties illegally laid, it must allege protest. *Schlesinger v. U. S.*, 1 Ct. of Cl. 16; *Nicoll v. U. S.*, 1 Ct. of Cl. 70.

It need not set forth the evidence. *Noble v. U. S.*, Dev. Ct. of Cl. 84.

It may be amended by leave of court. *Shaw v. U. S.*, 9 Ct. of Cl. 301.

Whether, since the passage of the Bowman Act (22 St. at L. 485, ch. 116), an assignee can sue in his own name, has not yet been decided by the supreme court, although before its passage he could not. *U. S. v. Gillis*, 95 U. S. 407.

In *Emmons v. U. S.*, 48 Fed. Rep. 43, it was held that an assignee can sue in

The petition must be verified by the affidavit of the claimant, his agent or attorney in fact.<sup>1</sup>

The provisions relating to the dismissal of petitions for disloyalty are given in the notes.<sup>2</sup>

his own name in the circuit and district courts.

A party who asserts a claim must prove the transfer. *Tebbett v. U. S.*, 5 Ct. of Cl. 607; *Crowell v. U. S.*, 6 Ct. of Cl. 23.

Minors should sue through a guardian appointed in the state of their domicile, instead of through the guardian appointed by the state where the property is. *Stanton's Case*, 4 Ct. of Cl. 456.

All who have joint interests should join. *Hale v. U. S.*, Dev. Ct. of Cl. 137.

When their interests are separate, they cannot join. *Wilson v. U. S.*, 1 Ct. of Cl. 318.

If joint owners join, they may amend so as to ask for separate judgment on the merits. *Mott v. U. S.*, 3 Ct. of Cl. 218.

A partner cannot intervene after several years of silence and claim as his individual property that claimed by his firm without showing fraud. *Bellocque v. U. S.*, 8 Ct. of Cl. 493.

Although one person is a member of two firms, yet the firms cannot unite in one petition. *Parish v. U. S.*, 1 Ct. of Cl. 345.

If two persons join, one without right, the petition may be amended by striking out the name of such person. *Molina v. U. S.*, 6 Ct. of Cl. 269.

The principal may petition in his own name, though his agent in contracting failed to disclose the principal's name. Or the petition may be filed in the agent's name for the principal's use. *Ramsdell v. U. S.*, 2 Ct. of Cl. 508.

The assignor may repudiate an assignment void by statute, and sue in his own name. *Belt's Case*, 15 Ct. of Cl. 92.

A married woman who, by the law of her domicile, may hold property in equity, may sue in her own name, even though her husband refuses to be a party, if the laws of her domicile allow such a suit. *Stanton's Case*, 4 Ct. of Cl. 456.

A state may sue in the court of claims. *U. S. v. Louisiana*, 123 U. S. 32.

1. U. S. R. S., § 1072.

If the petition is not verified, a motion to dismiss it will be entertained. But in such a case an amended petition

may be filed, properly verified. *Griffin v. U. S.*, 13 Ct. of Cl. 257.

If an assignor dies *pendente lite*, a verification by his executor is sufficient. *Pullen v. U. S.*, 7 Ct. of Cl. 507.

Where the assignor and assignee join as co-claimants, there is no necessity of proving the assignment, the assignor verifying the petition which alleges that the suit is for the assignee. *Tebbett v. U. S.*, 5 Ct. of Cl. 607.

2. U. S. R. S., § 1073, provides for the dismissal of the petition where the allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the government (U. S. R. S., § 1092) are successfully traversed by the government.

"Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the *United States* during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the *United States* and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway shall be *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein." U. S. R. S., § 1074.

"Aid and comfort," in this section of the Revised Statutes, requires the acts to have been committed with the intention of aiding the war. Serving in the rebellion was "aid" to it. *Grossmeyer's Case*, 4 Ct. of Cl. 1.

The aid must have been given voluntarily. *U. S. v. Padelford*, 9 Wall. (U. S.) 531.

Any acts which assist, countenance, or encourage, come within this section. *Bates' Case*, 4 Ct. of Cl. 569.

As to the proof of allegiance, this section does not materially change the nature of the proof required in the previous act. *U. S. v. Padelford*, 9 Wall. (U. S.) 531; *Grossmeyer's Case*, 4 Ct. of Cl. 1.

If the claimant has not obtained a

7. **Appeals.**—This subject has already been considered.<sup>1</sup>

8. **Evidence.**—Where Congress has not otherwise provided, the common-law rules govern in the matter of evidence.<sup>2</sup> Congress has, however, at different times, made various modifications by statutory enactments.<sup>3</sup>

9. **Judgments.**—The object of the court of claims being to investigate such claims as are referred to it by the provisions of law, its

pardon, he must prove his loyalty. *Patterson v. U. S.*, 6 Ct. of Cl. 40.

The citizen of a loyal state has the presumption of loyalty to favor him. *Turner v. U. S.*, 3 Ct. of Cl. 400.

But an alien need not prove more than his neutrality. *Rothschild v. U. S.*, 6 Ct. of Cl. 204. See *Hill v. U. S.*, 8 Ct. of Cl. 470.

Persons associated with the confederacy are not required to set forth their loyalty, after proclamation of pardon. *Armstrong v. U. S.*, 13 Wall. (U. S.) 154; *Pargoud v. U. S.*, 13 Wall. (U. S.) 156; *White v. U. S.*, 19 Ct. of Cl. 436; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Hayne v. U. S.*, 7 Ct. of Cl. 443; *Waring v. U. S.*, 7 Ct. of Cl. 501; *Armstrong's Case*, 7 Ct. of Cl. 280. But see *Mills v. U. S.*, 6 Ct. of Cl. 253.

By complying with the conditions required by the President's proclamation of pardon and amnesty, one was purged of offense against the *United States*. *U. S. v. Padelford*, 9 Wall. (U. S.) 531; *U. S. v. Klein*, 13 Wall. (U. S.) 128; *Backer v. U. S.*, 7 Ct. of Cl. 551; *Hamilton v. U. S.*, 7 Ct. of Cl. 444; *Hardee v. U. S.*, 8 Ct. of Cl. 316.

An alien resident is within the terms of the proclamation of pardon. *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Green v. U. S.*, 8 Ct. of Cl. 412.

1. See *supra*, this title, *Supreme Court*.

2. *Moore v. U. S.*, 91 U. S. 270.

Only such statement of facts can be taken to the supreme court as may be necessary to enable it to decide upon the propositions of law ruled upon by the court of claims, and that must be presented in the shape of facts found by the court, and not by the evidence in detail. *De Groot v. U. S.*, 5 Wall. (U. S.) 419.

Where the court of claims sends to the supreme court as part of its findings all the evidence on which a fact essential to judgment was found, and it appears that there was no legal evidence to establish such fact, the supreme court must reverse. *U. S. v. Clark*, 96 U. S. 37.

Where the rights of parties stand on circumstantial facts alone, and there is doubt as to the legal effect of such facts, the court on request should so frame its findings as to put the question in the record. *U. S. v. Pugh*, 99 U. S. 265. *Ex parte* affidavits are not admissible as depositions in the court of claims. *Main v. U. S.*, 21 Ct. of Cl. 54. See *Chickasaw Nation v. U. S.*, 19 Ct. of Cl. 133.

3. U. S. R. S., § 1074.

As to proof of loyalty, see *supra*, this title, *Pleading*.

The court of claims has power to call on any department for any information or paper it may deem necessary, and to use all recorded and printed reports made by the committee of Congress; but the head of any department may refuse to comply with a call for information or papers, if he considers a compliance prejudicial to public interest. U. S. R. S., § 1076.

The court cannot authorize the taking of testimony when it appears that the facts set forth in the claimant's petition do not furnish ground for relief. U. S. R. S., § 1077.

When testimony is taken, it should be in the county where the witness resides, if it can be conveniently done. U. S. R. S., § 108f.

The court may issue subpoenas to require the attendance of witnesses in order to be examined before persons commissioned to take testimony, and such subpoenas shall have the same force as if issued from a district court. U. S. R. S., § 1082.

In taking testimony, the *United States* shall be given an opportunity to file interrogatories or by attorney to examine witnesses; and like opportunity shall be given the claimant, in cases where testimony is taken on behalf of the *United States*. U. S. R. S., § 1083.

The commissioner taking testimony to be used before the court, shall administer an oath or affirmation to the witnesses brought before him. U. S. R. S., § 1084.

Witnesses may not be excluded on

judgments are framed to suit the exigencies of the special cases, and have such force and effect as the law gives to them in each instance.<sup>1</sup>

A final judgment in this court is a bar to a suit in any other court.<sup>2</sup>

Interest on judgments is recoverable.<sup>3</sup>

**10. Limitations.**—Every claim against the *United States* cognizable in the court of claims will be barred, unless a petition setting forth a statement thereof is filed in the court or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives within six years after the claim first accrued,<sup>4</sup> and Congress alone can take a claim against the *United States* out of the

account of color or interest. U. S. R. S., §§ 1078, 1079; 22 St. at L. 485; 24 St. at L. 505.

The court may, at the instance of the attorney appearing for the *United States*, make an order directing a claimant to appear and be examined on oath before any commissioner of the court on matters touching the claim. U. S. R. S., § 1080.

As to proof in Indian depredation claim cases, see 26 St. at L. 851.

1. As to the enforcement of judgments in cases transmitted by departments, see *supra*, this title, *Jurisdiction—Provisions of the Revised Statutes*.

Judgments generally are satisfied by payment out of any general appropriation made by law, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the court and signed by the chief justice, or, in his absence, by the presiding justice. Such payment operates as a full discharge. U. S. R. S., §§ 1090, 1092.

2. U. S. R. S., § 1093; 26 St. at L. 851.

But such a judgment must be on the merits. *Spicer v. U. S.*, 5 Ct. of Cl. 34.

If upon the merits, even though erroneous, it is still a bar. *Osborne v. U. S.*, 19 Wall. (U. S.) 577.

3. U. S. R. S., § 1090; 26 St. at L. 504; *U. S. v. McKee*, 91 U. S. 442; *Hobbs v. U. S.*, 19 Ct. of Cl. 220; *Russell v. U. S.*, 15 Ct. of Cl. 168.

4. U. S. R. S., § 1069, provided that the claims of married women first accrued during marriage, and of infants first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased;

but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

As to the effect of the above section, see *Webb v. U. S.*, 20 Ct. of Cl. 493.

The act of March 3d, 1883 (22 St. at L. 485), excludes by express terms the jurisdiction of the court of claims over claims barred by any law of the *United States*. *Battelle v. U. S.*, 21 Ct. of Cl. 250; *Blair v. U. S.*, 21 Ct. of Cl. 253. See also *U. S. v. Taylor*, 104 U. S. 221; and *U. S. v. Lawton*, 110 U. S. 146, approving *U. S. v. Taylor*, 104 U. S. 221.

The general rule that limitation does not operate by its own force as a bar, but is a defense which must be set up, to be availed of, does not apply to suits in the court of claims against the government. *Finn v. U. S.*, 123 U. S. 227; *Kendall v. U. S.*, 14 Ct. of Cl. 122.

While the petition may be amended after more than six years have elapsed, yet the petition must be filed within the six years after the claim first accrued. *Griffin v. U. S.*, 13 Ct. of Cl. 257; *Devlin v. U. S.*, 12 Ct. of Cl. 266; *Cross' Case*, 4 Ct. of Cl. 271; *Carter v. U. S.*, 6 Ct. of Cl. 31; *Bulkely v. U. S.*, 8 Ct. of Cl. 517; *Campbell v. U. S.*, 13 Ct. of Cl. 108.

The Statute of Limitations does not apply to claims for the proceeds of captured or abandoned property, as those claims have a separate period of limitation. *Tibbetts v. U. S.*, 1 Ct. of Cl. 169.

The exceptions named in the statute are the only ones that can be allowed. *Cross' Case*, 4 Ct. of Cl. 271.

If the claimant dies before the claim accrues, the statute will not begin to run until an administrator is appointed. *Fulenweider v. U. S.*, 9 Ct. of Cl. 403.



Statute of Limitations by enacting a law to that effect.<sup>1</sup> While a claim sent to the court of claims by the head of an executive department, under section 1063 of the Revised Statutes, is not subject to the statute,<sup>2</sup> the reference of a claim by one of the Houses of Congress is so subject.<sup>3</sup> Under the Act of 1887, the time of limitation for suits against the *United States* is six years.<sup>4</sup>

**11. Miscellaneous Matters of Practice.**—The court may establish rules of practice.<sup>5</sup> No person shall file or prosecute in the court of claims, or in the supreme court on appeal, any claims in respect to which he or his assignee has pending in any other court any suit or process against any person who, at the time the cause of action alleged in suit or process arose, was acting in respect to it under authority of the *United States*.<sup>6</sup>

Citizens or subjects of any government which accords the citizens of the *United States* the right to prosecute claims against such government in its courts, are accorded a like privilege in prosecuting claims against the *United States* in the court of claims.<sup>7</sup>

When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial,<sup>8</sup> and the court may, on motion on

But its operation is not suspended at his death if the claim accrued in his lifetime. *Sierra v. U. S.*, 9 Ct. of Cl. 224.

A part payment of the debt, there being no presumption that it was paid on account of the debt, will not take the claim out of the statute. *U. S. v. Wilder*, 13 Wall. (U. S.) 254.

1. *Palmer v. U. S.*, 26 Ct. of Cl. 82.

2. *Winnissimmet Co. v. U. S.*, 12 Ct. of Cl. 319.

Where a claim is referred to the court under U. S. R. S., § 1063, it must appear that it was presented to the proper department within six years, or it will be barred. *Alexandria, etc., R. Co. v. U. S.*, 26 Ct. of Cl. 327.

3. *Ford v. U. S.*, 116 U. S. 213.

Where the House of Representatives sends a claim to the court of claims, and it appears that an action was brought before on the same claim and dismissed because barred by the statute, the court of claims will not entertain it, as the act under which submissions are authorized excepts claims "now barred by virtue of the provisions of any law of the *United States*" from the court's jurisdiction. *Dunbar v. U. S.*, 19 Ct. of Cl. 489.

The court of claims may entertain a claim, though the secretary of the proper department has disallowed it as stale. *Brinsmade v. U. S.*, 1 Ct. of Cl. 111.

4. 24 St. at L. 505.

5. U. S. R. S., § 1070.

6. U. S. R. S., § 1067.

7. U. S. R. S., § 1068.

The subjects of the following foreign governments are accorded such rights: *Great Britain*: *U. S. v. O'Keefe*, 11 Wall. (U. S.) 178; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147. *Switzerland*: *Lobsinger v. U. S.*, 5 Ct. of Cl. 687. *Italy*: *Fichera v. U. S.*, 9 Ct. of Cl. 254. *Prussia*: *Brown v. U. S.*, 5 Ct. of Cl. 571. *Spain*: *Molian v. U. S.*, 6 Ct. of Cl. 269. *Belgium*: *DeGivé v. U. S.*, 7 Ct. of Cl. 517. *France*: *Rothschild v. U. S.*, 6 Ct. of Cl. 204; *Dauphin v. U. S.*, 6 Ct. of Cl. 221.

This is true, although such governments deny the right by special reservation in a few cases. *U. S. v. O'Keefe*, 11 Wall. (U. S.) 178; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147.

8. U. S. R. S., § 1087.

A delay of three years is sufficient to preclude a claimant's right to a new trial. *Figh v. U. S.*, 3 Ct. of Cl. 97.

Newly discovered evidence may give the right to a new trial. *Murphy v. U. S.*, 15 Ct. of Cl. 217. But it does not if it could have been discovered by due diligence. *Bramhall v. U. S.*, 6 Ct. of Cl. 238; *Garrison v. U. S.*, 2 Ct. of Cl. 382; *Armstrong v. U. S.*, 6 Ct. of Cl. 226; *Deeson v. U. S.*, 6 Ct. of Cl. 227.

behalf of the *United States*, grant a new trial, and stay payment of judgment at any time while the claim is pending, or within two years next after final disposition of the case, upon such evidence as shall satisfy the court that fraud or wrong or injustice had been done the *United States*.<sup>1</sup>

While the court of claims cannot delegate its powers, yet it may refer cases with complicated accounts and facts to a special commissioner to state accounts, marshal assets, and adjust losses, and the judgments thus rendered are considered the result of the deliberation of the court, and not of the commissioner alone.<sup>2</sup>

**VII. COURT OF PRIVATE LAND CLAIMS—1. Authority and Organization.**—This court was established by Act of March 3d, 1891, for

An error of law which is a ground for appeal, cannot give a right to a new trial, merely because the appeal is more inconvenient. *Ealer v. U. S.*, 5 Ct. of Cl. 708. Neither will a new trial be granted because the amount involved is too small to allow an appeal. *Deeson v. U. S.*, 5 Ct. of Cl. 227.

If the court of claims has jurisdiction in a case, when it determines that a motion for a new trial was made in time, or not, its decision is not reviewable. *Young v. U. S.*, 95 U. S. 641; *U. S. v. Crussell*, 12 Wall. (U. S.) 175. *Ex parte* testimony admitted on the hearing of a motion is sufficient to warrant the granting of a new trial. *Ayers v. U. S.*, 92 U. S. 41.

A new trial may be granted after appeal. *Ex p. Russell*, 13 Wall. (U. S.) 664; *Ex p. U. S.*, 16 Wall. (U. S.) 699.

No new trial will be granted for evidence merely cumulative. *Silvey v. U. S.*, 7 Ct. of Cl. 305; *Payan v. U. S.*, 15 Ct. of Cl. 56. Nor for the court's omission to find a fact which would not control other evidence in the case. *Rhine v. U. S.*, 15 Ct. of Cl. 59. Nor because the attorney was not apprised by his client of material evidence. *Armstrong v. U. S.*, 6 Ct. of Cl. 226.

1. But until an order is made staying the payment of the judgment, it will be payable as provided by law. *U. S. R. S.*, § 1088.

"Final disposition" in this section means final determination on appeal, if an appeal is taken; if none is taken, then its final determination by the court of claims. *Ex p. Russell*, 13 Wall. (U. S.) 664.

The new trial may be granted within two years after the "final disposition," even though the court's judgment has been affirmed, and the mandate of af-

firmance filed. *Ex p. U. S.*, 16 Wall. (U. S.) 699.

The "injustice" in this section means such as is discovered after judgment rendered, and not such as results from judicial error. *Child v. U. S.*, 6 Ct. of Cl. 44.

A motion on behalf of the *United States* need not be disposed of within two years. *Bellocq v. U. S.*, 13 Ct. of Cl. 195.

A new trial will be granted for new evidence when *prima facie* sufficient. *Tait v. U. S.*, 5 Ct. of Cl. 638; *Ayers v. U. S.*, 5 Ct. of Cl. 712; *Douglas v. U. S.*, 11 Ct. of Cl. 655.

A motion for a new trial on behalf of the *United States* may be made while an appeal is pending in the supreme court; and, unless the motion is granted and a new trial ordered, that court will not dismiss the appeal because of the motion. *U. S. v. Ayers*, 9 Wall. (U. S.) 608; *U. S. v. Young*, 94 U. S. 258.

A new trial will be granted the *United States* on motion, if it appears *prima facie* that wrong has been done the government. *Douglas v. U. S.*, 11 Ct. of Cl. 655; *Tait v. U. S.*, 5 Ct. of Cl. 638; *Ayers v. U. S.*, 5 Ct. of Cl. 712.

But a new trial will not be granted to the *United States*, because certain evidence which was not considered material was not offered at the first trial. *Ford v. U. S.*, 18 Ct. of Cl. 70.

If one motion has been denied, a second motion based on the same grounds will not be considered. *Child v. U. S.*, 6 Ct. of Cl. 44.

2. Intermingled Cotton Cases, 92 U. S. 651.

A reference is permissible where several seek to recover the proceeds of property from a common fund. *Persons v. U. S.*, 10 Ct. of Cl. 502.

the settlement of disputes as to certain private titles to land claimed under Spanish or Mexican grants within the Territories of *New Mexico, Arizona, and Utah*, and the States of *Nevada, Colorado, and Wyoming*. The court by the terms of the act will cease to exist Dec. 31st, 1895.<sup>1</sup>

**2. Officers—***a. JUDGES.*—The court consists of a chief justice and four associate justices, who must be, when appointed, citizens and residents of some of the states of the *United States*. They are appointed by the President, to hold office until Dec. 31st, 1895. Any three of them constitute a quorum. Each of them has power to administer oaths and affirmations.<sup>2</sup>

*b. CLERKS.*—The court appoints a clerk and a deputy clerk.<sup>3</sup>

*c. MARSHALS.*—The court does not have a special marshal, but the duty is imposed by law upon the *United States* marshal for any district or territory in which the court is held, to serve its process and to attend court, when directed by it to do so, either in person or by deputy.<sup>4</sup>

*d. ATTORNEYS—*(1) *Of the Government.*—The President is directed and empowered to appoint, with the advice and consent of the Senate, an attorney to represent the *United States* in the court.<sup>5</sup>

(2)—*Of Private Suitors.*<sup>6</sup>

*e. OTHER OFFICERS.*—The court appoints also a stenographer and a Spanish interpreter.<sup>7</sup>

**3. Seats and Terms.**—Such sessions shall be held as shall be needful for the purposes of the organization of the court. Notice of the times and places must be given by publication in both English and Spanish in one newspaper published at the capital of the state or territory where the court is to be held, once a week for two consecutive weeks, the last of which publications shall be not less than thirty days next preceding the time of the session. Adjournments may be made from time to time without publication. The court may sit within the States of *Colorado, Wyoming, and Nevada*, and in the Territories of *New Mexico, Arizona, and Utah*.<sup>8</sup>

1. 26 St. at L. 854, §§ 18, 19. As to the method of settlement of title under these grants previous to the act, see Foster's Federal Practice (2d ed.), § 459.

2. 26 St. at L. 854, § 1, provides that the salary of each shall be \$5,000 per year, payable monthly, and that the government shall reimburse them for necessary traveling and other personal expenses while engaged in the performance of their duties.

3. 26 St. at L. 854. The duties of the clerks are specified in the Court of Private Land Claims Rule No. 1.

4. 26 St. at L. 854, § 1.

5. 26 St. at L. 854, § 1.

Court of Private Land Claims Rule No. 7, provides that the attorney for the

*United States* need not verify by oath every application or motion made by him to the court or a judge thereof.

6. Court of Private Land Claims Rule No. 1, provides that, "The clerk shall keep a roll of attorneys; any attorney who is a member of the Supreme Court of the *United States*, or any circuit court of the *United States*, or of the highest court of the state or territory in which he resides, shall, upon exhibiting his certificate of admission to the clerk, be entitled to have his name entered upon the roll of attorneys, and to appear in any cause pending before the court."

7. 26 St. at L. 854, §§ 1, 2.

8. 26 St. at L. 854, § 1.

**4. Jurisdiction.**—The jurisdiction of the court embraces the consideration of private claims to land derived from Spanish or Mexican grants, concessions, warrants or surveys, which the *United States* are bound to recognize and confirm by treaty with *Mexico*. Such lands must lie within the States of *Nevada*, *Colorado*, or *Wyoming*, or the Territories of *New Mexico*, *Arizona*, or *Utah*. It thus extends to five classes of cases:

*First.* Proceedings in regard to titles not confirmed by act of Congress at the date of the passage of the act, or otherwise finally decided and made complete and perfect.<sup>1</sup>

*Second.* Proceedings in regard to titles which were complete and perfect at the time the *United States* acquired sovereignty.<sup>2</sup>

*Third.* Proceedings brought on request of the head of the department of public justice, on the ground that the same are in his opinion required by the public interest or the rights of other claimants.<sup>3</sup>

*Fourth.* Claims under grants for the establishment of cities, towns or villages by the Spanish or Mexican government.<sup>4</sup>

*Fifth.* Proceedings against the *United States* by claimants of lands decreed to claimants, but previously sold to other persons, to recover the value of such lands.<sup>5</sup>

But the jurisdiction is subject to certain limitations: the title must have been lawfully derived from the Spanish or Mexican government; the court must not interfere with just Indian titles; it may not ordinarily confirm grants to mines of precious metals; it may not affect rights allowed by Congress; it may not affect rights between individuals; its decrees do not operate to make the *United States* liable; they merely release whatever claim it may have; nor may they confirm incomplete grants for more than eleven square leagues of land; they cannot confirm unless all the conditions of such grants have been complied with.<sup>6</sup> Acting within the above jurisdiction and limits, the court may determine all questions of title, location, extent, and boundaries.<sup>7</sup> Suits are to be brought in the state or territory where the land is situated; if no regular session is held in a state or territory, suit may be brought in such places as the rules may designate.<sup>8</sup>

Suits involving lands in *Wyoming*, *Nevada*, *Arizona*, or *Utah* may be brought at either of the places where regular terms are held.<sup>9</sup>

**5. Practice and Procedure.**—The court may issue any process necessary to the transaction of the business of the court and may adopt necessary rules and regulations.<sup>10</sup> It has the powers of a circuit court to preserve order, secure attendance of witnesses, and punish contempts.

1. 26 St. at L. 854, § 6.

2. 26 St. at L. 854, § 8.

3. 26 St. at L. 854, § 8.

4. 26 St. at L. 854, § 11.

5. 26 St. at L. 854, § 14.

6. 26 St. at L. 854, § 13.

7. 26 St. at L. 854, § 7.

8. 26 St. at L. 854, § 6.

9. On this point reference may be had to Rules of Court of Private Land Claims, Rule No. 1.

10. 26 St. at L. 854, § 1.

The judge in vacation may grant orders for taking testimony and dispose of interlocutory motions.<sup>1</sup>

Proceedings begin with a petition and correspond as nearly as may be, both as to procedure and pleading, with the equity practice of the *United States*.<sup>2</sup> For the relief granted, the form of decree and minor matters of practice, reference is had to the act and the rules of the court.

**VIII. COURTS OF THE TERRITORIES AND OF THE DISTRICT OF COLUMBIA**—(See **COURTS**, vol. 4, p. 461).—These are not strictly courts of the *United States* nor a part of the federal judicial system. The territorial courts are organized by Congress in pursuance of the power possessed by it of making all needful rules and regulations respecting the territories belonging to the *United States*.<sup>3</sup>

The supreme court of the *District of Columbia* is a special court, created to exercise certain limited jurisdiction.

The jurisdiction of these tribunals is regulated by a large number of statutes of limited application.

**UNITED STATES MARSHALS**.—See **SHERIFFS**, vol. 22, p. 564.

**UNIVERSITIES AND COLLEGES**.—(See **EDUCATION**, vol. 6, p. 158; **SCHOOLS**, vol. 21, p. 748; **TAXATION**, vol. 25, p. 165.)

I. Definition, 682.

II. Foundation and Legislative Control, 683.

III. Visitation, 685.

IV. Powers, 686.

V. Admission and Government of Students, 689.

VI. Donations and Subscriptions, 692.

1. *Government Aid*, 692.

2. *Subscriptions* (See also **SUBSCRIPTIONS**, vol. 24, p. 326), 693.

VII. Dissolution, 693.

**I. DEFINITION**.—A university is an institution of higher learning consisting of an assemblage of colleges united under one corporate organization and government, affording instruction in the arts, sciences, and the learned professions, and conferring degrees. A college is an organized assembly or collection of persons established by law, and empowered to co-operate for the performance of some special function, or for the promotion of some given object, which may be educational, political, ecclesiastical, or scientific in its character.<sup>4</sup>

1. 26 St. at L. 854, § 12; Court of Private Land Claims Rules Nos. 4, 5, 6.

2. 26 St. at L. 854, §§ 6, 7.

3. *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434; *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 545. Curtis on Jurisdiction of *United States Courts*, p. 93.

Territorial courts are not courts of the *United States* within the meaning of the Constitution of the *United States*. The state courts, and not the federal courts, will be the successors of the territorial courts on the admission of the territory to the union as a state. *Beatty v. Ross*, 1 Fla. 232.

The expression "courts of the *United States*," in the act of Congress providing that in the courts of the *United States* no witness shall be excluded, etc., because a party or interested, does not include the courts of a territory. *Good v. Martin*, 95 U. S. 90.

4. Black's L. Dict.

A college, in English law, is a civil corporation, company, or society of men, having certain privileges and endowed with certain revenues, founded by royal license. An assemblage of several of these colleges is called a "university." Black's L. Dict.

"In American law, a college is an in-

**II. FOUNDATION AND LEGISLATIVE CONTROL.**—Universities and colleges may be founded wholly by the state, in which case they are public corporations subject to the control of the legislature;<sup>1</sup> or they may be founded by private donations, aided or unaided pecuniarily by the government, when they are private corporations, over which the legislature has no control,<sup>2</sup>

stitution of learning, where youth are instructed in the higher branches. Colleges are usually incorporated and endowed, and enjoy certain privileges granted them by charter." Rap. & Law. L. Dict.

The assemblage of the cardinals at Rome is called a college. The body of presidential electors is called the electoral college, although the whole body never comes together. Bouv. L. Dict.

Where a turnpike road was authorized to be laid out from Bowdoin College, it was held that by Bowdoin College was meant, not any particular building, but the land held by the trustees on which to erect suitable buildings to accommodate the students, their instructors and governors. The word "college" is more naturally applied to the place where a collection of students is contemplated, than to the hall or other buildings intended for their accommodation. *Stanwood v. Peirce*, 7 Mass. 458.

**Medical College.**—A medical college is not embraced within the terms "literary or scientific college or university." *People v. Gunn*, 96 N. Y. 317; 6 Am. & Eng. Corp. Cas. 584.

A law treating "of the powers and duties of the trustees of colleges," was held to apply only to literary institutions, to the exclusion of schools for teaching special sciences, such as medicine. *People v. Albany Medical College*, 26 Hun (N. Y.) 348.

1. *University of Ala. v. Winston*, 5 Stew. & P. (Ala.) 25; *University of N. Car. v. Maulsby*, 8 Ired. Eq. (N. Car.) 257.

In *Head v. University of Mo.*, 47 Mo. 220, Currier, J., said: "The university is clearly a public institution, and not a private corporation. It was established by an act of the legislature, which act commits the government of the institution to a board of curators. The curators were not named in the act, but provision was made for their election by a joint vote of the Senate and House of Representatives. They were removable at the pleasure of the legislature, and had no power to appoint their successors. There are no

named grantees in the act, and consequently no parties either to accept or reject the grant. In a word, the state entered into no compact with private parties. The state established an institution of its own, and provided for its control and government, through its own agents and appointees. The act creating the institution, declares that a 'university is hereby instituted in this state, the government whereof shall be vested in a board of curators.' The university is then declared a 'corporation and body politic' and invested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea of private parties and private rights. No such parties or rights were concerned in the institution of the University of the State of *Missouri*. By establishing the university the state created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes—a state university." See also *Weary v. State University*, 42 Iowa 335.

As the *California* constitution declared that the University of *California* should continue in the form and character prescribed by certain acts then in force, any attempt by the legislature to transfer the control of the Hastings Law School after its joinder with the university, is unconstitutional. *People v. Kewen*, 69 Cal. 215.

**In England.**—Blackstone classes the English universities as lay corporations, and the colleges in and out of the universities as eleemosynary corporations. 1 Bl. Com. 471.

2. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *State v. Adams*, 44 Mo. 570; *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642.

Because a corporation is established for purposes of general charity, or for

save under the reservations in the charter or act of incorporation.<sup>1</sup>

education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518. In this celebrated case, it was held that the charter granted to Dartmouth College by the British crown was a contract, and that an act of the *New Hampshire* legislature altering the charter in a material respect without the consent of the corporation, was an impairment of the obligation of such contract and unconstitutional.

The legislature has not an unrestrained power of legislation over charters granted to corporations for educational purposes, though a part of the funds be granted by a city or local public. *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642.

That a college, merely because it receives a charter from the government, though founded by private benefactors, is not thereby constituted a public corporation controlled by the government, is clear beyond any reasonable doubt. *Allen v. McKeen*, 1 Sumn. (U. S.) 276; *Phillips v. Bury*, 1 Ld. Raym. 8.

In *Atty. Gen'l v. Pearce*, 2 Atk. 87, Lord Hardwicke said: "The charter of the Crown cannot make a charity more or less public, but only more permanent than it would otherwise be."

"An eleemosynary corporation is a private charity constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations." 2 Kent's Com. (2d ed.), § 23, p. 274.

The Normal University of Normal, Illinois, is a private eleemosynary corporation, not a state institution, and a legislative act directing it to reconvey a portion of its land to the original grantor, is unconstitutional, as taking the property without due process of law. *State Education Board v. Bakewell*, 122 Ill. 339.

But where a person bequeathed his estate for the education of poor children, it was held dedicated to public uses, and that a society incorporated for the purpose of administering the fund was a public corporation, whose charter might be revoked and whose

property and franchises might be transferred by the state to other agents. *Wambersie v. Orange Humane Soc.*, 84 Va. 446; 28 Am. & Eng. Corp. Cas. 83. And see *Prince Williams School Board v. Stuart*, 80 Va. 69.

If a medical society, pursuant to an act of the legislature, organizes a medical college and maintains it some years, an act of the legislature separately incorporating the college and vesting in it, without the consent of the medical society, all the rights, powers, and duties formerly vested in the medical society, is unconstitutional. *State v. Heyward*, 3 Rich. (S. Car.) 389.

In *California*, an application for an order to incorporate a college, under the Act of 1850, will not be allowed when the subscriptions of real estate fail to define the boundaries of the land to be given. *In re California College*, 1 Cal. 329.

**Adoption of College as State Institution.**—Where the legislature, in providing for a college, the leading object of which should be to teach such branches of learning as are related to agriculture and the mechanical arts, in compliance with the provisions of the act of Congress granting public lands to the several states and territories which might provide colleges for that purpose, passed July 2d, 1862, designated and adopted a corporation formed for literary purposes to hold property in trust for a religious association, as the agricultural college of the state, in which all students should be instructed in accordance with the requirements of said act of Congress, and the corporation accepted such designation and adoption, in pursuance of a requirement of the legislature, it was held that the relations of the corporation to the religious association were not thereby changed; that the state, in consequence of such act and acceptance, was not authorized to alter the charter of the corporation, or interfere with the right of the association to manage property conveyed to the former, as provided in the charter; and that the designation of the corporation as such college neither created a new entity nor changed its character as trustee of the property held by it for the benefit of the association. *Liggett v. Ladd*, 17 Oregon 89; 27 Am. & Eng. Corp. Cas. 406.

1. See *Matter of McGraw*, 111 N. Y. 66.

**III. VISITATION.**—Every founder of an eleemosynary corporation, and his heirs, have a right to visit and inquire into and correct all the irregularities and abuses which may arise in the course of the administration of its funds, unless he has conferred the power upon some other person. The power of visitation is not a power to revoke the gift, to change its uses, or to divest the rights of the parties entitled to the bounty. It is a mere power to control and arrest abuses and to enforce a due observance of the statutes of the charity.<sup>1</sup> But the founder may part with his visitatorial power and vest it in other persons, and when he does so, they exclusively succeed to his authority. No technical terms are necessary to assign over or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by the particular persons under the charter, it can be inferred that the founder meant to part with it in their favor, and he may divide it

Charters may be altered, modified, or amended in all cases where the power to do so is reserved in the charter or in some antecedent general law, and a provision in a charter that it shall not be altered in any other manner than by act of the legislature, is equivalent to an express reservation to the state to make any alterations in the charter which the legislature may deem expedient. *Pennsylvania College Cases*, 13 Wall. (U. S.) 190.

An act amending the charter of a college, of which the state was an equal joint owner, by providing that the number of trustees be increased, and that the majority of them consist of certain state officers, whereas the majority had previously been elected by the private stockholders, is not an interference with contractual, vested, or constitutional rights of the private stockholders; and the fact that the charter, as originally granted, was amended by an act making the state an equal joint owner, and providing that four of the eleven trustees be state officers, and that seven be elected by the stockholders, does not prevent a subsequent amendment changing the number of trustees and providing that the majority of them consist of certain state officers, the legislative right to amend or repeal the charter having been reserved in the general law under which the college was incorporated. *Jackson v. Walsh*, 75 Md. 304; 37 Am. & Eng. Corp. Cas. 51.

**Legislative Power to Consolidate Colleges.**—The legislature may, where power to alter a charter has been reserved or the institutions consent, consolidate two colleges into one cor-

poration, and this power is not changed, varied, or modified by contracts for scholarships made with the trustees of one of the colleges, prior to the consolidation. *Pennsylvania College Cases*, 13 Wall. (U. S.) 190.

1. *Allen v. McKeen*, 1 Sumn. (U. S.) 276.

In *Phillips v. Bury*, 2 T. R. 352, Lord Holt said: "The visitatorial power is an appointment of law, and ariseth from the property which the founder had in the lands assigned to support the charity, and as he is the author of the charity, the law gives him and his heirs a visitatorial power; that is, an authority to inspect the accounts and to regulate the behavior of the members that partake of the charity, for it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves (for divisions and contests would arise amongst them about the dividend of the charity), to pursue the intent and design of him who bestowed it upon them."

The visitors' power may be limited by the founder, but though limited to certain times, they may visit whenever called in. *St. John's College v. Todington*, 1 Burr. 158; 1 Ld. Ken. 441.

The power to interpret statutes constitutes a visitor, and it is incidental to the office to hear complaints. *Rex v. Ely*, 1 W. Bl. 85. They are not tied up to any particular forms, nor are they liable to prohibition for irregularity in their proceedings or informality in their acts, but only for want of jurisdiction. *Ely v. Bentley*, 2 Bro. P. C. 220. They need not hear parol evidence on



among various persons or subject it to any modification or control by the fundamental statutes of the foundation.<sup>1</sup> If the visitor refuses to receive and hear an appeal, the court will grant a *mandamus* to compel him,<sup>2</sup> but it cannot afterward review his decision.<sup>3</sup>

**IV. POWERS.**—While a university or college can do no act for which authority is not specifically or impliedly granted in its charter or act of corporation,<sup>4</sup> yet it may, under the general powers conferred upon it, make by-laws and regulations for the

an appeal. It is sufficient if they receive the grounds of the appeal, and the answer to it, in writing. *Rex v. Ely*, 2 T. R. 290.

Where a university is incorporated by charter under a visitor, all matters relating to the internal management of the *domus*, as to passing resolutions, holding examinations, conferring degrees, etc., are under the exclusive control of the visitor, a court of law or equity having only jurisdiction with respect to matters out of the house, as between the university and third persons. *Thomson v. University of London*, 33 L. J. Ch. 625; 10 Jur. N. S. 669; 10 L. T. N. S. 403; 12 W. R. 733.

In *Bracken v. William and Mary College*, 1 Call (Va.) 161; 3 Call (Va.) 573, it was held that a statute of the visitor's discontinuing a grammar school connected with the college, and putting down the professorship connected therewith, and abolishing the salary of the professor, was valid.

1. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 675; *Philips v. Bury*, 2 T. R. 352.

The visitatorial power is a hereditary founded in property and valuable in the intendment of law; and where it is vested in trustees, there can be no amotion of them from their corporate capacity, and no disturbance or interference with the just exercise of their authority, unless it is reserved by the statutes of the foundation or charter. As managers, however, of the revenues of the charity, they are not beyond control, but are subject to the general superintendence of a court of chancery for any abuse of their trust in the management of it. *Allen v. McKeen*, 1 Sumn. (U. S.) 276.

In *England*, if no special visitor is appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by the great seal. *Rex v. St. Catherine's Hall*, 4 T. R. 233.

The appointment of a visitor may be collected from the general tenor of the statutes. *St. Johns College v. Todington*, 1 Burr. 158; 1 Ld. Ken. 441.

Visitatorial power may be delegated generally or specially. *Rex v. Ely*, 1 W. Bl. 85.

**Visitors—Removal.**—The medical college of *Virginia* is a public corporation. Visitatorial authority is vested in the state, and is to be exercised by the legislature. The governor has power to fill vacancies in the board of visitors, by virtue of provisions of an act of the assembly, but he cannot remove members of the board. *Lewis v. Whittle*, 77 Va. 415; 5 Am. & Eng. Corp. Cas. 271.

2. *Rex v. Ely*, 5 T. R. 475. And see *Rex v. Worcester*, 4 M. & S. 415.

But where it is doubtful who is the visitor of a college, the court will not grant a *mandamus*. *Rex v. Ely*, 1 Wils. 266; 1 W. Bl. 52. See also *Reg. v. Hertford College*, 3 Q. B. Div. 693; 47 L. J. Q. B. 649; 39 L. T. 18; 27 W. R. 347.

3. *Ex p. Buller*, 1 Jur. N. S. 709.

4. A college founded and established by the regents of the university in a particular place, has not the power to establish a school as a branch of such college, and to appoint professors to take charge of the same in a place different from that in which the college is located. *People v. Geneva College*, 5 Wend. (N. Y.) 211.

In *Geneva College Medical Inst. v. Patterson*, 1 Den. (N. Y.) 61, it was held that the charter of Columbia College did not give the president of the college authority to erect a medical school as a body corporate, though the chancellor of the English universities had the power, and the charter of Columbia said the college was to have all the rights, powers, and privileges of the English universities.

If the charter of a university provides that one-third of its stock be expended for grounds and buildings, the

proper government of the institution.<sup>1</sup> So under its general and implied powers it may receive grants of real and personal property.<sup>2</sup>

balance to be kept as a permanent fund, and the interest to be used to maintain, sustain, and support it, and requires that the interest on the stock shall be paid solely in tuition at the usual rates of tuition therein, the institution has no authority to distribute its revenues amongst its shareholders, but it has authority to make its tuition free. *White v. Butler University*, 78 Ind. 585.

It was clearly contemplated by the founders of Hillsdale College, by its articles of association, and by the terms of the deed to it of the land occupied by the college, that it should be carried on as a unit; and no power is conferred upon the board of trustees to create separate schools or colleges. Separate departments may be organized, but they must all belong to, and be a part of the college, and the trustees have no power to convey the title to any part of said land to any person or institution for the purpose of carrying on a separate school. *Hillsdale College v. Rideout*, 82 Mich. 94.

The board of trustees of Ohio University have power to lay out into lots the portion of the land marked as commons on the town plat of the town of Athens, and dispose thereof for the benefit of the university. *Crippen v. Ohio University*, 12 Ohio 97.

**Sending of Delegates to Convention.**—Under the *New York Rev. Sts.*, Geneva College is not entitled to send a delegate to a meeting of the State Medical Society. *People v. New York Medical Society*, 18 Wend. (N. Y.) 539.

**Salary of Professor.**—The trustees of the College of the city of New York have no right to pass a resolution directing that a professor's salary be continued for six months after his death and be paid to his widow, and such claim is properly rejected by the auditor. *People v. Jackson*, 85 N. Y. 541, reversing 23 Hun (N. Y.) 568.

Under the *Nebraska* law of 1879, salaries of the officers and professors of the State University for the years 1879, 1880, are payable out of the general fund. *State v. Liedtke*, 9 Neb. 469.

1. Proper heating and lighting of the college halls being necessary for the accomplishment of the purposes of the institution, the board of regents may, under the general authority conferred upon them, enact a by-law charging

each student in attendance his proportionate share of the expense therefor. *State v. Wisconsin University*, 54 Wis. 159.

Regulations adopted by persons in charge of an educational institution are analogous to by-laws enacted by municipal and other corporations, and both will be annulled by the courts when found to be unauthorized, against common right, or palpably unreasonable. *Ang. & Ames on Corp.*, § 357; *Dill. Mun. Corp.* (3d ed.), § 369; *People v. Medical Soc.*, 24 Barb. (N. Y.) 570; *People v. Medical Soc.*, 32 N. Y. 187; *State v. White*, 82 Ind. 278; 42 Am. Rep. 496.

A college has no right to adopt by-laws injuriously affecting the rights of others under prior contracts, by annexing conditions not contained in the contracts. *Illinois, etc., College v. Cooper*, 25 Ill. 133.

**Regulations as to Admission.**—For regulations governing the admission of students, see *infra*, this title, *Admission and Government of Students*.

2. As a body corporate, a university or college may, through its board of trustees, and within the limits prescribed by its charter, receive such grants of real or personal property as may from time to time be given for the purpose of enabling it to carry out the objects of its incorporation. *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642; *Auburn Theological Seminary v. Cole*, 18 Barb. (N. Y.) 361.

A limitation on the power to hold property is a limitation on the power to take, for a corporation may only take what it can hold, and heirs and next of kin of a testator who attempts to give property to a university in excess of the limitation, may assert the invalidity of the gift, and the question is not affected by the fact that subsequent to the death of the testator the limitation on the power of the university to take was removed by the legislature. *Matter of McGraw*, 111 N. Y. 66, affirming 45 Hun (N. Y.) 354.

A power to "acquire" real property includes a taking by devise. *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375.

The provisions of the *New York Rev. Stat.*, limiting the amount of property which incorporated colleges may

And, under its general and implied powers, it may confer degrees,<sup>1</sup>

take, are not restricted to colleges chartered by the regents, but apply as well to those created by special charters. *Matter of McGraw*, 111 N. Y. 66.

Where the question was the amount of property owned by Cornell University, the validity of a gift to it being disputed on the ground of its being in excess of the limitation imposed by statute, it was held that certain western lands and contracts, and endowment fund must be reckoned as part of its property, but not the college land-scrip fund held by the state, and that the value of the university grounds and buildings thereon should be estimated for the purpose only for which they were used. *McGraw v. Cornell University*, 45 Hun (N. Y.) 354.

The powers granted by the charter of the Farmers' College of *Ohio* give the right to receive a subscription to an endowment fund for which a subscriber was to receive instruction for one pupil perpetually and free of any charge for tuition therefor. *Farmers' College v. Cary*, 35 Ohio St. 648.

1. But colleges and universities have no power to confer degrees or grant diplomas unless it is expressly given by the legislature. *Case of Medical College of Philadelphia*, 3 Whart. (Pa.) 445; *People v. Geneva College*, 5 Wend. (N. Y.) 211. In delivering the opinion of the court in this last case, Savage, C. J., said: "Corporations can exercise no powers but such as are granted expressly or incidentally. The defendants are a corporation for the purpose of instructing pupils in the arts and sciences. They have power to confer degrees which are evidence of the proficiency made by their pupils; they have power, of course, to appoint tutors and professors to teach those branches of learning which will qualify pupils for receiving diplomas. These are franchises, and cannot be exercised by a corporation without legislative authority. It is not denied that an individual may instruct pupils, and may employ teachers under him, and may call them professors, and may also give a certificate or diploma. But a diploma or degree of doctor of medicine from an individual, will not give its possessor a right to practice in this state as a physician; a diploma or degree from a college does give that right. The individual who confers a degree does not profess to act by legislative authority;

the corporation does. The degree of the individual confers no privilege or immunity upon the pupil; the degree of the corporation does confer a privilege. Hence the same act, when done by an individual, may be no franchise, yet is such when done by a corporation."

A medical college organized under the *Vermont Rev. Laws*, § 3664, which provides that persons may associate together and have the powers of a corporation for the purpose of establishing and maintaining literary and scientific institutions, cannot confer the degree of M. D. No such authority is expressly given by the statute, nor is it fairly inferable therefrom. *Townsend v. Gray*, 62 Vt. 373. Powers, J., in delivering the opinion of the court in this case, said: "No express power to confer degrees can be found in the statute under which this medical college is organized, and hence the power to confer degrees must be classed as incidental to the general powers of a corporation formed for the purpose of maintaining a literary or scientific institution, if it exists at all. It would hardly do to say that literary or scientific institutions have such power upon any theory that without it they cannot answer the ends of their creation. . . . The power to confer degrees not being conferred explicitly by the statute, and not being necessary to enable a literary or scientific institution to carry forward studies of a literary or scientific character, clearly does not exist at all." And see *Case of Medical College*, 3 Whart. (Pa.) 445.

Power to confer degrees cannot be given in a charter granted a college by a *Pennsylvania* court of common pleas. *In re Duquesne College Charter*, 2 Pa. Dist. Rep. 555.

Where a college is empowered to grant a degree, and the mode of making such grant or proving the same is not specially pointed out, a vote by such body that the degree be granted is an execution of the power, and a duly authenticated copy of the vote is sufficient proof of it. *Wright v. Lanckton*, 19 Pick. (Mass.) 288.

**Honorary Degrees.**—A statute providing that any person who should be graduated a doctor of medicine in B institution should be entitled to all the rights and privileges granted to the medical graduates of Harvard College,

and sue and be sued.<sup>1</sup> It cannot change its location where it has accepted contributions on the condition that it should be permanently located at a specified place, and an injunction will lie to restrain it;<sup>2</sup> but it may, with the consent of the legislature, change its name.<sup>3</sup> In the absence of a special contract, it acquires no right to appropriate the result of the literary labors of one of its professors while in its employ.<sup>4</sup>

**V. ADMISSION AND GOVERNMENT OF STUDENTS.**—The right of admission cannot be enforced when there is not sufficient room in the university, and may be postponed until the applicant has made suitable proficiency in the preliminary studies; but it is a right which the trustees are not authorized to materially abridge and which they cannot, as an abstract proposition, rightfully deny.<sup>5</sup> The trustees may absolutely prohibit any connection between Greek letter fraternities and the university, and prohibit the attendance of students upon the meetings of such fraternities or other secret college societies, or from having any active connection with them so long as the students remain under the control of the university; but they cannot make membership in such societies a disqualification for admission as a student.<sup>6</sup> Where one has

does not apply to one who has received only the honorary degree of doctor of medicine without having been educated at the institution. *Wright v. Lanckton*, 19 Pick. (Mass.) 288.

1. The trustees may sue by their corporate title without setting out their individual names. *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324.

In a suit by a university which has, with the assent of the legislature, changed its name, it is sufficient, in alleging the change, to aver that it was made by a vote of the directors within the time limited by the act, without stating the names of the directors, the number of votes cast, etc. *Hazelett v. Butler University*, 84 Ind. 230.

Where two colleges have been consolidated into one corporation by a valid act of the legislature, neither of the original corporations can thereafter sue for any cause of action. *Pennsylvania College Case*, 13 Wall. (U. S.) 190.

2. **Injunction to Prevent Removal.**—Those who contribute to a fund on condition that a literary and theological seminary shall be located permanently at a specified place, and in consideration thereof, and which is accordingly located there permanently, have a right to apply to the supreme court for an injunction to prevent an illegal and unauthorized removal of the seminary to another place. *Hascall v. Madison University*, 8 Barb. (N. Y.) 174.

**Location.**—If a location of a state college is fixed by the constitution, the location can be changed only by an amendment of the constitution. *State Institutions*, 9 Colo. 626.

3. **Change of Name.**—An act which allows a university to change its name by a vote of its trustees in a limited time, is not unconstitutional as amending the charter, creating a new corporation, or being a local or special law. *Hazelett v. Butler University*, 84 Ind. 230.

4. **Literary Work of a Professor.**—An observatory or college cannot, unless special agreement is made, acquire the right to appropriate the results of literary labors, as an author, of a professor during his employment, although he uses the facilities afforded him by the college. *Peters v. Borst* (Supreme Ct.), 9 N. Y. Supp. 789.

5. *State v. White*, 82 Ind. 285; 42 Am. Rep. 496; *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405; *Foltz v. Hoge*, 54 Cal. 28. In this last case it was held that it was the intention of the *California Act* of March 14th, 1878, creating the *Hastings Law School* in the University of *California*, that the law school should affiliate with and be governed by the laws applicable to the university, and that an applicant for admission to the law school could not be rejected solely on the ground that she was a woman.

6. *State v. White*, 82 Ind. 278; 42

paid the tuition fees and received a certificate entitling him to instruction, it cannot be refused,<sup>1</sup> and it has been held that a state

Am. Rep. 496. In this case a student had been refused admission to Purdue University unless he took the following pledge: "I do solemnly promise that I will disconnect myself as an active member of the Sigma Chi Fraternity during my connection with Purdue University." Niblack, J., in delivering the opinion of the court, said: "The possession of this great power over a student after he has entered the university does not justify the imposition of either degrading or extraordinary terms as a condition of admission into it. Nor does it justify anything which may be construed as an invidious discrimination against an applicant on account of his previous membership in any one of the Greek fraternities, conceding their character, objects and aims to be what they were averred to be in the complaint. . . . The pledge tendered by President White to Hawley carried with it the implication that membership in the Sigma Chi Fraternity might properly be treated as a disqualification for admission as a student in the university, a doctrine wholly inadmissible in its application to Purdue University, or to any of the other public schools or colleges of the state. If mere membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student in a public school, then membership in any other secret or similar society may be converted into a like disqualification, and in this way discriminations might be made against large classes of the inhabitants of the state, in utter disregard of the fundamental ideas upon which our entire educational system is based. Membership in an inherently immoral society or fraternity might perhaps be urged against the admissibility of a student, upon the ground that such relation to such a society or fraternity tended to establish a want of moral character or moral fitness in the applicant, and in that view the allegations of the complaint as to the character, objects and aims of the Sigma Chi society and other kindred Greek fraternities became material and ought not to have been struck out. Our conclusion is that so much of regulation No. 3, adopted by the faculty, as may be construed to impose disabilities on persons already

members of the Greek fraternities, and as requires a written pledge as a condition of admission, is both *ultra vires* and palpably unreasonable, and hence inoperative and void, and that the pledge tendered to Hawley was one which the faculty had no legal right to demand as a condition of his admission." It will be seen that the court draws a distinction between the right to expel a student for disobedience of the rules of the institution after he has entered, and the refusal of admission, unless he pledges obedience to those rules, regarding which Wood, J., in a dissenting opinion, says: "The proposition is put forward, seemingly as pivotal, that the admission of students is one thing, and the government of them after admission is quite another thing, and on the strength of this it is said that the authorities in relation to the government and control of persons after they have been admitted have no direct application to the question involved in the case. As applicable to the case in the record, the distinction seems to me to be unsubstantial and immaterial. If the moment a student has passed the portal of the institution he is bound to obey a prescribed rule of the college, he may, in all reason, be required, before he is permitted to enter, to promise obedience. The final remedy for disobedience is expulsion, and, if there may be an expulsion for disobeying, there may be exclusion for refusing to promise compliance with a proper regulation. . . . If the faculty, in their wisdom or as a result of their experience, have determined that an express promise exacted of all alike is a more efficient means of securing good order and good behavior, the courts cannot safely, or with propriety, undertake to review their decision."

In *People v. Wheaton College*, 40 Ill. 186, it was held that the rule of an incorporated college forbidding its students joining any secret society, is not unreasonable, and that a student might be expelled for joining a secret society in violation of such rule.

1. If a student has paid his tuition fee and received a certificate which entitles him to all the privileges of the course of study, his right to demand instruction is not restricted to the term at which he entered. A demand for

having the right to send a limited number of free students to a university, may send them to any department of the university.<sup>1</sup>

Students may be required to attend religious exercises,<sup>2</sup> and a student who, between the time of his final examination and the day of conferring decrees, raises a disturbance, may be either refused his degree or expelled.<sup>3</sup>

In many of the states statutes have been enacted providing that credit shall not be given to students under age without the consent of their parents or guardians.<sup>4</sup>

instruction, if made within a reasonable time, is sufficient. *Iron City Commercial College v. Kerr*, 3 Brew. (Pa.) 196.

**Scholarships.**—A certificate of permanent scholarship issued by the trustees of a college, under the provisions of its charter and by-laws, by which the holder, in consideration of money paid, becomes entitled to the tuition of one pupil *in perpetuo*, is a valid and binding contract conferring upon the holder the right to send any fit person within his option to the college as a pupil to be educated, subject to the usual regulations of the institution, free of tuition, and the refusal of the corporation to permit the holder of the certificate the benefit thereof by denying him the right to appoint a pupil is a breach of the contract, for which damages may be recovered. *Howard College v. Turner*, 71 Ala. 429.

The contract created by the purchase of a perpetual scholarship cannot be impaired by a by-law annexing conditions not contained in the contract. *Illinois, etc., College v. Cooper*, 25 Ill. 133.

Under the statute authorizing the selection of scholars for scholarships in Cornell University from the public schools of the state, normal schools are not included, and students in them are not eligible. *People v. Crissey*, 45 Hun (N. Y.) 19.

1. *McDonald v. Hagins*, 7 Blackf. (Ind.) 525. In this case it was held that the right of each county in the state to send two students to the Indiana University, to be instructed free of tuition, included the right to free tuition in the law department, as well as in the other departments of the institution.

2. A rule of a university requiring all students, not especially excused, to attend religious exercises, is not in conflict with the constitutional provision that no person shall be required to at-

tend or support any ministry or place of worship against his wishes. *North v. University of Illinois*, 137 Ill. 206.

3. In *People v. New York Law School*, 68 Hun (N. Y.) 118, Follett, J., said: "That there should be some power vested in the faculties of schools and colleges to repress disorderly conduct will be conceded by all. It cannot be a student, having passed all examinations necessary for degree, can, before graduation, excite disturbance, and threaten injury to the school or college, without being amenable to some punishment. No course would seem open except to forthwith expel him or refuse his degree. . . . To hold that dissatisfied students in the colleges and schools of this state can review the discretion of faculties in cases when the facts justify the exercise of discretion, would be most unwise. We see no reason why the right to discipline a student is not as great between the final examination and the graduation as before, and if we can control the action of the faculty in this case (it was an appeal from an order of the special term granting peremptory *mandamus* against the college faculty commanding them to grant the relator his degree), why may we not be called upon to supervise it in the case of expulsion or suspension of students during their college course?"

But a college, after specifying in its circular the fees and qualifications necessary to entitle a student to a degree, cannot, after he has complied with such terms, arbitrarily refuse him his examination and degree. *People v. Bellevue Hospital Medical College* (Supreme Ct.), 38 N. Y. St. Rep. 418.

4. In *Massachusetts*, such a statute was held to be constitutional, but it was decided that no penalty was incurred by the tradesman if the college faculty had failed to make rules regarding the giving of credit to students. *Soper v. Harvard College*, 1 Pick. (Mass.) 177; 11 Am. Dec. 159. To the same effect

**VI. DONATIONS AND SUBSCRIPTIONS—1. Government Aid.**—The state may aid universities and colleges by appropriations of public money,<sup>1</sup> grants of public land,<sup>2</sup> or by exempting its property from taxation,<sup>3</sup> and an act directing the personal estate remaining unclaimed in the hands of an executor or administrator for seven

was *Morse v. State*, 6 Conn. 9, where it was decided that if the person had been examined and admitted to the lectures at Yale, he was a "student of Yale College," though he had not been "matriculated."

1. *Maryland Agricultural College v. Keating*, 58 Md. 580.

The legislature may direct the levy and collection of a certain tax for the benefit of the state university, and the university is entitled to all moneys collected under the levy. *People v. Auditor Gen'l*, 19 Mich. 13.

2. If an act of Congress donates land for the endowment of a university, and the state accepts it upon the condition of the grant, the fund can only be controlled by the action of the political department of the government. *State v. Vicksburg, etc.*, R. Co., 51 Miss. 366.

The Act of Congress March 26th, 1804, making provision for the disposal of public lands in the *Indiana Territory*, conferred no right on the trustees of Vincennes University to the township of land preserved by that act for the use of a seminary of learning. *State v. Vincennes University*, 2 Ind. 293.

The state is not restricted to one college in the use of money received from the sale of public lands appropriated by Act of Congress, August 30th, 1890, to the various states for the more complete endowment and maintenance of colleges for the benefit of agricultural and mechanical arts, established in accordance with the Act of Congress, July 2d, 1864, of which Sections 4 and 5 provide for at least one college in each state. It is for the legislature to determine to whom the fund shall be paid, and the treasurer and receiver general have no right to pay it out until directed to do so by the state. *Massachusetts Agricultural College v. Marden*, 156 Mass. 150.

By an act incorporating the Ohio State University, the trustees were required to have the public lands with which they were intrusted for the benefit of the institution, appraised by three freeholders, and were authorized to lease the lands for ninety-nine years, renewable forever, reserving the rents

of six per cent. per annum. *McVey v. Ohio University*, 11 Ohio 134.

Under an act of Congress donating public lands to several states and territories, which may provide colleges for the benefit of agricultural and mechanical arts, and the *New York* statute accepting the same, the state, as trustee, is not liable to insure the beneficiary under the acts (*Cornell University*) five per cent. on the amount of the trust fund arising from the sale of the lands or the land-scrip irrespective of the rate which the state is enabled to receive by investing the bonds of a character named in both the state and federal legislation, but such sum only as is actually received as interest, where it has been unable to invest in bonds at par bearing five per cent. *People v. Davenport*, 117 N. Y. 549.

The acts of the legislature of *Alabama*, 1821, 1822, providing for a sale of the university lands, imposed an absolute forfeiture of the lands as a penalty for failing to make punctual payment of the purchase-money; and it was held that the title of a purchaser of such lands was purely equitable, and that the fee simple remained in the trustees of the university until the whole purchase-money was paid; so that a failure to discharge the installments at the time due, created an absolute forfeiture and vested the whole title immediately in the trustees and discharged the vendee's bonds. *University of Alabama v. Winston*, 5 Stew. & P. (Ala.) 17.

3. *Harvard College v. Kettell*, 16 Mass. 204. And see *TAXATION*, vol. 25, p. 165.

Under the colonial law of 1650, providing that all lands, tenements, or revenues of Harvard College not exceeding in value five hundred pounds per annum should be exempt from taxation, it was held that the lands acquired by the college before their income amounted to five hundred pounds would never be liable to taxation so long as they were owned by the college, and that they were equally exempt from taxation in the hands of the lessee. *Hardy v. Waltham*, 7 Pick. (Mass.) 108.

years, to be paid over to the literary fund, has been held constitutional.<sup>1</sup>

**2. Subscriptions**—(See also SUBSCRIPTIONS, vol. 24, p. 326).—Subscriptions to the funds of universities and colleges are valid obligations upon which an action may be maintained.<sup>2</sup>

**VII. DISSOLUTION.**—A literary corporation may be dissolved by

1. *University of North Carolina v. Maultsby*, 8 *Ired. Eq. (N. Car.)* 257. In this case it was held that the University of North Carolina is a public institution, a body politic, founded by the state on the public funds, and for a general public charity; and that an administrator is an officer appointed by the state in the exercise of a political trust to take charge of dead men's estates; and that getting his office and the possession of the assets from public authority, he must execute the office and account for and deposit the property under the direction of the law. It was, therefore, held to be competent for the legislature to enact that an administrator should, after a reasonable time, pay an unclaimed surplus of the estate, either to the university or other person charged by law with the keeping of the same, for the benefit of creditors and next of kin; it merely changing the fund from one agency of the state to another without changing the trust.

But the provisions of the *North Carolina Act of 1874-1875*, ch. 236, enacting "that all dividends heretofore declared, or which shall hereafter be declared, by any company, corporation or association, whether chartered or not, which shall not be recovered or claimed by suit by the parties entitled thereto for five years after the same were or shall be declared," shall be paid by the corporations or companies to the trustees of the university, are unconstitutional and not warranted by art. 9, § 6, of the state constitution. *University v. North Carolina R. Co.*, 76 *N. Car.* 103; 22 *Am. Rep.* 671.

2. *Farmers' College v. McMicken*, 2 *Disney (Ohio)* 495; *Farmers' College v. Cary*, 35 *Ohio St.* 648; *Ladies' Collegiate Institute v. French*, 16 *Gray (Mass.)* 196; *Farmington Academy v. Allen*, 14 *Mass.* 172; 7 *Am. Dec.* 201. But see *Phillips Limerick Academy v. Davis*, 11 *Mass.* 113; 6 *Am. Dec.* 162; *Bridgewater Academy v. Gilbert*, 2 *Pick. (Mass.)* 579; 13 *Am. Dec.* 457.

The implied promise of the promisee to hold and appropriate the funds sub-

scribed, in conformity with the terms and objects of the subscription, is a sufficient legal consideration for the promise of the subscriber. *Ladies' Collegiate Institute v. French*, 16 *Gray (Mass.)* 196.

A gratuitous subscription to pay certain money to a particular stated fund, to be raised for the endowment of certain new professorships of a college, becomes a fixed legal obligation as soon as the college has performed its undertaking, and raised a required amount of reliable subscriptions. Such subscription is a promise to the college, to do an act if the college will perform a prescribed duty on its part, and if accepted, the contract is complete. *Farmers' College v. McMicken*, 2 *Disney (Ohio)* 495.

Where the subscription is upon condition that the college shall remain in the town where it is then located, and in case of removal the subscription shall become void and the money be refunded, and that the college shall within one year accept the subscription, and by vote order the subscription paper entered upon its records, and the conditions are complied with, the promise is founded upon a legal consideration and is binding on the subscriber. *Williams College v. Danforth*, 12 *Pick. (Mass.)* 541.

**Promissory Note—Consideration.**—An agreement by the agent of the trustees of a college that the college "will hold its doors open upon all moral subjects," is a sufficient consideration for a promissory note given to the trustees. *Hammond v. Shepard*, 40 *How. Pr. (N. Y. Supreme Ct.)* 452.

Where a subscription to the fund was made after the incorporation of the body who were its trustees, and afterward a promissory note was given, purporting to be for value received, payable to the same party, and referring expressly to the subscription and purposes of it as the consideration of the note, and those purposes were in process of execution, the note was held to be founded on a sufficient consideration and binding on the promisor.



either the forfeiture,<sup>1</sup> or voluntary surrender of its franchise.<sup>2</sup> The power to decide upon the advisability of a voluntary dissolution rests with the president and trustees.<sup>3</sup>

**UNKNOWN.**—See note 4.

**UNLAWFUL ASSEMBLY.**—(See *AFFRAY*, vol. 1, p. 315; *RIOT*, vol. 21, p. 408; *ROUT*, vol. 21, p. 436.)

An unlawful assembly is a disturbance of the peace by three or more persons who assemble together with an intention to do an unlawful act which, if done, would make them rioters.<sup>5</sup>

*Amherst Academy v. Cows*, 6 Pick. (Mass.) 427; 17 Am. Dec. 387.

1. Where the charter of a college provided that it should have a course in agriculture, but the general course should be controlled by the trustees, it was held that the collegiate franchise was not forfeited by the partial decline of the agricultural department because the students refused to take that course, when it appeared that there was a professor of the department assisted by competent instructors. *State v. Farmers' College*, 32 Ohio St. 487.

*Quo warranto* lies to forfeit a college charter, when it appears that for a long time the college has not performed any of its functions for which it was incorporated, and its property is exempt from taxation under the constitution, which was in force when it was chartered, but would not be under a subsequently adopted constitution. *Edgar Collegiate Institute v. People*, 142 Ill. 363.

2. Where the act of incorporation of a college provides no method by which it may be reincorporated or dissolved, it may dissolve itself by a voluntary surrender of its franchise. *People v. College of California*, 38 Cal. 166. It was held in this case that upon the dissolution of the college, its property, after payment of its debts, vested in the state.

**By Act of the Legislature.**—Neither subsequent legislation nor the *Alabama* Constitution of 1868 dissolves the corporation created by the *Alabama* Act of 1820, called the "Trustees of the University of Alabama." *University of Ala. v. Moody*, 62 Ala. 389.

3. In *People v. College of Cal.*, 38 Cal. 166, Crockett, J., said: "It was and is for the president and trustees to decide whether the public interest will be subserved by dissolving the corporation and diverting its property, after the payment of its debts, to the support

of a new and kindred institution, to be established under more auspicious circumstances and with a more liberal endowment. It would be an extraordinary *casus omissus* in the law if the managers of a literary institution without a sufficient endowment to render it effective, were compelled against their convictions and judgments to maintain it in its feeble, sickly condition, when by a surrender of its franchise and devoting its property in aid of a new institution of learning, a great public good might be accomplished."

4. **Contents Unknown.**—As to the words, "contents unknown," describing goods in a bill of lading, see *BILL OF LADING*, vol. 2, p. 227.

5. 4 Bl. Com. 146; Hawk. P. C., ch. 65, § 9.

If persons assemble together for a purpose which, if executed, would make them rioters, but, having assembled, do nothing, and separate without carrying their purpose into execution, it is nevertheless an unlawful assembly. *Rex v. Birt*, 5 C. & P. 154; 24 E. C. L. 252.

Unlawful assemblies, routs, and riots are three allied disturbances of the public peace. If the assembly moves forward toward the execution of its unlawful design, it is a rout. An actual execution of the design is a riot. Hawk. P. C., ch. 65, § 9. The statutes of some of the states, *e. g.*, *Maine* and *Wisconsin*, attempt to maintain the common-law distinction between unlawful assemblies, routs and riots. In *Bonneville v. State*, 53 Wis. 680, it was held, however, that a complaint under the *Wisconsin* Rev. St., § 4511, was not bad in omitting to specify the particular unlawful act intended by the assembly, though, at common law, such omission probably would have been fatal. See 2 Arch. Crim. Pl. 590, and note; *Reg. v. Gulston*, 2 Ld. Raym. 1210; *Reg. v. Soley*, 2 Salk. 594.

Under the *Texas* statute governing

this offense (Pen. Code, art. 279), it was held in *McGehee v. State*, 23 Tex. App. 330, that a conviction might be had under an indictment charging an unlawful assembly with force and arms for the purpose of intimidating a railway conductor from running a train. And see, on the general subject, and as illustrating the distinction between an unlawful assembly and a riot, *Rex v. Blisset*, 1 Mod. 13; *Rex v. Cox*, 4 C. & P. 538; 19 E. C. L. 516; *State v. Stalcup*, 1 Ired. (N. Car.) 30.

Any assembly of persons attended with circumstances calculated to excite alarm, is an unlawful assembly. *Reg. v. Neale*, 9 C. & P. 431; 38 E. C. L. 176. Any assembly of a great number of persons which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm and consternation, is generally criminal and unlawful, and all parties joining in such assembly, disregarding its probable effect and the alarm and consternation that are likely to ensue, and all who give countenance and support to it, are criminal parties. *Rex v. Hunt*, 1 Russ. C. & M. 388. And see *Rex v. Hunt*, 3 B. & Ald. 566.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood, is an unlawful assembly. And in viewing the question the jury should take into consideration the hour at which the parties met, and the language used by the persons assembled and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. *Reg. v. Vincent*, 9 C. & P. 91; 38 E. C. L. 48.

But where parties assembled for a lawful purpose and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it, it was held that they could not be convicted of an unlawful assembly. *Beatty v. Gillbanks*, 9 Q. B. Div. 308. In this case the appellants were members of the Salvation Army, who assembled for the purpose of

forming a parade and holding a public meeting, with the knowledge that there was an organized band of persons who would seek to dispute the passage of the "Army" through the streets, and that a disturbance of the peace would probably result. Field, J., in delivering the opinion in this case, said: "The charge against them is, that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the queen. Before they can be convicted it must be shown that this offense has been committed. There is no doubt that they, and with them others, assembled together in great numbers; but such an assembly, to be unlawful, must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such as, on several previous occasions, had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants, knowing when they assembled together that such consequences would again arise, are liable to this charge. Now, I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequences of acts of the appellants, they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them. . . . What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this,—that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of the justices, whether the facts stated in the case constituted the offense charged in the information must, therefore, be answered in the negative." And see *Reg. v. Clarkson*, 66 L. T. N. S. 297.

Persons assembling to obstruct offi-

UNLAWFULLY.—See note.<sup>1</sup>

cers of the law, are guilty of an unlawful assembly, whether a riot takes place or not. *Reg. v. McNaughten*, 14 Cox. C. C. 576.

A magistrate is not justified in forcibly dispersing a meeting, merely upon the ground that he believes, and has reasonable and probable cause to believe, that it is held with an unlawful intent. Unless the meeting be itself unlawful, the plea justifying the assault, upon the ground that it was committed by a magistrate in the dispersion of a meeting, must either allege as a fact that the meeting was unlawful, or state facts from which its unlawfulness can be inferred. *O'Kelly v. Harvey*, L. R., 10 Ir. 285.

In *People v. Most*, 128 N. Y. 108, *affirming* 8 N. Y. Supp. 625, the defendant, Herr Most, was indicted for participating in an unlawful assembly in violation of section 451 of the *New York Penal Code*, which provides that whenever three or more persons, being assembled, attempt or threaten any act tending toward a breach of the peace, or any injury to person or property, or any unlawful act, such assembly is unlawful and every person participating therein is guilty of a misdemeanor. The meeting in question took place the day before the hanging of the Chicago anarchists, and to protest against their execution; the defendant in his speech denounced the government and officers of the law and the judges concerned in the trial, advised his hearers to arm and be ready for the revolution "not far distant," and declared that they would avenge the blood of their comrades, and that the governor of *Illinois* would not be spared in the general destruction. He referred to the "police blood-hounds" and exclaimed, "God help them if they are found at our socials." The audience exhibited, by their cheers and appearance, warm approval of these sentiments, and when the speaker said the day of revolution was not far distant, one of them said excitedly, "Why not to-night, for we are ready and prepared?" It was held that the evidence was sufficient to sustain the verdict convicting the defendant, under the statute.

1. In *Indictment*.—In an indictment, the term "unlawfully" has been held not equivalent to "willfully," *State v. Hussey*, 60 Me. 410; *Rex v. Davis*, 1

Leach 556; *Rex v. Reader*, 4 C. & P. 244; 19 E. C. L. 367; nor to "knowingly." See *KNOWING*, vol. 12, p. 522.

Where an offense must be "unlawfully" committed, to charge that it was "willfully" committed, omitting the term "unlawfully," is fatal. *Reg. v. Fife*, 17 Ont. 710.

**Feloniously.**—The term "feloniously," in an indictment, has been held equivalent to "unlawfully." See *CRIMINAL PROCEDURE*, vol. 4, p. 752; *INDICTMENT*, vol. 10, p. 598.

**Unlawfully and Maliciously.**—In *State v. Massey*, 97 N. Car. 465, the words "unlawfully and maliciously," in an indictment, were held not equivalent to the statutory words "wantonly and willfully." The court, by Merrimon, J., said: "The term 'unlawfully' implies that an act is done or not done, as the law allows or requires; but the term 'wantonly' implies turpitude—that the act done is of willful, wicked purpose. The term 'willfully' implies that the act is done knowingly and of stubborn purpose, but not of malice."

**Unlawful Purposes and Acts of a Corporation.**—The word "unlawful," as applied to the purposes and acts of a corporation, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do—or, in other words, such acts, powers, and contracts as are *ultra vires*. *People v. Chicago Gas Trust Co.*, 130 Ill. 269. See also *ULTRA VIRES*, vol. 27, p. 351.

**Unlawfully, Illegally, Wrongfully.**—The term is synonymous with "illegal," see *ILLEGAL*, vol. 9, p. 879; and "wrongful," when used with reference to a cause of action for negligence. *Wells v. Sibley* (Supreme Ct.), 9 N. Y. Supp. 344; *Dickinson v. New York*, 92 N. Y. 584. But in a statute prescribing the remedy to obtain possession of personal property unlawfully obtained, the term "wrongfully" has been held not to be synonymous with "unlawfully." *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183. See also *Howard County v. Armstrong*, 91 Ind. 528; *Durham v. Montgomery County*, 95 Ind. 182; *Henry County v. Murphy*, 100 Ind. 570. But see *INDICTMENT*, vol. 10, p. 547.

**UNLESS.**—See note 1.

**UNLIQUIDATED.**—See LIQUIDATE, vol. 13, p. 845; LIQUIDATED DAMAGES, vol. 13, p. 847.

**UNLOAD.**—See LOAD, vol. 13, p. 973.

**UNMARRIED.**—This term frequently occurs in deeds of trust and wills, and has been the subject of judicial construction. Its primary meaning is, never having been married.<sup>3</sup> But the term is a word of flexible meaning, and "slight circumstances, no doubt, will be sufficient to give the word its other meaning," of "not having a husband, or wife, at the time in question."<sup>3</sup>

**UNOCCUPIED.**—(See also OCCUPY, vol. 17, p. 33).—See note 4.

**UNPAID.**—See note 5.

**Unlawfully Inflicting Grievous Bodily Harm.**—In construing the term "unlawfully," as used in an English statute directed against a husband "unlawfully inflicting grievous bodily harm upon his wife," the question arose whether "unlawfully" was to be given the wide general meaning which the term has when applied to acts which, if done by co-conspirators, are indictable. Stevens, J., said: "Unlawfully is used exceptionally in a wide general sense as regards conspiracy; but its ordinary import is an act which is forbidden by some defined law, and does not embrace that which is merely immoral." It was held that an act which would give a right to a judicial separation would fall within "unlawfully." *Reg. v. Clarence*, 22 Q. B. Div. 23. See CRIMINAL CONSPIRACY, vol. 4, p. 598.

1. The word "unless," in a clause in a marine policy, such as "free from average unless general," has the same meaning as "except." *Wilson v. Smith*, 3 Burr. 1556; *Price v. Insurance Co.*, 57 L. J. Q. B. 459. See also MARINE INSURANCE, vol. 14, p. 402; GENERAL AVERAGE, vol. 8, p. 1293.

So, in a deed, "unless" has the same meaning as "except" in creating a condition precedent. *In re Dickinson*, 51 L. J. Ch. 736.

3. *Clarke v. Colls*, 9 H. L. Cas. 601; *Dalrymple v. Hall*, 50 L. J. Ch. 302; 16 Ch. Div. 715; *Blundell v. DeFalbe*, 57 L. J. Ch. 576; 58 L. T. 621; *Heywood v. Heywood*, 30 L. J. Ch. 155; 29 Beav. 9; *In re Sergeant*, 54 L. J. Ch. 159; 26 Ch. Div. 575; *Norris v. Barber*, W. N. (73) 180; *Re Thistlethwayte's Trust*, 24 L. J. Ch. 712.

When a legacy is given to a daughter, who at the date of the will has

never been married, and the gift is conditional upon the legatee being "unmarried" at a given time, the word "unmarried" may properly be construed "a spinster," and not "a widow." *Williams on Executors* 1102, citing *Re Saunders*, 3 K. & J. 156.

A gift to an "unmarried" person does not mean that he is to remain unmarried. *Jubber v. Jubber*, 9 Sim. 503; *Hall v. Robertson*, 23 L. J. Ch. 241; 4 De G. & M. 781; *Williams on Executors* 1282.

"So long as she continues unmarried" is not equivalent to "during widowhood," and a divorced woman, if remaining unmarried, continues entitled. *Knox v. Wells*, W. N. (83) 58.

3. *Clarke v. Colls*, 9 H. L. Cas. 601; *Pratt v. Mathew*, 25 L. J. Ch. 409, 686; 22 Beav. 328; 8 De G. M. & G. 522; 27 L. T. 74, 267; *Mitchell v. Colls*, 29 L. J. Ch. 403; *Johns*, 674; *Day v. Barnard*, 30 L. J. Ch. 220; 1 Dr. & Sm. 351; *In re Sanders' Trusts*, L. R., 1 Eq. 675.

4. **In Tax Cases.**—As used in a statute regulating taxes, the term "unoccupied" has been held equivalent to "untenanted." *State v. Reinhardt*, 31 N. J. L. 218. It applies to land having no visible occupant, *State v. Hoffman*, 30 N. J. L. 346; and not to land occupied by the servant of the owner. *State v. Reinhardt*, 31 N. J. L. 218.

**In Fire Insurance Policies.**—See FIRE INSURANCE, vol. 7, p. 1037; OCCUPY, vol. 17, p. 33; VACANCY.

5. **"Unpaid" Equivalent to "Due"**—**Warrant of Attorney.**—A warrant of attorney to confess judgment upon a note for "such an amount as may appear to be unpaid thereon," was held only to authorize a confession of judgment for such amount as was actually

**UNREASONABLE.**—See note 1.

**UNREASONABLE SEARCHES AND SEIZURES.**—See SEARCHES AND SEIZURES, vol. 21, p. 955.

**UNSEATED.**—See SEATED, vol. 21, p. 981; TAXATION, vol. 25, p. 5.

**UNSOUND.**—See note 2.

**UNSUITABLE.**—See note 3.

**UNTIL.**—See note 4.

**UNTRUE.**—The word “untrue” *prima facie* means “inaccurate;” it does not necessarily imply willfully false.<sup>5</sup>

due upon the note. *Reid v. Southworth*, 71 Wis. 290. In construing a similar provision, *Orton, J.*, in *Sloan v. Anderson*, 57 Wis. 123, said: “The power of attorney does not authorize the confession of judgment before the note is due, or for more than is due upon it. The language, ‘for such amount as may appear to be unpaid thereon,’ does not give such authority by the necessary meaning of the word ‘unpaid,’ or by any meaning that can be forced by its context.” In *Reid v. Southworth*, 71 Wis. 290, the court said: “The word ‘unpaid’ is more commonly and properly applied to a debt due, than a debt undue.”

**Unpaid Rent.**—In a statute giving the right of distress for “rent unpaid,” by “rent unpaid is meant nothing more than arrears of rent—that is, rent behind in payment, although due.” *Weiss v. Jahn*, 37 N. J. L. 96.

1. “**Unreasonable Delay.**”—The terms “unreasonable delay,” as used with reference to the time within which a vendee might accept or refuse the goods, and refusal to accept within a “reasonable time,” have been said to be substantially alike. “Beyond a reasonable time is unreasonable delay. If the delay is not reasonable, it is unreasonable.” *Pratt v. Peck*, 70 Wis. 620. See also REASONABLE TIME, vol. 19, p. 1089.

2. **Unsound.**—See generally IMPLIED WARRANTY, vol. 10, p. 85; WARRANTY.

**Unsound as Applied to Horses.**—See HORSES, vol. 9, p. 759.

**Unsound Mind.**—See TESTAMENTARY CAPACITY, vol. 25, p. 970; INSANITY, vol. 11, p. 107.

3. **Unsuitable Means.**—As to the term “unsuitable means,” used in limiting

attempts to commit crime, see CRIMINAL LAW, vol. 4, p. 665.

4. As to whether “until” is exclusive or inclusive of the date to which it refers, see *TILL*, vol. 26, p. 2; *TIME (COMPUTATION OF)*, vol. 26, p. 3.

In the following cases the term was held inclusive of the date: *Kerr v. Jeston*, 1 Dowl. N. S. 538; *Knox v. Symmonds*, 3 Bro. C. C. 358; *Pugh v. Leeds*, Cowp. 714; *Dickens v. Wagner*, 3 Dowl. 535; *Backhouse v. Meller*, 4 H. & N. 116; *Rex v. Navestock*, Burr. S. C. 719; *Rogers v. Cherokee Iron, etc., Co.*, 70 Ga. 717; *Houghwout v. Bordonbin*, 18 N. J. Eq. 315; *Kendall v. Kingsley*, 120 Mass. 95.

In the following cases the term was held exclusive of the date: *Rogers v. Davis*, 8 Ir. L. R. 399; *Rex v. Stevens*, 5 East 250; *Newman v. Beaumont*, Owen 50; *Nichols v. Ramsel*, 2 Mod. 280; *Wicker v. Norris*, Cas. Temp. Hardw. 116; *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470; *Atkins v. Boylston F. & M. Ins. Co.*, 5 Met. (Mass.) 439; 39 Am. Dec. 692; *Webster v. French*, 12 Ill. 304; *People v. Walker*, 17 N. Y. 503; *People v. Crissey*, 91 N. Y. 631; *Corbin v. Ketcham*, 87 Ind. 139; *Ryan v. State Bank*, 10 Neb. 524.

**Until the Summer or Fall.**—An agreement to extend the time of payment “to the summer” of a given year, means until the first day of the first summer month, June; and an agreement to extend the time “until the fall,” means the first day of September. Courts take judicial notice of the seasons. *Abel v. Alexander*, 45 Ind. 523; 15 Am. Rep. 270.

5. *Fowkes v. Manchester, etc., L. Assur., etc., Assoc.*, 3 B. & S. 929; 113 E. C. L. 929. This case was with ref-

**UNUSED.**—See note 1.

**UNUSUAL.**—See **USUAL**.

**UNWILLING.**—See note 2.

**UP.**—See note 3.

**UPON.**—(See also **ON**, vol. 17, p. 183).—The word “upon” is interchangeable with **on**. See note 4.

**US.**—See note 5.

erence to the answers of an applicant for insurance; and in view of other circumstances it was held that the answers must be designedly false to avoid the policy. See also **FALSE**, vol. 7, p. 661; **INSURANCE**, vol. 11, p. 301.

1. In a *New Jersey* act providing for proceedings when a public highway should be unused for five years, “unused” was held to signify “abandoned” by the public. *Freeholders v. Pennsylvania R. Co.*, 45 N. J. L. 85. See also **ABANDONMENT**, vol. 1, p. 1; **HIGHWAYS**, vol. 9, p. 362.

2. In *Duddell v. Simpson*, 2 Ch. 102, Turner, L. J., in referring to the earlier cases on the ordinary English clause in conditions of sale, enabling a vendor to rescind the contract if he should be “unable or unwilling” to answer the purchaser’s requirements, said: “These cases have settled, and, I think, very wisely settled, that the word ‘unwilling,’ in a condition of sale of this description, is not to be considered as giving an arbitrary power to the vendor to annul the contract.” But though that passage was cited to *Bacon*, V. C., in *Re Dames*, 27 Ch. Div. 177, he held that the word “unwilling” was as potent as the word “unable;” that nobody was entitled to ask why he was unwilling; if he refused to comply with the requisition, that was enough. *In re Dames*, 29 Ch. Div. 626; *In re Terry*, 32 Ch. Div. 14. And the result seems to be that though “unwilling” means “reasonably unwilling,” and does not justify a vendor in capriciously translating it into “I will not,” yet in rescinding the contract he is not bound to give his reason for his unwillingness to complete it, and the *onus* of proving his caprice or *mala fides* is on the purchaser. *In re Glenton*, 53 L. T. 434; *In re Starr-Bowkett Bldg. Soc.*, 42 Ch. Div. 375; *Woolcott v. Peggie*, 15 App. Cas. 42.

3. **Bring Up.**—See **BRING**, vol. 2, p. 566.

**Lying Up.**—See **LIEN**, vol. 13, p. 627.

4. **Upon in the Sense of Over.**—As to “upon” in the sense of “over,” as applied to a grant of rights in streets to railroads, see **OVER**, vol. 17, p. 294. The term does not confine the road to the level grade of the street. In a statute authorizing a railroad company to construct its railroad across, along, or upon any stream of water, watercourse, street, highway, etc., it was held that the word “upon” did not necessarily mean upon the common grade of the street; but that by the statute the company was authorized to lay its road along any street at or above or below the common level of the existing or changed surface of the street. It was said, however, that the statute did not authorize the occupancy by a railroad for its exclusive use of the entire street or of such considerable portion of it as would substantially prevent the use of it by the general public. *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1.

**Upon Equivalent to When.**—In a contract where money is payable in installments, and it is agreed that a deed shall be given “upon” the payment of the whole amount of the purchase-money, the word “upon” is equivalent to “when.” *Adams v. Williams*, 2 W. & S. (Pa.) 227.

**Improvement Upon Land.**—The breaking of land with a plough is not an improvement “upon” land, such as will entitle the person doing the breaking to a mechanic’s lien therefor. *Brown v. Wyman*, 56 Iowa 452.

5. A warrant of attorney given by two persons, authorizing an attorney to appear to an action to be brought “against us,” and confess judgment “against us,” will not authorize the confession and entry of a judgment against one of them, even though the other be dead at the time judgment is entered. *Hunt v. Chamberlin*, 8 N. J. L. 336.

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**I. DEFINITION**—1. **The Words Not Technically Synonymous.**—The words “usages” and “customs” are generally used synonymously, both in legal writings and in popular language. It will be found, however, in making a systematic study of the law relating to “usages” and “customs,” that they cannot be used as entirely correlative terms. “Custom,” for example, means “usage” in the expression “custom of the trade;” but “usage” does not mean “custom” in the expression “custom of gavelkind.”

2. **The Meanings Stated.**—A custom is said to be such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter to which it relates. It is a law established by long usage. Usage, on the other hand, is an established method of dealing adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force because people make contracts in reference to it.<sup>1</sup>

1. Bouv. Law Dict., p. 463; Black's Law Dict., p. 312. A usage or practice of the people, which by common adoption and acquiescence, and of long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. A law, not written, established by long usage and the consent of our ancestors. See Bracton, fol. 2. If it be universal, it is common law; if particular to this or that place, it is then properly custom. 3 Salk. 112. Similarly in Burrill's Law Dict., Anderson's Law Dict., and Abbott's Law Dict.

In *Wilcox v. Wood*, 9 Wend. (N. Y.) 349, it was said: “The distinction between a usage of trade and a common-law custom, has not always been observed. A custom is something which has, by its universality and antiquity, acquired the force and effect of a law, in a particular place or country, in respect to the subject-matter to which it

relates, and is ordinarily taken notice of without proof.” *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211. “Custom is that length of usage which has become law. It is a usage which has acquired the force of law. *Hursh v. North*, 40 Pa. St. 241. A general custom is the common law itself, or a part of it.” *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407.

The Century Dictionary defines the word as follows: “The settled habits of a community such as are, and have been, for an indefinite time past, generally recognized in it as the standards of what is just and right; ancient and general usage having the force of law. Some writers use the word without qualification as meaning only general customs—that is, such as are prevalent throughout the nation—and some as meaning only local or particular customs, such as obtain only in a particular class, vocation, or place. In modern use, custom is more appropri-

3. "Custom" in the Sense of Law.—In a succeeding paragraph reference is made to custom as a source of law; as an example, the custom of merchants has become the law merchant; what was at one time custom has become law; the custom of allowing days of grace has become established as a law. It is therefore obviously improper to use the word custom when referring to something that has ceased to be a custom. Whenever a custom rises to the dignity of a law it should no longer be called a custom.<sup>1</sup>

4. Confusion of Ideas.—The use of the word in several notable instances has given rise to much confusion of thought. As an example, by an immemorial practice in the county of Kent, *England*, all the sons succeed to their father's inheritance; whereas in other parts of *England* only the eldest son thus succeeds. This

ate to immemorial habitudes, either general or characteristic of a particular district and having legal force, and usage to the habitudes of a particular vocation or trade."

**Distinguished from Prescription.**—In 2 Greenleaf on Evidence (15th ed.), § 248, it is said: "Custom is unwritten law, established by common consent and uniform practice from time immemorial; and it is local, having respect to the inhabitants of a particular place or district. It differs from prescription in this: that prescription is a personal right, belonging to one or a few persons, by particular designation, as, for example, the owners of a certain parcel of land. The term usage, in its broadest sense, includes them both; but is ordinarily applied to trade; designating the habits, modes and course of dealing, which are generally observed, either in any particular branch of trade, or in all mercantile transactions."

1. In Clarke's *Brown on Usages and Customs*, this improper use of the word is noticed. In speaking of the custom of merchants, it is said in Section 13: "So far as it has been judicially ascertained and established, so far as it has become the acknowledged law of the land, it has, it seems to us, ceased to deserve the name of custom, just as much as gavelkind or borough-English. . . . The usages of particular trades, when not restricted to some particular limits, but extended to the realm at large, cannot with propriety be considered as customs in the technical sense of that term. A usage of immemorial observance, which has received judicial sanction, becomes part of the general law of *England*. These seem to us to be undeserving of the appellation customs.

Custom seems to us to be applicable to the law before it has been recognized as law."

In *Harris v. Carson*, 7 Leigh (Va.) 632; 30 Am. Dec. 510, it was said: "In *England*, where they have particular customs, the custom of the county in which the land lies is as much the law of that county, as the common law is the law of the other parts of the country, where they have no such particular custom. The particular custom prevents the application of the common law to the county or district in which the custom prevails, by showing that the common law, as to this subject, never had any existence in that county or district."

In *Scales v. Key*, 11 Ad. & El. 819; 39 E. C. L. 240, it was held that a custom, proved to have existed from time immemorial till 1689, must be taken to exist still, if there is no further evidence proving or disproving its existence. "There are three ways in which the custom might be gotten rid of: First, by act of Parliament. Secondly, according to the constitution of the city of London, by act of the common council. Thirdly, if there were acts shown to have been done since 1689, sometimes according to the custom, and sometimes contrary to it, that would be evidence for a jury that the custom had not existed down to the present period. That has not been shown here; and the custom is not to be destroyed because there are no instances of the practice since 1689."

So in *Hammerton v. Honey*, 24 W. R. 603, it was said that as a custom is a local law, it cannot be gotten rid of except by statute; but long continued non-usage is strong evidence of the custom never having existed.

practice in Kent is known as the custom of gavelkind,<sup>1</sup> but it has long since ceased to be a mere custom ; it has become the law of Kent. It is recognized as a law by itself because it is different from, and contrary to, the general law of *England*. Hence in this case, it may be stated that a custom may be contrary to the general law ; and, in so far as the word custom refers to the custom of gavelkind, the statement is correct, because while it is a valid custom it is contrary to the general law. But, as we will observe in a succeeding paragraph, customs that are contrary to the general law are void.<sup>2</sup> A custom, as of gavelkind, is contrary to the general law and is valid ; but a custom, as of agents or of vendors, contrary to the general law, is on that account void. There thus appear to be contradictory rules,<sup>3</sup> but the contradiction arises only because we use the word custom, in the first instance, in the sense of the law of Kent, and, in the second instance, to mean a business mode of dealing or usage. We must therefore decide in which sense we shall use the word, and then use it only in that sense, if we are to keep clear of confusion.

In *Green v. Reg.*, L. R., 1 App. Cas. 513, it was held that as a rule, existing customs or rights are not to be taken away by mere general words in an act of parliament. "But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the act is a private act of Parliament, and though the particular custom may have been confirmed, years before, by a verdict in a court of law."

1. 1 Bl. Com., pp. 66, 67.

2. See *infra*, this title, *A Usage Must Not Be Contrary to Law*.

3. The failure to distinguish between these two uses of the word has caused Mr. Lawson, in his work on *Usages and Customs*, § 225 *et seq.*, much difficulty in reconciling the decisions upon the subject ; and indeed they cannot be reconciled if the different meanings are not regarded. Mr. Lawson says in section 225: "It was no objection to a common-law custom that it was contrary to the common law of the land ; otherwise the customs of gavelkind or borough-English, which are directly opposed to the law of descent ; the custom of Kent, which is inconsistent with the law of escheats, and many other customs in conflict with common-law rules or maxims, could not have been recognized. In general, too, evidence of a usage of trade is not inadmissible because it is contrary to the principles of law gov-

erning such cases ; for it is obvious that if proof of a usage could be rejected because it established something different from the law, no custom would ever be proved, because if it were not different, it would be a part of the law." And in section 226: "This being so plain, it is somewhat startling to find a large number of cases in the reports in which the principle is broadly laid down that a usage or custom in opposition to an established rule of law is void and of no effect. In *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141 ; 35 Am. Dec. 363, Wilde, J., said : 'Now, it seems to me very clear that no particular usage opposed to the established principles of law can be sustained.' In *Warren v. Franklin Ins. Co.*, 104 Mass. 518, Chapman, C. J., said : 'This being the rule of law as to damages, the custom of a particular port could not vary it.' In *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385, Bosworth, J., said : 'No usage can exist or be proved by which the liabilities of parties to a written contract will be greater or less than the settled law of the state has adjudged them to be.' In *Schieffelin v. Harvey*, Anth. N. P. (N. Y.) 76, Thompson, J., said : 'The established principles of law cannot be controlled by custom.' In *Minnesota Cent. R. Co. v. Morgan*, 52 Barb. (N. Y.) 217, Miller, J., said : 'No custom can be established which contravenes a well-settled principle of law.' In *Raisin v. Clark*, 41 Md. 158 ; 20 Am. Rep. 66,

There is also in some parts of *England* the custom of borough-English, by which the youngest son inherits the estate of his father in preference to all his elder brothers; and there are several other customs in different counties, which have become the law of those particular localities.<sup>1</sup>

**5. How the Words Are Used in this Article.**—It is thus apparent that the word "custom" is used in two senses: one as meaning a local law, as the custom of gavelkind; the other as meaning a modern usage of trade. In discussing the local laws of *England* and the local common-law customs, the word "custom" is alone appropriate, and should be exclusively used. On the other hand, when the modern methods of business dealing—usages—are

Miller, J., said: 'A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice.'

1. See *BOROUGH-ENGLISH*, vol. 2, p. 480.

In *Clements v. Scudamore*, 1 P. Wms. 63, it was held that in pleading a special custom, the nature of it must be set forth, but not so of borough-English, or any custom which the law regards. "Wherever this custom of borough-English has obtained, the youngest son is there placed in the room of the eldest, who inherits by the common law; and there is no difference in the course of descents, but that the custom prefers the youngest son, and the common law the eldest. All the lands in *England* were at first and before the conquest, in nature of gavelkind, and descended equally to all the issue. The common law takes notice of these customs of gavelkind and borough-English."

**The Pennsylvania Cases.**—The *Pennsylvania* cases distinguish more sharply than any others between the meaning of the words "custom" and "usage." In these cases "custom" is generally used as signifying a local law; very much as borough-English was a local law in *England*; a "custom" is required to possess the common-law attributes, such as that it must be so ancient "that the memory of man runneth not to the contrary." "Usages" are restricted to what may be more plainly called "modern usages of trade;" but the distinction is not always closely observed.

In *Hursh v. North*, 40 Pa. St. 241, to avoid the bar of the Statute of Limitations, the court below admitted evidence to show a usage or practice of the plaintiffs to sell on credit without such terms being expressed. The appellate court said: "It was not pretended that any general custom existed in the

country to this effect, or any special custom affecting either the particular locality or trade. A custom is something which has the force and effect of law; is law by the usage and consent of the people. But it must be uniform and universal within the sphere of its action, and so ancient 'that the memory of man runneth not to the contrary.' 1 Bl. Com. 68-74; *Newbold v. Wright*, 4 Rawle (Pa.) 212; *Rapp v. Palmer*, 3 Watts (Pa.) 179. It was nothing like that which the plaintiff's testimony tended to prove. If it had been, it will be conceded that the custom would have been the law of the contract, and both parties would have been bound by it. It was not this, however, which the testimony was offered to prove, but the practice and usage of the firm in regard to giving credit. Now, as this was not good, as a custom, according to the definitions, it did not, *ex proprio vigore*, bind."

In *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302; 39 Am. Rep. 785, which was an action for damages for injuries to property caused by water pumped from a mine, the court said of the defendant: "It could not justify its action on the ground that the customary mode of disposing of water, pumped from mines in the coal regions, was to allow it to follow into the adjacent natural water-courses, as such usage lacked the necessary age to establish a general custom, and such a custom would not only be unreasonable, but unlawful. As a general custom, it lacks the necessary age, for the beginning of deep coal mining, in the regions above named, is quite within the memory of men yet living. Wanting this, it fails in a particular essential to the establishment of such custom."

In *Jones v. Wagner*, 66 Pa. St. 430; 5 Am. Rep. 385, it was said that a usage

under consideration, we may either use the word "custom" or "usage;" for in this connection the two words are synonymous. In reading this article these distinctions should be kept in view. In the succeeding paragraphs treating of the older English law, the word "custom" is alone used. In the larger portion of the article, relating to the modern usages of trade, the words "custom" and "usage" are employed as synonymous.

**II. CUSTOMS IN THE OLDER LAW.**—Customs are said to be: *First*, general, or those which prevail throughout the whole kingdom, country, or state; and *Second*, particular, or those which prevail in a particular place or among a particular class.

**1. General Customs—The Common Law.**—Such customs are said to regulate the procedure of courts, the rights of persons under contracts, the acquisition and transfer of property, the determination of criminal acts, and many other legal rights, remedies, and obligations. Recognized and adopted by courts of justice, these customs became rules of universal application and force, and all men are conclusively presumed to know them.<sup>1</sup> The decisions of

to mine without the observance of the duty to provide support for the surface above, must have been so ancient and uniform in the region in which the property is situated, as to amount to a custom or usage capable of controlling the rule of the common law cited above, and of becoming the law itself. One element of such a custom would be, that it is so ancient "that the memory of man runneth not to the contrary." This could not be, and was hardly pretended of the locality in question.

In *Corcoran v. Chess*, 131 Pa. St. 356, the plaintiff alleged, and called witnesses to show, a custom that mason work was to be measured by the rule contended for by him. The court said: "The evidence, however, failed to prove any such custom. It was at most a mere usage of the trade, neither ancient nor general enough to acquire the force of custom. Had there been such a custom, the parties must be presumed to have known of it, and to have contracted in view of it. In other words, the law would write such custom into their contract. It is not so with a mere usage of trade, recent in its date and not general in its application. The parties cannot be presumed to have contracted upon the faith, and with knowledge, actual or constructive, on the part of the defendants, of such usage; and their acquiescence therein must be shown before they can be affected by it."

In *Ulmer v. Farnsworth*, 80 Me. 500, the court said: "It requires the citation of no authorities to show that to give a custom the force of law, among other things, it must be universal and its origin in point of time so far back 'that the memory of man runneth not to the contrary.' This custom is at best but a local one and is confined to 'a particular business or employment,' and so recent in its origin that its beginning is within the memory of some of the witnesses."

In *Nolte v. Hill*, 36 Ohio St. 186, it was said that although the terms "custom" and "usage" are frequently used as synonymous, this is a confusion liable to lead into grave error. "Custom is the thing to be proved; usage is the evidence of it. A custom when properly established has the force and effect of law as between the parties, and it is as improper to ask a witness what is the custom as it would be to ask him what is the law. The witness may testify as to what is in fact the usage, and as to all the circumstances and incidents, but it is for the court to determine as a question of law, whether such usage shall have the force and effect of a custom." And see also *Ackerman v. Shelp*, 8 N. J. L. 125; *Allen v. Stevens*, 29 N. J. L. 509; *Stevens v. Paterson*, etc., R. Co., 34 N. J. L. 532; 3 Am. Rep. 269; *Harris v. Carson*, 7 Leigh (Va.) 632; 30 Am. Dec. 510; *Dela-plane v. Crenshaw*, 15 Gratt. (Va.) 457. 1. 1 Bl. Com. 73.

judges upon these customs, together with the writings of the old authors of repute, are the evidence of the common law.<sup>1</sup>

A discussion of these general customs would be a discussion of the established principles of the common law, and would therefore be entirely beyond the scope of this article.

**2. Particular Customs**—*a.* IMPORTANCE OF AND RULES GOVERNING PARTICULAR CUSTOMS.—Nor are the particular customs of the older English law of much practical importance to us. These local customs were the outgrowth of peculiar conditions of life, especially of the feudal system of land tenure. Many of the customs related to the rights of common for the recreation of the people, the pasture of cattle, etc. Others pertained to ancient methods of business as practised by the guilds of the larger towns. But although these local customs are in themselves of no value to us, the legal rules governing them have had a direct influence upon the development of the modern law of usages, and it is therefore necessary for us briefly to consider them. They are set forth by Blackstone,<sup>2</sup> who says that to make particular customs good they must be ancient.<sup>3</sup> He says too that such customs, to be good,

1. Chiefly Glanville, Bracton, Britton, Fleta, Hengham, Littleton, Statute, Brooke, Fitzherbert, Staundford and Coke; 1 Bl. Com. 72. See Crabbe's and Reeve's Histories of Common Law.

2. 1 Bl. Com. 76, etc.

The reader will bear in mind that these rules are mentioned at this point only in connection with common-law customs, and out of respect to the usual method of discussing the subject. The rules relating to usages of trade will be found at length, *infra*.

3. A custom must be ancient; that is, it must have been used so long that the memory of man runneth not to the contrary. If it can be shown to have commenced, it is void as a custom. Of course, it must have had a beginning, but if its beginning can be discovered, then the individual who originated the custom can be ascertained, and one man will be the maker of the law, which is impossible. But if there is no evidence of its beginning, it will be presumed to have existed during the whole period of legal record. 1 Bl. Com. 76. The time "whereof the memory of man runneth not to the contrary" has been judicially determined to mean the year A. D. 1189, the beginning of the reign of King Richard the First. As America was not discovered at that time, no custom which requires immemoriality to establish it can exist here. In *Ocean Beach Asso-*

*ciation v. Brinley*, 34 N. J. Eq. 438, it is said: "The first requisite of a good custom is that it shall have been used so long that the memory of man runneth not to the contrary. For which reason no custom can prevail against an express act of Parliament, since the statute itself is a proof of a time when such custom did not exist. 1 Bl. Com. 76; Bac. Abr., tit. 'Custom,' A. Customs similar to those of gavelkind and borough-English, cannot exist here, for they cannot have the antiquity necessary to their validity." *Ackerman v. Shelp*, 8 N. J. L. 125; *Allen v. Stevens*, 29 N. J. L. 509.

In *Harris v. Carson*, 7 Leigh (Va.) 632; 30 Am. Dec. 510, it is said: "Any practice or usage, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom, because it lacks the essential ingredient of a good custom—it is not immemorial." And in *Delaplaine v. Crenshaw*, 15 Gratt. (Va.) 457, it was said: "That a custom, to displace the common law, must be immemorial, and that the time of legal memory runs back to the reign of Richard Cœur de Lion, are maxims of such ancient, universal, and familiar acceptance in the English law that it is now quite too late to controvert their correctness. It has been made the subject of regret and complaint that the time of legal memory was not

must be continued,<sup>1</sup> compulsory,<sup>2</sup> consistent with each other,<sup>3</sup> certain,<sup>4</sup> acquiesced in,<sup>5</sup> and reasonable.<sup>6</sup>

shortened by the courts of law, upon the same reason which led to the reduction of the period of limitation, yet that it remained unchanged is everywhere conceded. This court has disaffirmed the existence of any customary law in *Virginia*." For an interesting account of the origin and history of "legal memory," see the note to *Cassidy v. Stewart*, 2 M. & G. 437.

1. **A Custom Must Be Continued.**—"If a custom ceased and recommenced, its new beginning would be within the memory of man. But an interruption which is to prove valid as against a custom, must be an actual interruption of the usage, and not simply an interruption of the possession of the right." 1 Bl. Com. 77.

In *Clarke's Browne on Usages and Customs*, § 16, it is said, following *Blackstone*: "One of the common illustrations will make this clear. If the inhabitants of a parish have a customary right to water their cattle at a certain pool, a mere discontinuance of the practice for ten years would not destroy the custom, although it would add to the difficulties of proving its existence. If, however, the right be discontinued for a single day, that would prove the non-existence of any asserted custom analogous with the right."

2. **A custom must be compulsory**, otherwise it loses the imperative character of law; that is, when it is established as a custom, it must be binding upon all, and not left to the option of every man whether he will conform to it or not. A custom that all the inhabitants shall be rated toward the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd, and indeed no custom at all. 1 Bl. Com. 78; *Lawson's Usages and Customs*, § 11; *Clarke's Brown on Usages and Customs*, § 28.

3. **Customs Must Be Consistent With Each Other.**—One custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity and both established by mutual consent. If two customs are contradictory, it is evident that they cannot both have been established by mutual consent. 1 Bl. Com. 78.

The allegation of one custom is not

to be met by the allegation of another custom, inconsistent with the first, but rather by the denial of the existence of the first as a custom. *Clarke's Brown*, § 28. If one man alleges that by custom he has the right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows; for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. 1 Bl. Com. 76. The cases upon this point are *Aldred's Case*, 9 Rep. 58 b; *Kenchin v. Knight*, 1 Wils. 253; *Parkin v. Radcliffe*, 1 B. & P. 282.

4. **A Custom Must Be Certain.**—Thus, a custom that land shall descend to the most worthy of the owner's blood is void; for how shall this worth be determined? A custom to pay two pence an acre in lieu of title is good; but a custom to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. *Dane's Abr.*, ch. 26, § 5; *Millechamp v. Johnson*, Wilses 205; *Bell v. Wardell*, Wilses 202; *Steel v. Houghton*, 1 H. Bl. 51; *Rex v. Ecclesfield*, 1 B. & Ald. 360; *Lloyd v. Jones*, 12 Jur. 657; 17 L. J. C. P. 206; 6 C. B. 81; *Selby v. Robinson*, 2 T. R. 758; *Tanistry's Case*, Dav. 32; *Blewett v. Tregonning*, 3 Ad. & El. 554; 30 E. C. L. 151; *Wilkes v. Broadbent*, 1 Wils. 63; *Salisbury v. Gladstone*, 9 H. L. Cas. 692; *Wilson v. Wilses*, 7 East 121; *Clayton v. Corby*, 5 Q. B. 415; 48 E. C. L. 413; *Peppin v. Shakespear*, 6 T. R. 748; *Duberley v. Page*, 2 T. R. 391; *Valentine v. Penny*, Noy 145; *Dean of Ely v. Warren*, 2 Atk. 189; *Hayward v. Cunningham*, 1 Lev. 231; *Hayward v. Cunningham*, 1 Sid. 354; *Manchester v. Vale*, 1 Saund. 28.

5. **A Custom Must Be Acquiesced in.**—Not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed is a proof that such consent was wanting. 1 Bl. Com. 77.

6. **A Custom Must Be Reasonable.**—Or rather it must not be unreasonable; which is not always, as *Sir Edward Coke* says, to be understood of every unlearned man's reason, but of artificial and legal reason. 1 Bl. Com. 77; *Clayton v. Corby*, 5 Q. B. 415; 48 E. C.

*b. MANOR CUSTOMS—CITY OF LONDON CUSTOMS.*—In the English reports there are also found many particular customs of manors, in regard to the respective rights of landlord and tenants, rights of pasturage, etc.<sup>1</sup> Besides these there were a large number of local customs of the city of London, relating to a great variety of matters. None of these are of particular importance to the American lawyer, but from a historical standpoint some of them are interesting. This is especially so with some of the customs

L. 413; *Wilkes v. Broadbent*, 1 Wils. 63; 1 *Dane's Abr.*, ch. 26, art. 1, § 4; *Bremner v. Hull*, L. R., 1 C. P. 748; 12 *Jur. N. S.* 648; *Rex v. Gordon*, 1 B. & Ald. 524; *Hix v. Gardiner*, 1 Bulst. 195; *Hilton v. Granville*, D. & M. 614; 5 Q. B. 701; *Rogers v. Brenton*, 10 Q. B. 26; 59 E. C. L. 25; *Mounsey v. Ismay*, 1 H. & C. 729; *Fitch v. Rawlings*, 2 H. Bl. 393; *Bell v. Wardell*, Willes 202; *Race v. Ward*, 4 El. & Bl. 702; 82 E. C. L. 700; *Hall v. Nottingham*, 1 Exch. Div. 1; *Bennington v. Taylor*, 2 Lutw. R. C. 1517; *London v. Vanacre*, 12 Mod. 269; *Cocksedge v. Fanshaw*, 1 Doug. 119; *Colton v. Smith*, Cowp. 47; *Vinkestine v. Ebdon*, 12 Mod. 216; *Serjeant v. Read*, 1 Wils. 91; *Beau v. Bloom*, 3 Wils. 458; cases in *Dane's Abridg.*, ch. 36, art. 2, § 1; *Salisbury v. Gladstone*, 9 H. L. Cas. 692, an important case; *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Dean of Ely v. Warren*, 2 Atk. 189; *Hix v. Gardiner*, 1 Bulst. 195; *Drake v. Wigglesworth*, Willes 654; *Winchester v. Willies*, 11 Mod. 48; *Taylor v. Devey*, 7 Ad. & El. 409; 34 E. C. L. 131; *Rockey v. Huggins*, Cro. Car. 220; *Vaughan v. Atwood*, 1 Mod. 202.

A custom may be good, though the particular reason of it cannot be assigned. Thus, a custom in a parish that no man shall put his beasts into the common until the third day of October, would be good; and yet, it would be hard to show the reason why that day in particular is fixed upon rather than the day before or after. *Smith v. Tyson*, 1 P. & D. 307; 1 N. & P. 784; 9 Ad. & El. 408, is an instructive case upon this subject. The court of exchequer chamber held not unreasonable a custom for all victuallers to erect booths on a common, parcel of the waste of a manor, selected by the lord for holding fairs yearly, and to place posts and tables there, during a certain period of every year. *Tindal, C. J.*, said: "To give validity to a custom, which has been well described to be 'an usage which obtains the force of

law, and is in truth the binding law within a particular district, or at a particular place, of the persons and things which it concerns' (see *Le Case de Tanistry*, *Davy's Rep.* 32), it must be certain, reasonable, immemorial, and continued without interruption. Of these requisites the only one which is brought in question now is, whether the custom is reasonable or not. . . . A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, as the custom of gavelkind and borough-English, which are directly contrary to the law of descent, or the custom of Kent, which is contrary to the law of escheats; nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favor of husbandry; or to dry nets on the land of another, in favor of fishing, and for the benefit of navigation. But a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason, for it could not have had a reasonable commencement."

So in *Salisbury v. Gladstone*, 9 H. L. Cas. 692, it was said: "When it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom."

1. As an instance of the customs in regard to tithes, see *Clarke v. Clarke*, 2 Y. & C. 245, where the court decided that the reasonableness of setting out every tenth turnip instead of tenth heap of turnips for the parson, must depend upon whether, by that mode of



of the city of London, from which may be traced several branches of our present common law.<sup>1</sup>

**III. THE NATURE AND CHARACTERISTICS OF USAGES—1. Distinctions Between Usages and Technical Customs—***a.* USAGE A MODE OF DEALING.—Reference has been made to the fact that the word “custom” in its strict technical sense means a law, whereas “usage” is a mode of dealing; and that this technical meaning of the word “custom” must not be confused with its other meaning as synonymous with the word “usage.” This distinction will be made still clearer by reference to the extracts in the note.<sup>2</sup>

tithing, the parson has an opportunity of seeing that the tithe is fairly laid out.

1. The customs of the city of London are illustrated in the following cases: *Bruin v. Knott*, 12 Sim. 453; *Piper v. Chappell*, 14 M. & W. 624; *Stainton v. Jones*, 2 Selw. N. P. 1225; *Plummer v. Benthams*, 1 Burr. 248; *Blacquiére v. Hawkins*, 1 Doug. 378; *Harthop v. Hoare*, 1 Wils. 8; *Lyons v. Depass*, 3 P. & D. 177; *Laybourne v. Crisp*, 4 M. & W. 320; *Magrath v. Hardy*, 6 Scott 627; *Bulbroke v. Good-eve*, 1 W. Bl. 569; *Arnold v. Poole*, 4 M. & G. 860; *Webb v. Hurrell*, 4 C. B. 287; 56 E. C. L. 287; *Crosby v. Hetherington*, 5 Scott N. R. 637; *Bradbee v. Christ's Hospital*, 5 Scott N. R. 79; *Collyer v. Stennet*, 5 Scott N. R. 34; *Salter's Co. v. Jay*, 2 G. & D. 414; *Merchant Tailors' Co. v. Truscott*, 11 Exch. 855.

Various customs of manors are mentioned in these cases: *Gard v. Callard*, 6 M. & S. 69; *Richardson v. Capes*, 4 D. & R. 512; *Richardson v. Walker*, 4 D. & R. 498; *Cort v. Birkbeck*, 1 Doug. 218; *Brabant v. Wilson*, 35 L. J. Q. B. 49; *Hanmer v. Chance*, 11 Jur. N. S. 397; 13 W. R. 556; *Portland v. Hill*, L. R., 2 Eq. 765; 12 Jur. N. S. 286; 15 W. R. 38; *Salisbury v. Gladstone*, 9 H. L. Cas. 692; *Anglesey v. Hatherton*, 10 M. & W. 218; *Muggleton v. Barnett*, 1 H. & N. 282; 2 H. & N. 653; *Denn v. Spray*, 1 T. R. 466; *Reg. v. Hale*, 1 P. & D. 293; 9 Ad. & El. 339; 36 E. C. L. 159; *Clarkson v. Woodhouse*, 5 T. R. 412; 3 Doug. 189; *Freeman v. Phillips*, 4 M. & S. 486; *Sheppard v. Hall*, 3 B. & Ad. 433; 2 E. C. L. 110; *Wilcock v. Windsor*, 3 B. & Ad. 43; 23 E. C. L. 29; *Davidson v. MoScrop*, 2 East 56; *Rex v. Joliffe*, 3 D. & R. 240; 2 B. & C. 54; 9 E. C. L. 21.

2. In *Hammerton v. Honey*, 24 W. R. 603, *Jessell, M. R.*, said: “Now, what is a custom? A custom, as I un-

derstand it, is local common law. It is common law because it is not statute law; it is local law because it is a law of a particular place as distinguished from the general common law. Now, what is the meaning of local common law? Local common law, like general common law, is the law of the country as it existed before the time of legal memory, which is generally considered the time of Richard I. Therefore, when people allege a custom, they allege that which they call a custom as having been the law of the place before the time of legal memory.”

In *Robinson v. Mollett*, L. R., 7 H. L. 802, *Baron Cleasby* said: “These usages of trade must not be confounded with local customs or usages connected with land, or the various rights belonging to it, or with modes of election to public offices, and matters of that nature. These have the force of law independent of persons consenting to them, and they are fixed and certain and cannot be changed. But the usages of what is called the London tallow market have no legal obligation, except so far as persons expressly or impliedly consent to them.”

In *Hall v. Nottingham*, 1 Exch. Div. 1, *Cleasby, B.*, said: “I believe the proper meaning of the word ‘custom,’ as applied to a matter of this description, is something that has the effect of a local law.”

“This distinction, indeed, between the general custom of merchants, which is part of the law of the realm, and the particular usages of certain particular businesses, was not, it seems, so clearly marked in former times as it is now; thus we find *Buller, Justice*, saying, 2 T. R., p. 73, that, ‘Within the last thirty years (his lordship spoke in 1787) the commercial law of this country has taken a very different turn from what it did before. Before that period we find that, in courts of law,

*b.* USAGE NEED NOT BE ANCIENT.—A custom in its sense of law was required to be so ancient that “the memory of man runneth not to the contrary.” A usage, however, need only be old enough to be well established in the trade or place.<sup>1</sup> The

all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind; not only to rule the particular case then under consideration, but to serve as a guide for the future.” Note to *Wigglesworth v. Dallison*, 2 Smith’s Lead. Cas. 594.

1. In *Sleight v. Hartshorne*, 2 Johns. (N. Y.) 531, Chancellor Kent said: “Where the term ‘usages of trade’ is made use of, it admits of an application, either to the general usages of trade which compose the law of merchants, of universal authority among commercial men in civilized societies, and forming one of the constituent parts of the laws of this state, as the general law of the land, or to usages of local origin, or prevailing in a particular branch of trade. The former are considered in the nature of those positive laws of which every member of the community is presumed to be connasant, and which are resorted to as known and established tests of contracts in all cases arising under them. The other depends upon the usage of the persons engaged in the traffic to which they apply, the knowledge of which is not legally imposed on the community, but derives its binding force from the supposed knowledge of the persons engaged in that particular species of traffic, at the place, or in the trade in which it obtains. The latter may be proved by witnesses.”

In *Cole v. Skrainka*, 37 Mo. App. 427, it was held that a usage of trade, defining the meaning of a term or expression, need not be ancient; it is sufficient, if it has existed for such time as to establish an intention, on the part of the contracting parties, to use the expression in the sense thus defined. “In regard to the objection, that the usage was not sufficiently long continued to create a custom, it might be observed that the evidence tends to show that the usage is as old as the adoption of the eight-inch block pavement in controversy, and no usage can be older than the thing to

which it refers. This is not a question of custom by which third parties are sought to be charged but the question of the meaning of a term employed by the contracting parties. If the meaning of the term was well understood between the contracting parties, it is immaterial whether such usage was one day or one thousand years old.”

In *Rindskoff v. Barrett*, 14 Iowa 101, it was said: “Mr. Parsons says, and truly, that the word embraces very many degrees of the same meaning. One extreme is that ancient, universal and well-established custom, which is in fact, law. The other is a manner of doing a particular thing in a small neighborhood, or by a small class of men, for a few years. Whatever it is, if it falls within the reason of the rule which makes it a part of the contract, it amounts to a custom. If established, the length of its duration is not very material.”

In *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175, it is said that by the usages and customs of business is not understood to be meant such customs as, from their long continuance, have become part of the common law, but such customs and usages as are generally regarded and adopted by the persons doing business in the vicinity, and with reference to which contracts are made.

In 2 Parsons on Contracts, p. 540, it is said: “It is obvious that the word ‘custom’ is used in many senses, or rather that it embraces very many different degrees of the same meaning. By it may be understood, either that ancient and universal, and perfectly established custom, which is in fact law; or only a manner of doing some particular thing, in a small neighborhood, or by a small class of men, for a few years; or any measure of the same kind of meaning within these two extremes.” See also *Cooper v. Berry*, 21 Ga. 526; *Smith v. Rice*, 56 Ala. 417; *Wall v. East River Ins. Co.*, 3 Duer (N. Y.) 264; *Adams v. Otterback*, 15 How. (U. S.) 539; *Buford v. Tucker*, 44 Ala. 89; *Carlisle v. Wallace*, 12 Ind. 252; 72 Am. Dec. 207; *Alabama, etc., Rivers R. Co. v. Ridd*, 35 Ala. 209; *Hall v.*

only requirement for its validity in this respect is its existence long enough to be generally known, so that contracts are made in reference to it.<sup>1</sup>

**2. The Basis of Their Legal Force.**—The fundamental principle upon which the entire law of usage is based is that a usage becomes a part of the contracts of parties. It is only on this account that a usage has any legal effect. The whole theory of usages rests upon the presumption that parties, in making a contract, do so with the intention that the usages of the place or trade should be regarded as part of the contract. It is as a part of a contract that a usage is to be judged.<sup>2</sup>

Storrs, 7 Wis. 253; Newbold v. Wright, 4 Rawle (Pa.) 195.

1. In *Thompson v. Hamilton*, 12 Pick. (Mass.) 426; 23 Am. Dec. 619, it was argued that the usage was not ancient; the court said that was immaterial. The question is, whether the parties contracted with reference to it, and in this view, the fact of its being well established, so as to be generally known to persons engaged in this course of business, is of importance, but not its antiquity.

In *Sewell v. Corp.*, 1 C. & P. 392; 11 E. C. L. 432, the plaintiff, a veterinary surgeon, sued for attendance and medicines furnished to the defendant's horse. A witness was asked whether to his knowledge it was the custom to pay veterinary surgeons for attendance as well as medicines. It was objected by the defendant's counsel that this could not constitute a custom, being modern. Best, C. J., said: "They do not mean a custom whereof the memory of man runneth not to the contrary; but if there is a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage. You may cross-examine as to the extent of that usage. With respect to veterinary surgeons, I know of no law that applies to them particularly. If there is no contract, they must go on a *quantum meruit*. There is a usage for a broker to have commission. If there is a usage here, it is evidence to regulate the claim."

In *Williams v. Gilman*, 5 Me. 276, the court said: "The counsel for the defendant treated this usage among printers and booksellers as a custom, such as we find described in our law-books, and have contended that, to be valid, it must have existed for time immemorial, uninterrupted, definite, rea-

sonable, etc. We apprehend that the law of local customs is not applicable in this case. The usage relied on has nothing local in its nature; it relates to a certain class of people spread through the country, and to the peculiar business in which they are employed."

In 2 Greenl. on Ev. (15th ed.) 251, it is said that in regard to the usages of trade, it is not necessary that they should have existed immemorially; it is sufficient if they be established, known, certain, uniform, reasonable, and not contrary to law.

In *Smith v. Wright*, 1 Cai. (N. Y.) 43; 2 Am. Dec. 162, it was said that the usage has been against the allowance of average to goods placed on the deck of a vessel. "This is proved to be the case, from the testimony of several insurance brokers and merchants, of long standing among us; some of whom carry it back as far as thirty years; a period, however, too short, it is said, to establish a usage. The true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it."

2. In *Pleasants v. Pendleton*, 6 Rand. (Va.) 493; 18 Am. Dec. 726, it was said: "An established usage (says Chief Justice Gibbs, in *Lucas v. Dorrien*, 2 Com. L. Rep. 105), constitutes the common understanding of parties in their dealings; and on the foot of that common understanding, they are supposed to contract."

In *Barlow v. Lambert*, 28 Ala. 704; 55 Am. Dec. 374, it was said that customs are at most but a part and parcel of the contract and are only binding because they are a part of the contract.

In *Foley v. Mason*, 6 Md. 37, it was said that the theory of the law of usage rests upon the presumption, that in certain transactions the parties did not

intend to expressly stipulate the whole of the contract by which they designed to be bound, but that they intended to contract with reference to the known usages upon the subject, and that those usages were to be regarded as part of the contract.

In *Walker v. Barron*, 6 Minn. 508, it was held that proof of particular customs is generally allowed to aid courts and juries in arriving at the intention of parties, when they perform acts or make contracts that are susceptible of more than one meaning. It is to place the court in the position occupied by the party, and surround it with the same influence that operated or might have operated upon him when acting. "It is only because the custom is supposed to have influenced the parties who act within the sphere of its operation that it is admissible at all."

In *Schooner Reeside*, 2 Sumn. (U. S.) 567, Story, J., said: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied."

In *Linsley v. Lovely*, 26 Vt. 123, it was held that the office of a usage is strictly one of exposition, and is allowable to be given in evidence as one means of arriving at the intention of the parties; and can never be received to thwart it, when it is clearly and fully expressed.

In *Van Hoesen v. Cameron*, 54 Mich. 609, it was held that parties contracting are supposed to do so with reference to the known usages and customs which enter into and govern the subject-matter to which the contract relates, and all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs which exist.

In *Branch v. Palmer*, 65 Ga. 210, a draft was drawn, with bill of lading attached, when the cotton was shipped on the cars, and the court allowed evidence to show that such was the uni-

versal custom of the trade. "Our own code embodies the substance of the common law, as construed by our own earlier decisions on the doctrine in respect to customs of this sort, and the effect thereof upon contracts. Section 4 of the code declares, under paragraph 1, which is on the subject of 'Laws of Force in this State,' that, 'The custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became by implication a part of the contract.' So that it will be seen that the custom of a trade is admissible, not as ordinary parol evidence, but as law, entering into the contract just as any other law does. It is not dependent on the rule that parol evidence is inadmissible to vary a writing, nor inconsistent therewith, but upon the ground that the law makes the custom part of the contract, and when the custom is so universal as to become the law of the trade, it becomes by implication a part of the contract, and the contract is to be construed thereby, just the same as if it had been inserted therein."

In *McCulsky v. Klosterman*, 20 Oregon 108, it was said: "In all contracts as to the subject-matter of which known usages prevail, the parties proceed on the tacit assumption of such usages, but commonly reduce into writing the particulars of their agreement, but omit to specify those known usages which are included as of course by mutual understanding."

In *Lyon v. Culbertson*, 83 Ill. 33; 29 Am. Rep. 349, it was held that where there is a well-known usage which obtains in trade, it will be presumed that all who engage in that business, where it prevails, contract with a view to it, unless they exclude the presumption by their contract.

In *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264, it was held that a custom so long persisted in as to be known and practiced by a community, is the law of the particular business in which it exists; and the presumption arises that it is in the view of parties who contract about its subject-matter.

In *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199, it was said that if the usage had ceased at the time the contract was made, the reason of the rule as to usage fails; a contract is not ordinarily deemed to have been made with reference to an abolished usage.

This idea runs through all the cases, and will be found to be present in the extracts in the notes to every division of this article.

**3. Usage Cannot Create a Contract.**—A usage presupposes a contract to which the usage relates. The office of the usage is to show the true meaning of the parties in making their contract. It is only in connection with contracts that usages can exist. It is, therefore, held that a usage can only apply to a contract previously existing; usage cannot of itself create a contract. Usage, in other words, cannot make a contract where there is none. It cannot of itself establish a liability, or prove the existence of a contractual relation. Hence, before offering evidence of a usage, it is necessary to prove the existence of the contract to which the usage is sought to be attached; and if there is no such contract, the usage is irrelevant.<sup>1</sup>

**4. Irrelevant if Not in Minds of Parties.**—Inasmuch as a usage derives its effect from the fact that it enters into and becomes

In *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522, the court said that a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. "It does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse, or is generally disregarded."

In *Jupiter Min. Co. v. Bodie Consolidated Min. Co.*, 11 Fed. Rep. 666, it was similarly held, that to be of any validity, a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded.

1. In *Harper v. Calhoun*, 7 How. (Miss.), 203, it appeared that it was customary for the bank in that case to take assignments of stock in payment of debts; but the court held that the existence of this custom did not amount to a contract. "The custom of a bank may be proven for the purpose of interpreting a contract, but it is no evidence to establish one, when an express contract would be necessary."

In *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268, the court said that usage may be admitted to explain the intention of the parties in making a contract, but it is not to be received to establish the right, or to prove the origin of the relation, by which the parties become responsible to each other.

In *Ulmer v. Farnsworth*, 80 Me. 500,

the plaintiffs were the owners of a lime quarry in which they had a pump, used to drain their quarry from water accumulating therein. The defendant owned another quarry adjacent to the plaintiffs', there being one quarry between them. It was alleged that water accumulated in the defendant's quarry, and running through the one intervening, came upon that of the plaintiffs and was pumped up by them. It was to recover compensation for this service that this action was brought, the plaintiffs alleging that the defendant received benefit from it, as it prevented the injurious accumulation of water in his own quarry. The court said: "The plaintiffs rely upon an alleged custom or usage in that neighborhood by which, under like circumstances, the parties receiving this incidental benefit have recognized a liability to pay a certain specified sum. It is claimed that this usage of itself raises an implied promise on the part of the defendant. But usage or custom cannot be received to establish a liability, or to prove the origin of the relation by which the parties became responsible to each other. Such a usage may have an application to a contract previously existing, but cannot of itself create one."

In *Bowe v. Hyland*, 44 Minn. 88, it was held, in reference to a usage in connection with the renting of farms, that before evidence could be given to show the custom of renting farms upon shares in the locality in which this one was situated, it was incumbent to show that the farm had been rented in this

part of the contract of the parties, it is apparent that if the parties did not, in fact, contract with reference to the usage, it cannot be invoked as a part of the contract.<sup>1</sup> *A fortiori*, if the

way. Evidence of a usage or custom cannot be received to establish the making or existence of a contract. It can only have an application to a contract previously existing.

In *Moore v. Eason*, 11 Ired. (N. Car.) 568, which was an action of ejectment by a landlord against the tenant, the defendant, in order to show that the tenancy had expired at the alleged demise, offered to prove that it was the general usage in the locality for all leases to expire on December 31st. The court said the evidence was admissible not to establish a contract, but to add an incident to it. "Parol evidence may be admitted to show a custom or usage of a place, where a contract is entered into for the purpose of annexing incidents to, and explaining the meaning of terms used in it. But before the incident can be annexed, the contract itself, as made, must be proved. The incident cannot be used to establish the contract."

In *Tilley v. Chicago*, 103 U. S. 155, it appeared that the authorities of Chicago offered prizes for the best plan of a public building about to be erected. The plaintiff was awarded one of the prizes and was paid the amount. There was no further contract between the parties. The plans thus paid for were subsequently adopted for the building, but were not used. The plaintiff sued for superintending the construction of the building, alleging that by the usage of architects, in the absence of a special contract, the superintendence of the construction of a building belonged to the architect whose plans were adopted. The court held that there was no contract whatever between the parties as to superintending the work. "But it was complained that the evidence offered to prove the custom of architects was excluded. We think it was rightly excluded. Proof of usage can be received only to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. In all cases where evidence of usage is received, the rule must be taken with this qualification: that the evidence be not repugnant to, or inconsistent with, the contract. The inference from these principles is inevitable, that unless

some contract is shown, evidence of a usage or custom is immaterial."

In *Savings Bank v. Ward*, 100 U. S. 195, W., an attorney at law employed by C. to examine and report on the latter's title to a lot of ground, gave over his signature, a certificate stating that C.'s title to the lot was good and unincumbered. A savings bank with whom W. had no contract or communication, relying upon this certificate as true, loaned money to C., taking a deed of trust upon the lot as security. It appeared that C. in fact had no title to the lot, a fact which W. could have ascertained by reasonable care in his examination. The money loaned was not paid and C. became insolvent. The savings bank sued W. for the loss sustained. Testimony was introduced tending to show that there is a local usage in the *District of Columbia*, that the attorney examining the title of an applicant for a loan, shall be considered as also acting for the lender of the money, and complaint was made that the court below did not submit that evidence to the jury, with proper instructions. Evidence of usage is not admissible to contradict, or vary what is clear and unambiguous, or to restrict or enlarge what requires no explanation. But the court held, that where there is no contract, proof of usage will not make one, and it can only be admitted either to interpret the meaning of the language employed by the parties, or where the meaning is equivocal or obscure. And in *National Bank v. Burkhardt*, 100 U. S. 692, the court said: "Usage cannot make a contract where there is none." Similarly in *Thompson v. Riggs*, 5 Wall. (U. S.) 679. And see *Sanford v. Rawlings*, 43 Ill. 92.

1. In *McAllister v. Barnes*, 35 Mo. App. 668, it was held that evidence of a usage among neighboring merchants, whereby one holding a claim against an individual partner in another firm, and purchasing goods of that firm, would be treated as taking them in liquidation of his claim, with the consent of the other partners, was properly refused when, in the transaction under consideration, there was nothing to show that either party at the time relied upon such usage, or contracted with reference thereto.

party asserting the usage did not know of its existence at the time the contract was made, it cannot be relied upon by him.<sup>1</sup>

**5. Contract on Subject of Usage Excludes Usage.**—If parties make a special contract in relation to a matter which would otherwise be determined by usage, it follows that they intended to exclude the operation of the usage; since otherwise they would not make the special contract. Therefore, whenever it appears that an agreement has been made upon a particular point, and the controversy is as to the terms of that agreement, such terms cannot be shown by proof of the usage respecting them. In other words, the special agreement excludes the usage.<sup>2</sup>

To render a local usage in a particular market different from the general custom binding on persons dealing in such market, it must appear that they intended to comply with such usage. *Lewis v. Metcalf* (Kan. 1894), 36 Pac. Rep. 346.

1. In *Nonotuck Silk Co. v. Fair*, 112 Mass. 354, it appeared that the person attempting to prove the usage did not know of its existence at the time the contract was made. He could not therefore have contracted with reference to it, and cannot take advantage of it. See also *Kinne v. Ford*, 52 Barb. (N. Y.) 194; *Dann v. London Brewery Co.*, L. R., 8 Eq. 155; *Mohawk Bank v. Broderick*, 13 Wend. (N. Y.) 133; 27 Am. Dec. 193.

2. In *Windland v. Deeds*, 44 Iowa 98, it was held that both parties in that case having alleged the existence of a contract between them, it is not competent to show a usage in the neighborhood where they resided, respecting the matters provided for by the contract.

In *Edwards v. Goldsmith*, 16 Pa. St. 43, it was held that in an action by a broker, to recover compensation fixed by a special contract to sell certain real estate on ground rent, it was not competent for the defendant to prove the usual rates charged by brokers for services of a like character.

In *Main v. Eagle*, 1 E. D. Smith (N. Y.) 619, it was held that where in an action to recover for work, labor and commissions, on the sale of a ship, there is evidence of an express agreement between the parties, specifying the conditions upon which commissions shall be allowed; it is not competent to prove, that by the usage of brokers, commissions are allowable, although the conditions are not complied with.

In *Stebbins v. Brown*, 65 Barb. (N.

Y.) 274, which was an action upon an account for board and lodging, it was held not competent to meet evidence on the part of the defendant tending to show an express agreement that absences should be deducted from the charges for board, by proof that it is the custom of hotels not to allow such deductions. The claim of the defendant, as well as his right to the deduction, standing upon the alleged agreement, such agreement, if made, can neither be disposed of, nor altered by proof of custom.

In *Smith v. Barringer*, 37 Minn. 94, it was held that upon an issue in an action between two real-estate brokers as to whether there was an agreement between them to divide the commissions for a certain sale, evidence of a usage among real-estate brokers, that two making a sale, divide the commissions equally, unless a different arrangement is made, is not admissible.

Other similar cases are *Loneragan v. Courtney*, 75 Ill. 580; *Bowe v. Hyland*, 44 Minn. 88.

In *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398, it was held that evidence of a usage to require a written application for marine insurance, is incompetent for the purpose of meeting evidence on the part of the plaintiff tending to prove an oral contract of insurance. The plaintiff sought to escape from the effect of the provision in the policy, "no risk to be binding until accepted by the company and indorsed herein," by proof of an oral contract; and the defendant, while denying that such an oral contract had been made, sought to confirm its view by calling a witness, familiar with the customs and usages of the business of marine insurance in Boston, and asking him the question, "whether there is any usage as to the matter of making written applications for marine in-

6. *Acts of Accommodation or Indulgence.* — Usages must be distinguished from mere acts of accommodation or indulgence. Many things are done in the course of trade by way of favor, which cannot be held to constitute a usage entering into the contracts of the parties. The fact that such acts have constantly been done, not in obedience to duty or contract, but as a matter of form, cannot compel their continuance. Thus, a bank may constantly discount a customer's commercial paper, without establishing a binding usage to do so; merchants may accept checks in payment in lieu of cash, or may receive paper currency in lieu of coin, without raising a usage to prevent their insisting upon their legal rights whenever they wish to assert them. None of these acts of accommodation or indulgence can be said to form part of the contract between the parties.<sup>1</sup>

insurance." The question was excluded. "The fact that contracts of insurance are usually in writing, and expressed in the form of policies, is a matter of common knowledge, and needs no witness to prove it, and it might have been, and doubtless was, assumed on the trial of the present case. . . . A usage that an oral contract, if made, is considered invalid, would be plainly repugnant to law, and void. In the present case, the evidence of usage was offered, not in aid of the construction of a contract, but to support the position that no contract whatever had been made. If a contract had in point of fact been made as alleged, it was of no consequence whether it was according to general usage or not. . . . The plaintiff's case proceeded with a full recognition of the fact that it was necessary for him to show a contract not according to the usual course of the defendant's dealing; and direct testimony was introduced, on both sides, upon the precise point whether an oral contract of insurance had been made or not. There is nothing to show that any restriction was put upon any inquiry as to the defendant's own usage. It is no legitimate confirmation of the defendant's position, under such circumstances, to show that other insurance companies usually require applications for marine insurance to be in writing, as a condition of making the contract. This fact, if proved, would have no legal tendency to show that these parties did not make a contract orally. The plaintiff was not bound in law by such custom, if it existed. Whether other parties were, or were not, in the habit of making their contracts in a particular form, was nothing to him.

An oral contract was lawful; and the evidence was properly confined to the question whether this particular oral contract had been made, as testified by the plaintiff, without going into the general inquiry, whether other parties were accustomed to make such contracts. The issue being whether a particular contract had, or had not, been orally made, as it might lawfully be, evidence that contracts in that form were unusual was not admissible to meet and control evidence that such a contract had in fact been made. To hold otherwise would be to extend the office of a usage beyond any known precedent."

1. In *Citizens' Bank v. Grafflin*, 31 Md. 507, the court said: "Because the plaintiffs had been constant customers of the bank, which had discounted for them many like drafts, and immediately sent them on for acceptance, was no just reason to compel the bank to pursue a like course in the future. The concession of such a favor, though repeated in sundry instances, ought not to be construed to operate as imposing upon the bank the imperative duty of its constant repetition, and as conferring upon the plaintiffs the absolute right to demand and insist upon its continuance."

In *Metcalf v. Weld*, 14 Gray (Mass.) 210, the court said: "There are many usages of trade which have nothing to do with the contracts of parties. It is very customary for merchants to pay their debts by checks upon a bank, and this may be very well known to persons who deal with them, and yet no one is bound to receive a check in discharge of a promise to pay money. It may be a custom in some kinds of



**7. Habit Does Not Constitute Usage.**—The habit or usual practice of particular persons, or of persons in a particular trade, does not in itself constitute a usage. Habit is not a matter of legal cognizance; it is only when it has grown into a usage, with the essential characteristics of a usage, that it can be considered as such. Habit lacks the generality requisite for a usage, nor can it be said that a mere habit necessarily enters into the contemplation of parties in making their contracts.<sup>1</sup>

business to pay workmen in orders for goods; or in goods kept for sale by their employer; or not to pay wages punctually at the time they are due; and the fears or necessities of the laborer may induce him to yield to the custom, and accept payment in a manner, or at a time, convenient to the employer; but it would hardly be contended that such a custom could be regarded in determining the legal effect of a written agreement."

In *Lord v. Burbank*, 18 Me. 178, the court said: "However common it may be for persons in receiving payments to waive their strict rights, and make use of a paper currency, the law does not recognize such usage as binding upon any person, and when anyone insists upon his legal right to receive gold and silver only in payment, the law will uphold him in the exercise of that right, although it may appear to be an unexpected exercise of it, and not in conformity to the accustomed course of transacting business between parties in such circumstances."

In *Lewis v. Phoenix Mut. L. Ins. Co.*, 44 Conn. 72, in which a custom was alleged to exist by which the assured were entitled to pay premiums after the specified date, the court said: "All that could be claimed from the custom was, that the company or its agents were in the habit of waiving strict payment at the day in some cases, when there had been no change in the health or condition of the insured. This being so, there would be nothing that would bind the company to waive strict payment in any case, but they would be at liberty in all cases to insist upon strict performance."

In *Brent v. Cook*, 12 B. Mon. (Ky.) 268, it was held that the fact that it was the custom of the vendor of goods to wait twelve months with those who made accounts with him for goods, will not be sufficient proof of a contract to do so with a particular individual, especially when it does not show that the

purchaser had dealt with the merchant before and knew his custom. "We apprehend that the proof means nothing more than that the appellants were in the habit of indulging their customers for twelve months for the goods purchased by them, and not that there was a mutual implied agreement between them and their customers that the goods were sold and bought upon this credit."

In *Norton v. Heywood*, 20 Me. 359, it was held that where a contract in relation to land is explicit in its terms, and gives no authority to cut timber thereon, testimony to show that the owner had permitted others, under similar contracts, to cut timber without considering them as trespassers, is inadmissible to prove a license from the owner to cut timber in the case on trial.

In *Madden v. Blain*, 66 Ga. 49, it was said that for a physician to defend against an action for another physician's services, on the ground of a custom among physicians not to charge each other, it must appear that that custom was of such universal practice as to justify the conclusion that it became, by implication, a part of the contract. "This seems to have been a sort of courtesy among physicians, and not of universal observance, or extending to all cases." See also *Somerby v. Tappan*, Wright (Ohio) 570; *Cincinnati, etc., R. Co. v. Boal*, 15 Ind. 345; *Farlow v. Ellis*, 15 Gray (Mass.) 229.

1. In *Anewalt v. Hummel*, 109 Pa. St. 271, which was an action by a landlord against his tenant to recover the value of certain hay and stubble belonging to the landlord, which the tenant, on entering into possession of the demised farm, had found thereon and converted to his own use, the defendant offered evidence to prove that it was a custom among farmers in the neighborhood to allow the tenants the use of such produce. The testimony was limited to that of four farmers, who

**8. Usages Must Be Certain and Uniform.**—A usage must be certain and uniform; otherwise it would not afford a safe guide for the

testified that such was their practice in dealing with their tenants. Of this testimony the court said: "The evidence of the custom was too weak and inconclusive to submit to the jury. The most that it amounted to was the practice of a very limited number of farmers in dealing with their own tenants, while there were other farmers in the same neighborhood who had never heard of any such practice, and who did not follow it themselves. It needs but a moment's reflection to see that this would not make a custom binding upon the entire farming community in the absence of an express contract upon the subject-matter."

In *Fisher v. Campbell*, 9 Port. (Ala.) 210, in which a usage was alleged, giving overseers power to make purchases on behalf of their employers, it was proved that it was customary for overseers to purchase things necessary for their farms, etc. "It will scarcely be contended, that such a usage as this exists, so as to have the force of law, and be binding on employers generally; and if not, it proves nothing more than that some planters are in the practice of sanctioning such purchases; but it by no means follows that others, who have not assented to it, are bound by it."

In *Mobile, etc., R. Co. v. Jay*, 61 Ala. 247, it was held that the mere act or habit of a railroad company, in paying for medical services rendered to employes injured in its service, does not necessarily establish a custom of such business; before it can have that effect it must be shown to have been so generally known and so well settled as to raise the presumption that the services were rendered in reference to it.

In *Mason's Ben. Soc. v. Baldwin*, 86 Ill. 479, it was held that proof that in certain instances known to the witness a forfeiture of insurance policies was not exacted, is not sufficient to show a usage to waive such forfeitures.

In *Doughty v. Paige*, 48 Iowa 483, it was held that the custom of the attorneys of a certain county to hold themselves responsible for sheriff's fees, in cases wherein they were employed, did not subject an attorney to liability therefor, in the absence of an express agreement, or of proof that the attorneys were accustomed to pay for such

services regardless of the responsibility of their clients.

In *Adams v. Morse*, 51 Me. 497, it was held that evidence that "there has always been a custom at a certain saw-mill and other mills in the neighborhood to leave the slabs as belonging to the mill, the owners of the logs never claiming them," does not establish a legal right in the mill to the slabs sawed.

In *Gronstadt v. Witthoff*, 15 Fed. Rep. 265, the court held that a custom or usage to dispense with the rule as to the time when vessels' lay days begin to run, must be so fixed, uniform, and well understood, as to be presumed to form a part of the contract. Such a usage is not made out by evidence that, in the majority of cases, merely certain kinds of cargo are discharged on lighters for the mutual convenience of the consignee and the vessel, where it also appears that it is not unusual to discharge upon the dock, and that plenty of docks were available.

In *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199, it was held that evidence that conductors upon the Concord Railroad, in violation of their instructions from the corporation, had, after the adoption of such a rule in various instances, allowed tickets to be used contrary to its provisions, is not competent to show a usage on the part of the corporation in conflict with the rule, if such instances are not shown to have come to the knowledge of the governing officers of the corporation.

In *McClure v. Cox*, 32 Ala. 617, it was held that the "universal practice and understanding of persons employed in navigating" a particular river, does not, *per se*, constitute a custom. It merely substitutes the habit of boatmen for a custom of trade.

In *Austill v. Crawford*, 7 Ala. 335, it appeared that it was very common in the trade, for factors, in making large sales of cotton for different persons, to sell the same at an aggregate price and to apportion the price, or sum received, among the persons to whom the different crops belonged, according to the relative value of each crop. The court did not think this was a usage, such as would be binding on the planter, and said: "The language of

conduct of parties relying upon it, and could not be presumed to enter into their contracts.<sup>1</sup> Instances of uncertainty are seen in cases where an alleged usage varies at different times, or fixes no definite rule as to its operations; or leaves room for the exercise of individual opinions, or in any other manner fails to provide a definite and constant rule of conduct.<sup>2</sup>

the bill of exceptions is, that it was very common in the trade, but that a few factors in Mobile would not do so. This is certainly not proof of a usage of trade."

1. *Certainty and Uniformity*.—Wood v. Wood, 1 C. & P. 59; 11 E. C. L. 312.

2. In *Corcoran v. Chess*, 131 Pa. St. 356, a usage of a local bricklayers' association to apply to work, a method of constructive measurement, which varied from month to month, almost from day to day, was rejected as having no element of certainty.

In *Oelricks v. Ford*, 23 How. (U. S.) 49, the usage of brokers alleged was, that margins put up by a purchaser to cover an advance in the price of the commodity must be reasonable; but no rule by which the reasonableness of the margin can be determined was shown. This was held void for uncertainty. "As to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade."

In *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, the question was as to a usage in regard to an attendance fee upon a vessel in distress. There was no custom as to any certain amount, but the fee must be a reasonable fee. "In our opinion, a custom is not invalid because it does not fix the amount of the fee for every case. If the custom is certain that it must be a reasonable attendance fee, that is sufficient. If custom had undertaken to fix the same fee for every case, it would not have been a good custom." To the same effect is *Mills v. Colchester*, L. R., 2 C. P. 476.

In *Fellows v. New York*, 17 Hun (N. Y.) 249, it appeared that by one comptroller, and down to the year 1858, interest on advances to contract-

ors was exacted to the date of the confirmation of the assessment, as an invariable custom, but the adoption of a different rule thereafter by his successors left the question open to discussion and doubt. There was therefore no certain usage.

In *Thorn v. Rice*, 15 Me. 263, it was held that where the usage of a bank, in relation to giving notice to an indorser, is so loose and variable, and so different from what the law requires, as to leave it uncertain whether any notice was given to the indorser at any time or place, or put into the post office for him, such indorser is not bound by such usage by doing business with the bank.

In *Ninis v. Nelson*, 43 Fed. Rep. 777, the court rejected a custom that the agent of a ship in distress shall receive an attendance fee in his discretion. It appeared that the charge was not shown to be certain. Sometimes it was charged, sometimes not charged. No custom, also, could be good where all the discretion was on one side.

In *Sewell v. Corp.*, 1 C. & P. 392; 11 E. C. L. 432, the usage claimed, was to pay veterinary surgeons for attendance when there was not too much medicine required; this was too uncertain.

In *Wood v. Wood*, 1 C. & P. 59; 11 E. C. L. 312, it was alleged that there was a usage that a purchaser of cloth had three days within which he could notify the seller that he would keep the goods; some of the witnesses named three days as the time, others a week, and one a month. This was held invalid on account of its uncertainty.

In *Foley v. Mason*, 6 Md. 37, a usage was set up that merchants delivered to purchasers goods sold as cash without demanding the cash when the purchaser was considered good. The court said: "This is not a usage, which must be something fixed, certain, and universal. One man may think the purchaser good, when his next neighbor may think otherwise; and this is said to be a usage!"

In *Catlin v. Smith*, 24 Vt. 85, and *Steward v. Scudder*, 24 N. J. L. 96, us-

**9. Usages Must Be General.**—A usage must be general, by which is meant that the method of dealing must be the universal method of those engaged in the business in the place where the usage exists.<sup>1</sup> In this sense a usage may be general in a particular town,

ages of commission merchants on sales for cash to wait two, three or four days for their money, were likewise rejected.

In *Union R., etc., Co. v. Yeager*, 34 Ind. 1, the usage alleged was that in cash sales, payment might be made afterwards; no two of the witnesses agreed as to what time was allowed; it varied from three to twenty-five days; it was in force one month, but not the next. The usage was not established.

In *Wallace v. Morgan*, 23 Ind. 399, a usage was claimed among commission merchants in Indianapolis that flour, not suitable for the local market, might be forwarded to New York for sale. The court held the usage void for uncertainty, because it was impossible to determine exactly what grade of flour was, or was not, subject to its operation, leaving each factor to determine for himself to what grade the usage applied.

Other cases stating or illustrating the rule that a usage must be certain and uniform are: *Desha v. Holland*, 12 Ala. 513; 46 Am. Dec. 261; *Sweet v. Leach*, 6 Ill. App. 212; *Crawford v. Clark*, 15 Ill. 561; *Cadwell v. Meek*, 17 Ill. 220; *Bissell v. Ryan*, 23 Ill. 566; *Turner v. Dawson*, 50 Ill. 85; *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479; *Cincinnati, etc., R. Co. v. Boal*, 15 Ind. 345; *Rindskoff v. Barrett*, 14 Iowa 101; *Kendall v. Russell*, 5 Dana (Ky.) 501; 30 Am. Dec. 696; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200; *Foley v. Mason*, 6 Md. 37; *Murray v. Spencer*, 24 Md. 520; *Chesapeake Bank v. Swain*, 29 Md. 499; *Fay v. Alliance Ins. Co.*, 16 Gray (Mass.) 455; *Sawtelle v. Drew*, 122 Mass. 228; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 84; *Barton v. McKelway*, 22 N. J. L. 165; *Child v. Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26; *Vos v. Robinson*, 9 Johns (N. Y.) 192; *Isham v. Fox*, 7 Ohio St. 317; *Huston v. McArthur*, 7 Ohio, pt. 2, 54; *Somerby v. Tappan, Wright* (Ohio) 570; *Lowry v. Read*, 3 Brew. (Pa.) 452; *Ambler v. Phillips*, 132 Pa. St. 167; *Touro v. Cassin*, 1 Nott & M. (S. Car.) 173; 9 Am. Dec. 680; *Singleton v. Hilliard*, 1 Strobb. (S. Car.) 203; *Philips v. Wheeler*, 10 Tex. 536; *Linsley v. Lovely*, 26 Vt. 123; *Sterling*

*Organ Co. v. House*, 25 W. Va. 64; *Lamb v. Klaus*, 30 Wis. 94; *Hinton v. Coleman*, 45 Wis. 165; *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.) 606; *U. S. v. Buchanan*, 8 How. (U. S.) 83; *U. S. v. Duval, Gilp.* (U. S.) 356; *U. S. v. Duval, Gilp.* (U. S.) 372; *U. S. v. McCall, Gilp.* (U. S.) 563; *U. S. v. Buchanan, Crabbe* (U. S.) 563; *Hall v. Nottingham*, 1 Ex. Div. 1; *Collins v. Hope*, 3 Wash. (U. S.) 149; *Oelricks v. Ford*, 23 How. (U. S.) 49.

**1. Usage Must be General.**—In *Jelison v. Lee*, 3 Woodb. & M. (U. S.) 368, in which the existence of a usage was in question, the court said: "Some of the testimony would seem quite decisive to show that such a usage has grown up in parts of *England*, if not on the Continent, within the last quarter of a century. But this is contradicted by other witnesses, though fewer in number. It is said by others still not to be a settled usage anywhere, but resisted and irregular, and others testify to its being unreasonable and extortionate wherever practiced. My own opinion, on the whole evidence is, that it is by no means proved in cases precisely like this, that the usage is tolerated."

In *Couch v. Watson Coal Co.*, 46 Iowa 17, the question was whether the defendant was negligent in not providing coverings to the cages in the mine shafts. A witness who had worked in other coal mines for many years, testified that coverings were used in the shaft in which he had worked. This was incompetent to prove a custom in such mine, much less in the defendant's mine.

In *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, a hotel keeper in Boston was sued by a guest for money stolen from his room; the hotel keeper set up a usage of the hotels of Boston requiring guests to deposit money in the office safe. Two hotel keepers proved that they had printed regulations to that effect posted in the rooms of their hotels; two others testified that they did not have such printed regulations. As to the usage of the guests of these four hotels some deposited their money in the safes; others did not. The court held that no

or in a particular trade in that town.<sup>1</sup> Or, on the other hand,

general uniform custom could be established by this evidence.

In *Champion v. Wilson*, 64 Ga. 184, the court said: "Our code declares that 'the custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part of the contract;' but this cannot mean, as the court charged, that it must have been followed 'in every transaction of this sort.' For then one act of one broker would defeat a custom universal but for that act. Nor does it mean 'the whole—every one,' as the court reiterates; but it means, what it says, of such universal practice as to imply that the trade would understand that it went into the contract. It must be rather more than general—much more than the habit of a majority; but not absolutely unbroken by one single transaction of one tradesman. Such a rule would defeat every custom."

Similarly the same court said in *Desha v. Holland*, 12 Ala. 513; 46 Am. Dec. 261: "It is not indispensable to the validity of a usage of trade that it should be universally acquiesced in, for this would be to annul all customs as to those who were unwilling to abide by them. Instead of sharing the force of law and being of general obligation, they would depend for their operation upon the gratuitous assent of every person against whom they were invoked."

In *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 184, the court, by Cooley, J., said: "The testimony of witnesses shows that the question of shortage is frequently the subject of dispute. Capt. Elsie says: 'The custom is sometimes acquiesced in by the captains of vessels, and sometimes disputed. If the shortage is small, they generally pay it; if it is large, they generally dispute it, and leave it to be settled by the owners.' Mr. Stephenson, the general freight agent of the defendants, says: 'I have known captains to refuse to pay the shortage, but we always have the freight in our own hands before we settle. We invariably refuse to pay the captains until the two principals are agreed.' Capt. Montgomery, after testifying that the custom is universal, says: 'I have known the question of shortage disputed at least a hundred

times.' Several other witnesses give evidence that the custom is general, but the impression which the whole evidence leaves in our minds is, that the deduction of shortage is submitted to when the carrier concedes that it is his fault, or where the amount is not beyond what is usual and incident to transportation, but that it is disputed in other cases. A custom varying the common law must be clearly proved; but we do not find clear evidence in this case that ship-owners concede their liability to have deductions made from freight earned for the value of property receipted for by mistake. That the railway companies assert the right, is fully shown; but it must be generally assented to, as well as asserted, before the custom can be established."

In *Mears v. Waples*, 3 Houst. (Del.) 581, it was held that the known and received usage of a particular trade, and the established course of commercial dealings under it, are tacitly annexed to the terms and become part of a commercial contract. "And yet, even a number of banks, or commercial firms or houses in a large commercial city cannot, by their practice, establish a commercial usage, so as to make it binding on the trading community generally. The established custom or usage of a trade is undoubtedly the law of the trade. But to make it binding, it must be certain, uniform, reasonable and general, and of long standing, or, at least, of such long standing as to have become generally known, recognized, and acted on by the trade, so as to raise a fair presumption that the parties in entering into their engagements did so with a silent reference to the usage, and a tacit agreement that their rights and responsibilities should be determined by it."

1. In *Wayne v. Steamboat General Pike*, 16 Ohio 421, the owners of the boat claimed that there was a general and well-established usage by which a contract of lading, to deliver goods to a person residing at Memphis, means a delivery to S. & Co., owners of a wharf-boat lying in the stream opposite to the town, who, by said usage, are the general agents of all consignees residing at Memphis. The proof did not show that any such usage as that contended for was understood generally, at either

Memphis or Cincinnati, nor that it had been universally the custom. Several merchants of Cincinnati engaged in shipping goods to Memphis, had never heard of such a usage. The other merchants speak of S. & Co. refusing to receive goods of boats that would not make their bills good. "The most that could be made of the evidence, and all that it established, was, that steamboats have been, for several years, in the practice of landing goods at places upon the river where wharf-boats are stationed, with the keepers of the wharf-boat, and intrusting them with the duty of the delivery to the consignee, and then passing on without further care than to secure their freight. And that where the goods have eventually come to the proper hands, and no difficulty has occurred, no one has made any complaint. This, instead of proving a custom which is to control the terms of a bill of lading, and become a part of the law of the contract, is proving a very loose practice, which cannot terminate the responsibility of the carrier."

In *Robertson v. Wilder*, 69 Ga. 340, it was held that individual habits of dealing do not make a universal custom which by implication enters into the contract and forms a part thereof, nor will a deviation from the universal custom in particular instances impair or destroy its validity as such. Therefore, the fact that wharfingers of the port of Savannah, in competing for trade, frequently made contracts for less rates than those allowed either by law or by usage, does not make a universal or binding custom, which by implication enters into a wharfinger's contract.

In *Mears v. Waples*, 3 Houst. (Del.) 581, it was held that to constitute a usage that the copy of a bill of lading attached to a draft for the price of a cargo purchased and shipped by the drawees in Philadelphia, on account of, and in the names of, the drawees in Baltimore, to be delivered at Boston, is not to be detached from it by the drawees on the presentation and acceptance of the draft, but is to remain attached to it until the payment of the draft, it must be recognized and acted on as such in both of the cities first mentioned.

In *Walsh v. Frank*, 19 Ark. 271, an instruction as to the general custom of merchants upon the Mississippi and its tributaries, when the evidence before the jury was as to the custom of the merchants of three only of the impor-

tant commercial cities within the district of country designated, was held erroneous.

In *Richardson v. Goddard*, 23 How. (U. S.) 44, the question was whether the proof disclosed a custom in the port of Boston forbidding a carrier to unload a vessel on a day appointed by the governor of *Massachusetts* as a general fast day, and compelling the carrier to observe it as a holiday, there being no statute of the state forbidding the transaction of business on that day. The court said that no such custom was proved: "The testimony shows this, and no more: That some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work or do it privately; some work half a day, and some not at all. Public officers, school boys, apprentices, clerks, and others who live on salaries or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libellants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear that, however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that, like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston, if it amount to anything more than that every man might do as he pleased on that day, did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day."

In *Pevey v. Schulenburg, etc.*, *Lumber Co.*, 33 Minn. 45, it was held that proof that persons doing two-thirds of a particular business at a certain place had adopted a peculiar usage in respect thereto, it appearing that the other persons doing business at that place did not conform to that usage, is insufficient to constitute the usage a local or particular custom. "There was wanting that generality of usage at the place where the custom is alleged to have been established which is necessary to the existence of a custom. *Adams v. Otterback*, 15 How. (U. S.) 539; *Janney v. Boyd*, 30 Minn. 319."

there may be a general usage,<sup>1</sup> as, for example, of bankers, through-

In *Porter v. Hills*, 114 Mass. 106, it was likewise held that the fact that many persons, or a majority of persons engaged in a particular business, practice a particular method, does not establish a custom. The practice must be universal.

1. In *American Ins. Co. v. Neiberger*, 74 Mo. 167, proof that there was a custom observed by ten or twelve insurance companies to insert a particular clause in their policies was held not admissible to establish a similar custom on the part of other companies.

In *Berry v. Cooper*, 28 Ga. 543, it was held that if boats on a particular river, or a particular boat on that river, sometimes gave bills of lading containing an exemption from loss by fire, and at other times bills of lading containing no such exemption, then no such usage is established, for want of uniformity. And even if in a majority of cases, bills of lading contain such clauses of exemption, still the usage is not sufficiently proven as to make it the law of the contract between the parties.

In *Lewis v. Marshall*, 7 M. & G. 729, two witnesses stated, that the usual practice of the shipping trade was to consider steerage passengers as cargo, and their passage-money as freight; but stated no instance of such construction in their own knowledge, and added, that the guarantee in question was an unusual one. This evidence was held insufficient to prove a general usage of trade.

In *Decatur Nat. Bank v. Murphy*, 9 Ill. App. 112, the evidence failed to prove the existence of a general and uniform custom among the bankers where the transaction in controversy occurred, to make immediate examination of checks brought in for exchange, and the return of such as are dishonored. "There were but three banks in Decatur, and if any such requirements existed, there ought certainly to be great unanimity in respect thereto among the officers of these three banks."

In *Sturges v. Buckley*, 32 Conn. 265, a usage was set up by the defendant. The court below charged that it must be one that was followed in all cases by all persons in the same business along the same route, and must have been so long established that the plaintiff and all persons living in his

vicinity might be presumed to have known of it and to have acted upon it as they had occasion.

In *Gleason v. Walsh*, 43 Me. 397, it was held that a usage may be general and still confined to a particular city, district, town or village. *Van Ness v. Packard*, 2 Pet. (U. S.) 137; *Clark v. Baker*, 11 Met. (Mass.) 188; 45 Am. Dec. 199; *Williams v. Gilman*, 3 Me. 276; *Emmons v. Lord*, 18 Me. 351; *Perkins v. Jordan*, 35 Me. 23; *Thompson v. Hamilton*, 12 Pick. (Mass.) 426; 23 Am. Dec. 619.

In *Adams v. Otterback*, 15 How. (U. S.) 530, the usage relied on, and under which notice to the indorser was given, had been adopted by the bank two years before the note in question was discounted, but it seems only four cases had occurred under it. "No public notice was given at the time of its adoption, and no presumption can arise from the facts stated, that the indorser could have had notice of the usage. It is said, if a bank may establish a usage, it may change it; and that there must be a beginning of acts under it. This may be admitted, but it does not follow that a usage is obligatory from the time of its adoption. To give it the force of law, it requires an acquiescence and a notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank. But to constitute a usage, it must apply to a place, rather than to a particular bank. It must be the rule of all the banks of the place, or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement."

In *Svendson v. Wallace*, 46 L. T. N. S. 742, several witnesses were called, who gave evidence to the effect that for sixty or seventy years the practice of average adjusters had been as stated by the defendants; but that, in consequence of the decision in *Atwood v. Sellar*, 42 L. T. N. S. 644, some average adjusters had altered their mode of adjustment in such a case. The question, therefore, is, whether this could be said to be such a mercantile custom as must be read into the contract and bind the parties. It has not the general characteristics of a custom, and appears only to be the practice of skilled men who

out the whole country. In either case, the universal prevalence of a particular practice constitutes the usage a general one.<sup>1</sup>

**10. Usages Strictly Construed.**—Usages are to be strictly construed;<sup>2</sup> that is to say, the court will allow them only to operate upon a case that is clearly covered by them. As a usage is admissible because it forms a part of the contract of the parties, it will be given full effect in respect to contracts subject to its operation, but will not be allowed to extend further.<sup>3</sup>

**11. Views of Courts as to Extending the Scope of Usages.**—The views of various courts and judges have differed widely as to the

adopted the practice because it was the law. That is not a custom.

Other cases stating or illustrating the rule that a usage must be general are: *Fulton Ins. Co. v. Milner*, 23 Ala. 420; *Burr v. Sickles*, 17 Ark. 428; 65 Am. Dec. 437; *Walsh v. Frank*, 19 Ark. 270; *Sweet v. Leach*, 6 Ill. App. 212; *Dixon v. Dunham*, 14 Ill. 324; *Bissell v. Ryan*, 23 Ill. 566; *Coffman v. Campbell*, 87 Ill. 98; *Rindskoff v. Barrett*, 14 Iowa 101; *Duvall v. Farmers' Bank*, 9 Gill & J. (Md.) 31; *Thomson v. Albert*, 15 Md. 268; *Chesapeake Bank v. Swain*, 29 Md. 499; *Citizens' Bank v. Grafflin*, 31 Md. 507; *Rennell v. Kimball*, 5 Allen (Mass.) 356; *Schlessinger v. Dickinson*, 5 Allen (Mass.) 47; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Butler v. Charlestown*, 7 Gray (Mass.) 12; *Clark v. Baker*, 11 Met. (Mass.) 188; 45 Am. Dec. 199; *Cooke v. Fiske*, 14 Gray (Mass.) 491; *Thompson v. Hamilton*, 12 Pick. (Mass.) 426; 23 Am. Dec. 619; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Saunders v. Clark*, 106 Mass. 331; *Perkins v. Jordan*, 35 Me. 23; *Folsom v. Merchants, etc., Ins. Co.*, 38 Me. 414; *Gleason v. Walsh*, 43 Me. 397; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200; *Detroit, etc., R. Co. v. Van Steenburg*, 17 Mich. 99; *Summer v. Tyson*, 20 N. H. 384; *Chastain v. Bowman*, 1 Hill (N. Car.) 370; *Holford v. Adams*, 2 Duer (N. Y.) 471; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. (N. Y.) 26; *Weber v. Kingsland*, 8 Bosw. (N. Y.) 415; *Hotchkiss v. Artisans' Bank*, 42 Barb. (N. Y.) 517; *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Cope v. Dodd*, 13 Pa. St. 33; *Com. v. Mayloy*, 57 Pa. St. 291; *Sterling Organ Co. v. House*, 25 W. Va. 64; *Lamb v. Klaus*, 30 Wis. 94; *Hinton v. Coleman*, 45 Wis. 165; *Bentley v. Daggett*, 51 Wis. 224; 37 Am. Rep.

827; *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.) 606; *Adams v. Otterback*, 15 How. (U. S.) 539; *Oelricks v. Ford*, 23 How. (U. S.) 49; *Richardson v. Goddard*, 23 How. (U. S.) 44; *Sweeting v. Pearce*, 7 C. B. N. S. 449; 97 E. C. L. 448; *Fisher v. Western Assur. Co.*, 11 U. C. Q. B. 255; *DeHertel v. Supple*, 13 Grants Ch. (Ont.) 648; 14 Grants Ch. (Ont.) 421; *Salisbury v. Townson*, 1 Arnold on Ins. 283, 462; *Gurney v. Behrend*, 3 El. & Bl. 634; 77 E. C. L. 633; *Cumming v. Shand*, 5 H. & N. 95; *Coventry v. Gladstone*, L. R., 4 Eq. 491.

1. As to the usages of an individual, see *Knowledge of Usage—Usages of an Individual*.

2. *Arthur v. Bokenham*, 11 Mod. 161; *Denn v. Spray*, 1 T. R. 466; *Mugleton v. Barnett*, 2 H. & N. 653; *Richardson v. Walker*, 2 B. & C. 839; 9 E. C. L. 258.

3. A custom of delivering goods to a mate of a ship does not justify the delivering to a deck-hand. *Leigh v. Smith*, 1 C. & P. 638, 11 E. C. L. 506. A custom of placing goods on a dock near the vessel, and notifying the carrier does not cover the placing of more goods on the dock than the carrier is notified of. *Packard v. Getman*, 6 Cow. (N. Y.) 757; 16 Am. Dec. 475. A usage of a bank teller to issue certificates of deposit does not include the certification of a check. *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306. And see also the following cases: *Meigs v. Mutual Marine Ins. Co.*, 2 Cush. (Mass.) 439; *Nichols v. DeWolf*, 1 R. I. 277; *Rupp v. Sampson*, 16 Gray (Mass.) 308; 77 Am. Dec. 416; *Canby v. Frick*, 8 Md. 163; *Main v. Eagle*, 1 E. D. Smith (N. Y.) 619; *Field v. Banker*, 9 Bosw. (N. Y.) 467; *Dike v. Pool*, 15 Minn. 315; *Maryland F. Ins. Co. v. Whiteford*, 31 Md. 219; 1 Am. Rep. 45; *U. S. v. Buchanan*, *Crabbe* (U. S.) 563; *Morrison v. Hart*, 2 Bibb (Ky.) 4; 4



desirability of extending the functions of usage.<sup>1</sup> The extracts in the notes illustrate the views of certain judges who do not

Am. Dec. 663; *Colcock v. Louisville, etc., R. Co.*, 1 Strobb. (S. Car.) 329; *McCready v. Wright*, 5 Duer (N. Y.) 571; *Leggat v. Sands Ale Brewing Co.*, 60 Ill. 158; *Iltis v. Chicago, etc., R. Co.*, 40 Minn. 273; *DeCordova v. Barnum*, 130 N. Y. 615.

In *Ely v. New Haven Steamboat Co.*, 53 Barb. (N. Y.) 207, it was held that where the contract, in terms, or as affected by the usage of trade, is to deliver goods at a wharf, notice to the consignee of their arrival, is not necessary. "If usage requires notice to be given to the consignee, the fact that the store of the latter was closed the whole of the day on which the goods arrived, and until after they had been destroyed, will excuse the carriers from giving such notice. They are not bound to go beyond the usage, and seek the consignees elsewhere than at their place of business."

In *Overman v. Hoboken City Bank*, 31 N. J. L. 563, it was held that customs and special usages of trade which narrow and confuse the operations of the general rules of law, should be construed strictly, and not be extended to persons who are not clearly proved to have acted under them. Hence, proof of usage by banks, which are members of the clearing-house in the city of New York, in regard to the return of checks drawn on banks in the city, is not applicable to checks drawn on banks at a distance.

In *Metcalf v. Weld*, 14 Gray (Mass.) 210, the plaintiffs, seamen, entered into shipping articles with the defendants, owners of a vessel, by which they were entitled to receive a stipulated sum as advance wages. The defendants offered evidence tending to show that it is the custom in the port of Boston, where the plaintiffs were shipped, for owners of vessels to obtain their seamen through a shipping agent, and to pay the advance wages agreed in the shipping articles to the shipping agent; and that such shipping agent pays the same to the boarding-house keeper who brings the seamen to him; and the boarding-house keeper pays or accounts for the same to the seamen. It was shown that the money, at the time of the shipment, was not paid by the defendants to the shipping agent, but was charged to the defendants by him

on his books, and the amount, together with his own charges, was paid to the agent on a subsequent settlement of the defendants' account with him. The court said: "Was the payment proved to have been made according to custom? . . . The evidence did not show that it had been complied with. The money was not even paid by the owners to the shipping agent at the time it was due, but was charged by him in account. It does not appear that the plaintiffs had any relations to a boarding-house keeper, or that the advance wages have ever been paid to any one for their use. If any boarding-house keeper, authorized by them to receive the money, had actually received it, so that it had gone in any manner to their use, the defense might have been placed upon the ground of agency. But it certainly cannot be maintained that the defendants can discharge themselves by a mere transfer of their obligation to their own agent."

1. In *Wilcocks v. Phillips*, 1 Wall. Jr. (C. C.) 63, Baldwin, J., said of usage: "Its influence is universal. It attaches to nations and to individuals. It creates obligations. It interprets laws. . . . The ancient, established, uniform, and known custom of persons engaged in any trade makes a law for that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade are understood to consent. It makes, supplies, and construes their contracts. Known and settled usages ought to be respected by courts and juries, unless such usages are against the laws or policy of the country."

In *Clark v. Baker*, 11 Met. (Mass.) 188; 45 Am. Dec. 199, the court said: "These usages differ essentially from those more general customs which are known and exist as part of the general law of the land, and which are observed and applied without being established by evidence offered in each particular case. These local usages may be of comparatively recent origin, and may be limited to a single city or village. Learned jurists have often expressed their regret at the extension of this species of evidence, and especially that as to usage of a local and limited character, as impairing in

favor such extension;<sup>1</sup> the views of those who hold the contrary are more practically shown by the great volume of cases in which usage has been received to determine the rights of parties. For whatever may be said upon the subject, as a matter of abstract

some degree the symmetry of the law, and tending to uncertainty and embarrassment in the administration of justice; and also liable to the serious objection that the knowledge by the party to be affected by it, of the existence of such usage, is a mere legal presumption which may often be unfounded in reality, although such usage is established by what is deemed competent legal evidence. Notwithstanding these objections, such local usages have been held admissible by the judicial tribunals as competent to explain and qualify the contract, and give to it an effect materially different from that which the general law would have done in the absence of all evidence of such usage."

**1. Views of Judges Who Look with Disfavor on the Extension of the Functions of Usages.**—In *Dykers v. Allen*, 7 Hill (N. Y.) 497; 42 Am. Dec. 87, it was said: "To allow the usages of Wall street to control the general law in relation to any matter might result in the establishment of principles not always in accordance with sound morals. I prefer that legal principles should have a universal application, and that contracts should receive the same interpretation in the thronged and busy mart of a commercial metropolis that they do elsewhere."

In *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633, the court said: "Were the courts by their decisions to encourage the growth of these local usages, originating generally in lax business practice or mistaken ideas of law, they might become as great an evil, a source of as much want of uniformity in the law, as was the local legislation of the past."

In *Harper v. Pound*, 10 Ind. 32, it was said: "To permit the temporary or indolent usages of each locality to control contracts, would be to make contracts conceived in the same language, and relating to the same subject-matter, one thing in one place and another in another. This would create a body of local laws far more intricate and embarrassing in judicial investigations than the local statutes with which the state was formerly inundated. The recognition of these local usages is, as a

general rule, contrary to the public policy of the state. Our constitution and judicial decisions are hostile to local legislation and local customs."

In *Stover v. Whitman*, 6 Binn. (Pa.) 417, the court said: "Miserable will be our condition, if property is to depend, not on the contract of the parties, expounded by established principles of law, but on what is called the custom of particular places; so that we may have a different law in every town and village in the commonwealth."

In *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 184, Judge Cooley said: "Special customs are so liable to create confusion of legal rules in directions not contemplated in their adoption, that they are admitted into the law with great reluctance; and it is not often a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can incorporate it in their contracts if they see fit to do so."

In *Sawtelle v. Drew*, 122 Mass. 228, it was said: "A custom, within the meaning of the law, if general, is incorporated into and becomes a part of every contract to which it is applicable; if local, of every contract made by parties having knowledge of or bound to know its existence. It must be definite, precise, and unvarying. That is, not necessarily a custom, which is merely the ordinary mode of doing business; nor is a general habit or practice a custom. There is a great variety of things, which, in the ordinary transaction of business, are habitual and usual, but which are in no sense customs which, in law, are incorporated into and become parts of the contract entered into. When, therefore, there is offered to be proved a custom which is a part of the contract, it becomes necessary to look carefully to the exact language of the tender."

In *Berkshire Woolen Mills v. Proctor*, 7 Cush. (Mass.) 420, the court said: "The rights of parties must be determined by law, and not by any vague and undeterminate and partial usage of particular persons or places. A strict adherence to this principle is essential to a sound and consistent administration of justice. A departure

opinion, it is apparent that the importance of usage as a branch of law is more and more recognized, and the tendency, as illustrated by the decided cases, is plainly in the direction of extending their scope. In so far as this extension serves to make plain and enforce the unexpressed intentions of the parties, the results can only be beneficial. The only dangers, in the opinion of the writer, are two, *viz.*: *Firstly*, an extension of the rule of presumptive knowledge, by which a party is presumed to know and contract with reference to a usage of which he may, in fact, be ignorant; and *Secondly*, a restriction of the right of parties to contract

from it would work great injustice. No man could know what were his rights or his duties, if they were to be determined by loose evidence of some particular, indefinite, and partial usage."

In *Trueman v. Loder*, 11 Ad. & El. 597; 39 E. C. L. 178, Lord Denman, C. J., said: "If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open for a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written documents. Again: What can be more difficult than to ascertain as a matter of fact, such a prevalence of what is called a custom of trade, as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and, supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful, whether the parties to the individual contract really meant that it should include the custom."

In *Bolton v. Colder*, 1 Watts (Pa.) 360, Gibson, C. J., said: "Nothing should be more pertinaciously resisted than these attempts to transfer the func-

tions of the judge from the bench to the witness stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules whose existence, perhaps, they had no reason to suspect before they came to be applied to their rights. If the existence of a law be so obscure as to be known to the constitutional expositors of it only through the evidence of witnesses, it is no extravagant assumption to take for granted that the party to be affected was ignorant of it at the time when the knowledge of it would have been most material to him; and to try a man's actions by a rule with which he had not an opportunity to become acquainted beforehand is the very worst species of tyranny."

In *Schooner Reeside*, 2 Sumn. (U. S.) 567, Story, J., said: "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business or trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that, of late years, the courts of law, both in *England* and in *America*, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them."

And in *Donnell v. Columbian Ins. Co.*, 2 Sumn. (U. S.) 367, Story, J., said: "I am among those judges who think usages among merchants should be very sparingly adopted as rules of court by courts of justice, as they are often founded in mere mis-

as they please, resulting from an extension of the doctrine that a usage contrary to law is void, it being the right of all men to impliedly adopt, in their mutual dealings, rules different from those which the law would otherwise apply.

**12. Usages as a Source of Law.**—It would be beyond the scope of this article to trace the history of the common law, by showing how it has largely developed from a multitude of ancient usages. It is only possible to refer in the notes to the growth of the mercantile law from the usages of merchants.<sup>1</sup> This origin is espe-

take, and still more often in the want of enlarged and comprehensive views of the full bearing of principles."

Other cases expressing similar views are *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374; *Partridge v. Phoenix Mut. L. Ins. Co.*, 15 Wall. (U. S.) 573; *Delaplaine v. Crenshaw*, 15 Gratt. (Va.) 457.

**1. Growth of Mercantile Law from Usages of Merchants.**—In *Consequa v. Willings*, 1 Pet. (C. C.) 225, it was said that when a usage is so established as to leave no reasonable doubt of its existence, it becomes a part of the law; and the court will decide upon it as such, without requiring it to be again proved. "Most of the usages of trade have at some period been proved as matters of fact, and when sufficiently established, they have grown into laws. The rate of interest in *China*, for instance, is so well established to be twelve per centum, that the court would not require it to be proved."

In *Connor v. Robinson*, 2 Hill (S. Car.) 354, the court said: "The history of our jurisprudence abundantly shows that the law merchant is for the most part made up of rules originally framed and acted upon by the merchants for their own convenience and the benefit of trade, which, with the sanction of the courts of justice, have become the settled law of the land, and as binding on the citizen as any other rule of law; and it is from this source that the rules for the interpretation of mercantile contracts are principally derived. Every trade, art, and profession has a language in some degree peculiar to itself, and it is only by reference to the general understanding of those who are accustomed to use it that we arrive at the meaning. This process of law-making is perhaps the most unexceptionable. A rule prescribed by the legislature is necessarily arbitrary, and it is out of the question to expect that every possible case upon which it may

operate could be anticipated. It is liable, therefore, sometimes to operate injuriously, and it is only tolerated because it is productive of the greater good. Rules formed by usage are the work of time; they must be understood and acted upon by common consent, before they become binding, and the imposing interest of those upon whom they operate is a sure guaranty that they will not be permitted to operate unequally. The introduction of new articles of commerce, and any new source of enterprise which is opened to the merchants essentially different from those which have preceded, must give rise to customs and usages suited to their peculiar character; and as there are none more interested than those immediately concerned in the particular trade to establish those that are reasonable in themselves and precisely suited to the occasion, there is no reason why they should not be at liberty to prescribe rules for its government. These, it is true, have not the force of the law until they have received the sanction of the courts of justice, and in that way become a part of the general law; but they are received as evidence, and serve to explain what was intended by the parties."

In *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374, it was said: "Custom, long acquiesced in, and sanctioned by judicial decision, has given us the systems of laws known as the common law and the law merchant. These systems are judicially taken notice of, and are not the subject of proof. *Hogan v. Reynolds*, 8 Ala. 59. These systems, then, may be declared to have obtained the dignity of law. Local customs, or particular usages, can claim no such eminence."

In *Brandao v. Barnett*, 12 Cl. & F. 805, Lord Campbell said: "Those customs which have been universally and notoriously prevalent among mer-

cially interesting in the history of negotiable instruments.<sup>1</sup> Usages which at an earlier time were required to be proved as facts, have now, by judicial recognition and adoption, become the established rules of law.<sup>2</sup> In our own country instances are not

chants, and have been found by experience to be of public use, have been adopted by it (the law merchant) upon a principle of convenience and for the benefit of trade and commerce; and where so adopted it is unnecessary to plead and prove them."

By the custom of *Pennsylvania*, a book-account for goods sold, bears interest from the end of six months after the sale and delivery. *Adams v. Palmer*, 30 Pa. St. 346. And see *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Watt v. Hoch*, 25 Pa. St. 411.

1. In *Goodwin v. Roberts*, L. R., 10 Exch. 346; 44 L. J. Exch. 162, Chief Justice Cockburn said: "It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But, as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoris*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage, only unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it." On appeal, the last cited judgment was affirmed in the House of Lords, 1 App. Cas. 476, though the meaning of the phrase, the "law merchant," was not specially adverted to in the opinions.

In *Wood v. Watson*, 53 Me. 300, the court said: "Mercantile usage has es-

tablished the damages on bills on London, in case of dishonor, in *Massachusetts*, as determined in *Grimshaw v. Bender*, 6 Mass. 157, and, in this state, *Snow v. Goodrich*, 14 Me. 235, at ten per cent., instead of re-exchange. This usage forms a part of the law of the state. It had been of so long continuance, that, in 1809, when the judgment of the court in *Grimshaw v. Bender*, 6 Mass. 157, was pronounced, Chief Justice Parsons said that its origin could not be ascertained. It must, therefore, be deemed a part of the law merchant, and as obligatory as any portion of the common law, until it shall be modified or changed by the legislature."

2. In *Erie R. Co. v. Ackerson*, 33 N. J. L. 34, the court said that from a very early period, it has been the practice in this state to collect legal interest on a judgment, by means of an indorsement on the execution, and the right to do this must be regarded as the common law of *New Jersey*, become so by the same usage that has permitted the sheriff, with the consent of the plaintiff, to allow the goods levied on to remain in the possession of the defendant for almost an indefinite period.

In *Bonham v. Charlotte, etc., R. Co.*, 13 S. Car. 267, the court said: "It is true that the court takes notice of the general customs of the country; but that does not imply that the usages of business, as a general rule, lay within the judicial notice of the courts. Those customs that have been incorporated as part of the common law, as defined by adjudicated cases, are, beyond question, subjects of judicial notice without proof in point of fact. It is not to be denied that customs may and do become so incorporated that have had their origin since the period of time to which the common law looks as the test of antiquity. It may well be questioned whether any modern custom becomes incorporated in the common law until it has been established as a matter of fact by judicial authority. The change of the status of such a question from one of fact to one of law, is by gradual and almost insensible steps."

wanting of local usages in the various colonies or states which have since developed into binding legal principles.<sup>1</sup> The law of the road, and various rules of maritime law are familiar examples of this development.<sup>2</sup>

**IV. PROOF OF USAGES—1. Law and Fact for Court and Jury.—**Proof of a usage of trade involves questions both of law and fact.<sup>3</sup>

In *Slidell v. Grandjean*, 111 U. S. 412, it was held that the usages and customs prevailing in the province of *Louisiana*, affecting the alienation of lands, are to be respected in considering the rights of grantees of the former government. Usages long established and followed have to a great extent the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments. In *Spain* and in her dependencies great weight is given to such usages in the adjustment of rights of property.

In *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484, the court held that stockholders in chartered companies, bound to pay installments as called for upon notice from such companies, are affected by notices published in the newspapers where the companies transact their business. The substitution of such newspaper publication, in lieu of personal notice, has so long been a universal usage, and of a notoriety equal to that of newspapers themselves, that the custom of doing so has become a part of the law of the land.

1. In *Hoagland v. Wurts*, 41 N. J. L. 175, it was held that the legislative right to order low lands to be drained, at the expense of the owners, rested entirely on ancient custom, and could not be deduced from the power to legislate, unless, in the particular case, the lands were so situated or conditioned as to make their reclamation a matter of direct public concern. In this state, ancient usage sanctions legislation that provides for the drainage of low lands at the expense of the owners. But such legislation, to be valid, must conform to the usage upon which the right to legislate is founded. The right to appoint methods for the draining of meadows has been a branch of legislation that has existed in this state from the earliest times, and has been so frequently exercised and acknowledged, that it has become a part of the local common law.

In *Proprietary v. Jennings*, 1 Har. & M. (Md.) 92, the court said that the custom of surveyors, when the courses

and boundaries in a grant do not agree, is to disregard the course and run to the boundary; and that boundaries or calls are to be gratified at the expense of course and distance is a settled principle of construction.

In *Griffith v. Griffith*, 4 Har. & M. (Md.) 101, it was said that at common law the wife was entitled to a third part of the personal estate of the husband; and a bequest made to her by the husband, was not considered in lieu and exclusive of her dower; but she would take both. According to the custom of the city of London, if the husband devised a part of his personal estate to his wife, she was concluded by the bequest and deprived of her customary right, unless it appeared by his will that he intended she should have both. "Our acts of assembly are grounded on the custom of London. The acts passed relating to attachments, are allowed to be founded on the custom of London, and these acts concerning the dower of the wife, from their analogy to the custom of London, in that respect, I presume were grounded on that custom." See also *Hussey v. Jacob*, Ld. Raym. 86; *Leckbarrow v. Mason*, 2 T. R. 73; *Magill v. Brown*, Bright 346; *Cookendorfer v. Preston*, 4 How. (U. S.) 317; *Stone v. Rawlinson*, Miller 561; *Benson v. Chapman*, 8 C. B. 967, note; 65 E. C. L. 966; *Edie v. East India Co.*, 2 Burr. 1216; *Vallejo v. Wheeler*, 1 Cowp. 143; *Kruger v. Wilcox*, Am. Bl. 252.

2. In *Drew v. Steamboat Chesapeake*, 2 Dougl. (Mich.) 33, the court said, in regard to a general custom for vessels to pass each other to the left: "Such custom is a part of the law of the land; and a departure from it occasioning collision will render the party liable, unless the other party, by reasonable effort, might have prevented it; and each party should act upon the presumption that the other party will adhere to the custom."

3. **Law and Fact.**—*Mears v. Waples*, 3 Houst. (Del.) 581; *Sullivan v. Jernigan*, 21 Fla. 264; *Chicago Packing, etc., Co. v. Tilton*, 87 Ill. 548; *Pryce*

It is a question of law, what is sufficient usage to bind the parties; that is to say, for how long a time, at what places, and with what degree of uniformity it must have been observed. Therefore, whether a given state of facts establishes the usage claimed to exist is a question of law for the court; whether such a state of facts has been proved is a question for the jury.<sup>1</sup>

**2. Must Be Proved as Any Other Fact.**—A usage must be proved as any other fact in evidence; courts take no judicial notice of a usage.<sup>2</sup> Nor can its existence be left, without proof by witnesses, to the private information of jurors.<sup>3</sup>

**3. Number of Witnesses**—*a.* **ONE SUFFICIENT IF NOT CONTRADICTED.**—Notwithstanding certain early cases to the contrary, it is now settled that the testimony of a single witness is, as a matter of law, sufficient to establish the existence of a usage. The

*v. The Empress*, 3 West L. J. 174. In *Lewis v. Marshall*, 7 M. & G. 729, the court said: "The acknowledged rule is this: If the evidence offered at the trial by either party is evidence by law admissible for the determination of the question before a jury, the judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence when offered. Whether that evidence is of that character and description which makes it admissible, is a question for the determination of the judge alone, and is left solely to his decision."

1. *Sullivan v. Jernigan*, 21 Fla. 264; *Chicago Packing, etc., Co. v. Tilton*, 87 Ill. 547; *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522; *Branch v. Palmer*, 65 Ga. 210; *Pardridge v. Bailey*, 20 Ill. App. 351; *Huston v. Peters*, 1 Metc. (Ky.) 558; *Steward v. Scudder*, 24 N. J. L. 96; *Van Ness v. Pacard*, 2 Pet. (U. S.) 137; *Haas v. Hudmon*, 83 Ala. 174; *Carolina Nat. Bank v. Wallace*, 13 S. Car. 347; 36 Am. Rep. 694; *Allegre v. Maryland Ins. Co.*, 2 Gill. & J. (Md.) 136; 20 Am. Dec. 424; *Williams v. Woods*, 16 Md. 220; *Powell v. Bradlee*, 9 Gill & J. (Md.) 277; *Burroughs v. Langley*, 10 Md. 248; *Patterson v. Crowther*, 70 Md. 124.

See also *Goodyear v. Ogden*, 4 Hill (N. Y.) 104; *Dawson v. Kittle*, 4 Hill (N. Y.) 107; *Clark v. Cox*, 32 Mich. 204; *Parker v. Ibbetson*, 4 C. B. N. S. 346; 93 E. C. L. 345; *Hutchison v. Bowker*, 5 M. & W. 535. And see **QUESTIONS OF LAW AND FACT**, vol. 19, p. 635.

2. See, upon this subject, **JUDICIAL**

**NOTICE**, vol. 12, pp. 163-166; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; 35 Am. Dec. 363; *Gordon v. Little*, 8 S. & R. (Pa.) 557; 11 Am. Dec. 632; *Snowden v. Warder*, 3 Rawle (Pa.) 101; *Merchants' Mut. Ins. Co. v. Wilson*, 2 Md. 217; *Ward v. Everett*, 1 Dana (Ky.) 429; *Senac v. Pritchard*, 4 La. 160.

The burden of proof of establishing a usage or custom is upon the party asserting it. *Sultan v. 3000 Empty Oil Barrels*, 15 Fed. Rep. 618; *The John H. Cannon*, 51 Fed. Rep. 46; *Thomas v. Hooker Colville Steam Pump Co.*, 28 Mo. App. 563; *Hall v. Storrs*, 7 Wis. 253; *Caldecott v. Smythies*, 7 C. & P. 808.

A custom or usage cannot be proved by showing that the one sought to be charged with liability because of such custom has acted in accordance therewith in dealing with third persons. *Swain v. Thompson*, 6 Misc. (N. Y.) 209; 56 N. Y. S. R. 524; 26 N. Y. Supp. 536.

3. In *Green v. Hill*, 4 Tex. 465, the court below said: "I am not familiar with this custom of merchants in settling with insurance officers, or what are the liabilities of insurers in case of partial loss. I see on the jury planters and merchants, who doubtless are familiar with transactions of this kind; you will apply the rules of the same to the nature of this kind of transaction." On appeal this was disproved, and the court said: "The custom was not dependent on the knowledge any particular juror might have of such custom. If this were permitted, each juror might assume to know of his personal knowledge what the custom was, and no two of them agree,

fact that only a single witness testified, affects merely his credibility. The existence of a usage being a matter of fact to be decided by a jury, it may be proved as any other fact.<sup>1</sup>

*b. INSUFFICIENT IF CONTRADICTED.*—But if the testimony of a single witness as to the existence of a usage be contradicted by the testimony of another witness, the court will hold, as a matter of law, that the proof is not legally sufficient to establish its existence.<sup>2</sup>

If it was supposed that such knowledge was possessed by any one or more of the jurors, it was perfectly competent to make witnesses of such jurors; they would then be in the hands of each party, to ascertain the means of acquiring a knowledge of such fact on the part of the juror. The oath of a juror will not permit him to find a verdict on what he may think he knows, of himself; because then he would be passing on evidence known to himself, and not to his fellow jurors." See also *Tyson v. Laidlaw*, 18 La. 380.

*1. Number of Witnesses.*—In *Robinson v. U. S.*, 13 Wall. (U. S.) 363, the court said: "It is objected that the usage was proved by a single witness. But we cannot assert as a rule of law governing proof of usages of trade that if a single witness have a full knowledge and long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration and universality of the usage and is uncontradicted, the usage cannot be regarded by the jury as established." This may be taken to overrule a contrary decision in a circuit court in the case of *Barclay v. Kennedy*, 3 Wash. (U. S.) 350.

In *Jones v. Hoey*, 128 Mass. 585, the court said: "Notwithstanding the dictum in *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196, there can be no doubt, at the present day, that the circumstance that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact, and does not affect its competency or its sufficiency as matter of law."

In *Adams v. Pittsburgh Ins. Co.*, 76 Pa. St. 411, the court said that the law prescribes no certain number of witnesses to establish the fact of usage, although the concurring testimony of a large number may increase the probability of its being generally known.

In *Vail v. Rice*, 5 N. Y. 155, it was held that the testimony of one witness is sufficient to establish a commercial usage, if his means of knowledge are

abundant and his testimony full and satisfactory. *Qualifying Wood v. Hickok*, 2 Wend. (N. Y.) 501.

In *Partridge v. Forsyth*, 29 Ala. 200, the court said: "Some of the authorities assert the doctrine, in terms more or less positive, that one witness is insufficient to prove a custom. *Halwer-son v. Cole*, 1 Spears (S. Car.) 321; 40 Am. Dec. 603; *Cunningham v. Fonblanque*, 6 C. & P. 44; 25 E. C. L. 274; *Wood v. Hickok*, 2 Wend. (N. Y.) 501. But these citations are not sustained by any satisfactory argument, and are at war with the analogies of the law. We cannot lay it down as a positive rule that more than one witness is required to prove the existence of a custom or usage. No statute has prescribed such a rule, and we are not able to perceive a necessity for so radical a departure from general principles." Compare *Price v. White*, 9 Ala. 563; *Jewell v. Center*, 25 Ala. 498; *Smith v. Rice*, 56 Ala. 417. To the same effect are *Wootters v. Kauffman*, 67 Tex. 488; *Thomas v. O'Hara*, 1 Mill (S. Car.) 303; *Mars-ton v. Bank of Mobile*, 10 Ala. 284.

In other cases the evidence of a single witness to prove a usage has been admitted without objection. *Sewell v. Corp.*, 1 C. & P. 392; 11 E. C. L. 432; *Cohea v. Hunt*, 2 Smed. & M. (Miss.) 227; 41 Am. Dec. 589; *Miller v. North America's Ins. Co.*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 470; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Pittsburg v. O'Neill*, 1 Pa. St. 342; *Bis-sell v. Ryan*, 23 Ill. 566.

*2. In Parrott v. Thatcher*, 9 Pick. (Mass.) 426, it was held that a usage of a particular business is not sufficiently proved by the testimony of only one witness in support of it, where another witness equally familiar with the business denies it, and where other witnesses on the subject might be had. Therefore, where the plaintiff's case depended on their proving the usage of a particular business, with which many persons were conversant, and they offered only one witness to prove it,



c. TWO WITNESSES DESIRABLE.—In practice it is always desirable to have at least two witnesses to prove the usage, unless its existence is admitted; for if the testimony of one only is offered, and is contradicted, the usage is not proved; and, moreover, on appeal, the court would probably not disturb the verdict of a jury denying the existence of a usage proved by one witness only.<sup>1</sup>

4. **Qualifications of Witnesses.**—In order to render a witness competent to testify to the existence of a usage, it must appear that he personally knows of its existence as a fact.<sup>2</sup> This knowledge may be acquired from personal experience in the business to which the usage relates, or in any other manner, which entitles him to speak with accuracy. If it appears that the witness knows of the practice of individual persons only, or that he has not been in a position to know of the general course of business, or that he only recently learned of the alleged usage, he cannot be considered competent.<sup>3</sup> But it is not necessary that the witness should be

and the usage was denied by a witness for the defendants, who had the same means of knowledge as the plaintiff's witness, a verdict found for the plaintiffs was set aside and a new trial granted. To the same effect, see *Wootters v. Kauffman*, 67 Tex. 488; *Robinson v. U. S.*, 13 Wall. (U. S.) 363.

1. *Homar v. Graves*, 1 Mill (S. Car.) 308; *Treadway v. Sharon*, 7 Nev. 37.

2. **Qualifications of Witnesses.**—In *Hamilton v. Nickerson*, 13 Allen (Mass.) 351, a witness, who had been for twenty-seven years engaged in a certain business, was allowed to testify as to what he believed to be the custom in that business. The other witness testified that all the absolute knowledge he had on the subject was from his own business; that he could state what he believed the general custom to be from an extended knowledge of the business and of the custom, but could not state individual cases; and that he knew it in the way men generally gather knowledge. The court held that both witnesses were competent. "The existence of a custom or usage of trade could be proved only by the evidence of those who had such knowledge of the practice and course of business as to create in their minds the belief or conviction of its existence. The *factum probandum* was not a single isolated act or occurrence, but the result or conclusion derived from a series of similar acts or circumstances, creating and establishing in the mind of the witness a conviction or belief of the complex whole or comprehensive fact, to the existence

of which he was called upon to testify. In such case belief is knowledge, and constitutes direct and primary evidence. Indeed, the existence of a usage could not well be proved by showing particular instances of transacting business in a certain way. . . . The witness stated his belief of the existence of the usage as derived from a knowledge of the business for a long series of years. In regard to such a matter, a distinction between knowledge and belief is altogether too nice and metaphysical to be introduced into the rules of evidence by which justice is to be practically administered."

3. In *Standard Oil Co. v. Swan*, 89 Tenn. 434, the witness did not show that he was acquainted with the usage and custom of well-appointed and well-managed concerns. He only knew of the conduct of one, without explaining his relation to it.

In *Hale v. Gibbs*, 43 Iowa 380, a witness who was called to testify respecting a custom of trade, showed that his knowledge of it was not later than a year before the time of giving his testimony. His evidence was held to be incompetent.

In *Smith v. Rice*, 56 Ala. 417, it was held that a custom among planters, in relation to the manner of receiving supplies from merchants who advanced to them, could not be established by the testimony of a single witness, who only stated that he knew what had been the custom among his neighbors in relation to the matter since 1868, a period of several years.

In *Berry v. Cooper*, 28 Ga. 543, it

engaged in the business to which the usage is attached; thus, a usage among banks may be proved by a person having knowledge of bankers' usages, although not himself a banker or connected with a bank.<sup>1</sup>

**5. Form of Question to Witness.**—The proper form of question to be put to a witness, when it is desired to prove a usage, is indicated in the note. As the question may have to be defended, on appeal, in the form in which it is put, it is important that it should be carefully expressed.<sup>2</sup>

was held that by way of establishing a usage in shipping on a certain river, it was competent for a witness to testify as to what had been his habit and custom in shipping on all the boats on said river, as well as on the particular boat upon which the loss occurred which was the subject-matter of controversy.

1. In *Wilson v. Bauman*, 80 Ill. 493, the court held that where the plaintiff proved by witnesses a custom that the employment of an architect to make plans and designs for a building; carried with it an employment to superintend its construction, it was error to refuse to allow the defendant to show there was no such custom, except by witnesses who were architects. Such custom must be as well known to builders and contractors as to architects, and does not require special skill or science to know of its existence.

In *Griffin v. Rice*, 1 Hilt. (N. Y.) 184, it appeared that the witnesses, although not employed in the banking business, were dealers with the banks, and had knowledge of the ordinary course of dealing with them. "There is no necessity for showing a man to be an expert in banking, in order to prove a banking usage. He should know what the usage is, and then he is competent to testify, whether he be a banker, or employed in a bank, or a dealer with banks. There is no reason why a dealer should not have as much knowledge on such a subject as a person employed in a bank." And see *Allen v. Merchants' Bank*, 15 Wend. (N. Y.) 482.

In *Gregg v. Garverick*, 33 Kan. 190, it was held that it was not necessary that a witness should be a commission merchant, in order to prove the custom or usage of such merchants. If he knows what the usage is from dealing with such commission merchants, he is competent to testify to it.

In *Kermott v. Ayer*, 11 Mich. 181, it was held that the relative value of

foreign and American currency is a question of commercial usage, and may be proved by anyone acquainted with the usage.

In *Wear v. Sanger*, 91 Mo. 349, it was held that the custom of the Creek nation in the *Indian Territory*, as to the right of an Indian woman when married to a white man, to hold in her own right what property she had before marriage, is a question of fact to be proved as any other fact, and is properly submitted to the jury for their determination. One acquainted with the customs of the Creek nation although not a lawyer, is competent to testify as to the same.

In *Shackleford v. New Orleans, etc.*, R. Co., 37 Miss. 202, it was said that usages must be proven by witnesses who have had frequent and actual knowledge of the usage about which they testify.

In *Drew v. Steamboat Chesapeake*, 2 Doug. (Mich.) 33, it was held that a general custom of navigation, *e. g.*, for vessels to pass each other to the left, may be proved by the testimony of persons skilled in navigation.

In *Evans v. Commercial Mut. Ins. Co.*, 6 R. I. 47, it was held that the usages of iron merchants as to adjusting losses on policies on iron might be proved by insurance brokers as well as by iron dealers. See also *Camden v. Cowley*, 1 W. Bl. 417; *Gallup v. Lederer*, 1 Hun (N. Y.) 282.

**2. Form of Question.**—In *Robinson v. Chittenden*, 7 Hun (N. Y.) 133, it was held that the question, "Is it not customary for persons who take receipts for goods on board of a ship to procure bills of lading therefor?" and the question, "Is it not customary for the manifest of the ship to be made up from the bills of lading?" are not suggestive of a custom amounting to a usage of trade, although it may have been customary to do both the acts mentioned for the convenience of the carrier.

**6. Not Provable by Opinions.**—Usages being a fact, and to be proved as a fact, it follows that the existence of a usage cannot be established by the mere opinions of witnesses as to what the law is, as applied to the case in hand.<sup>1</sup> It often appears that what is supposed to be a usage of trade, is merely the general opinion of persons as to their rights and liabilities under certain

In *Steamboat Albatross v. Wayne*, 16 Ohio 513, it was held that a question propounded to a witness in this form: "What do you know, if anything, of any custom of trade in delivering goods at Memphis by steamboats different from the usage of other ports on the Mississippi river?" was in proper form.

In *Dwight v. Badgley*, 60 Hun (N. Y.) 144, it was held that the establishment of the existence of a general custom by evidence should have preceded the question which was put to the witness, and before such custom was established the witness could not properly be called upon to give a statement as to what the custom was. *Harris v. Tumbridge*, 83 N. Y. 93; 38 Am. Rep. 398.

In *Kershaw v. Wright*, 115 Mass. 361, it was held that on the issue whether an alleged commercial usage exists, a witness may be asked to describe how, under the usages in force, a transaction like the one in question would be conducted by all the parties thereto, from its inception to its conclusion.

In *Park v. Piedmont, etc., L. Ins. Co.*, 48 Ga. 601, a witness was asked, "Do you know of any usage or custom in the life-insurance business as to the commutation of renewals?" It was said on appeal that the proper form would have been, "What is the general or universal usage and custom in the life-insurance business as to the commutation of renewals?"

See also *Commercial Bank v. Union Bank*, 19 Barb. (N. Y.) 392; *Kendall v. Russell*, 5 Dana (Ky.) 501; 30 Am. Dec. 696; *Ecker v. Moore*, 2 Chand. (Wis.) 85; *Flynn v. Murphy*, 2 E. D. Smith (N. Y.) 378; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Patterson v. Crowther*, 70 Md. 124.

**1. Usage Not Provable by Opinion.**—

In *Hall v. Benson*, 7 C. & P. 711; 32 E. C. L. 702, a witness was asked whether there was any general course of business as to the matter in dispute. *Tindal, C. J.*, interrupted, saying: "Is there any course of business? Let your mind revolve over instances. I am not asking you whether it is just and

proper, but whether there is any prevailing course of business. Either you know such a course of business or you do not. If you do not, say so."

In *Mills v. Hallock*, 2 Edw. Ch. (N. Y.) 652, the court said: "A custom must be proved by evidence of facts and not by mere speculative opinions, by means of witnesses who have had frequent and actual experience of the custom. The testimony of those who speak from report only, and not from particular instances within their own knowledge, if receivable at all, is of no weight."

In *Allen v. Merchants' Bank*, 15 Wend. (N. Y.) 482, the court said: "The inquiry is not after the opinion of traders and merchants in respect to the law upon a given mercantile question, but after the evidence of a fact, to wit: the usage or practice in the course of mercantile business in the particular case. Independently of this usage, merchants are no more permitted to testify to the commercial law than other individuals."

In *Haskins v. Warren*, 115 Mass. 514, the court said: "Usage is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practised by themselves and others in the trade to which it relates. But their conclusions or inferences as to its effect, either upon the contract or the legal title or rights of parties, are not competent to show the character or force of the usage. Neither is it competent for them to testify what is the understanding of others in regard to its effect. The understanding of a community, or of a class, as to a legal effect or an implication of law, is not a valid usage; and evidence to prove it is not competent to determine legal rights under contracts."

Similarly in *Austin v. Williams*, 2 Ohio 61, it was held that the opinions of witnesses are not admissible to constitute a usage. Or, as expressed in

facts; such opinion cannot constitute a usage. Merchants may consider themselves as having certain rights in certain cases, and may think of the matter as being a usage of their trade; but a usage is a mode of conducting business, a course of dealing, and cannot from its nature be the subject of opinion. It must be a method of dealing with certain facts, and not a conclusion as to the rules of law pertaining to those facts.<sup>1</sup>

*Steamboat Albatross v. Wayne*, 16 Ohio 513: "A witness can only testify to facts, not to inferences deducible from facts." So in *Horan v. Strachan*, 86 Ga. 408, it was said that custom is not a question of opinion, but of fact, and cannot be proved by the opinion of witnesses that it ought to be so and so; it must be proved that the custom exists.

In *Shackelford v. New Orleans, etc.*, R. Co., 37 Miss. 202, it was held that customs and usages must be proven by evidence of facts, and not by mere speculative opinions.

In *Fletcher v. Seekell*, 1 R. I. 267, it was said that usage was made, not by opinions, but by the usual acts and conduct of men in a given class of cases.

In *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, it was said that a custom allowing commissions to the person in charge of the ship on disbursements not made by him, cannot be proved by the opinions of witnesses that such person is entitled to the commissions, whether he makes the disbursement or not.

In *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215; 34 Am. Dec. 289, the court said: "The custom of merchants, or mercantile usage, does not depend upon the private opinions of merchants as to what the law is, or even upon their opinions publicly expressed, but it depends upon their acts. The inquiry is not into the opinions of traders and merchants as to the law upon a mercantile question, but for the evidence of a fact, viz.: the usage or practice in the course of mercantile business in the particular case."

In *Gallup v. Lederer*, 1 Hun (N. Y.) 282, it was said: "To prove the existence of a custom, something more than the judgment or the conclusion of the witness called to support it is required. A custom is the result of usage, and can only be properly shown by proof of the usage from which it may be claimed to be derived. The inquiry in such cases is not after the

opinions of traders and merchants in respect to the law upon a mercantile question, but for the evidence of a fact, to wit: the usage or practice in the course of mercantile business in a particular case."

In *Edie v. East India Co.*, 2 Burr. 1216, the court said: "You may examine witnesses to prove a particular course of trade, or other matters in the nature of facts, but not to show what the law is. Nothing could be more dangerous than to fix the law upon the opinions of particular men." And see also, to the same effect, *Hawes v. Lawrence*, 3 Sandf. (N. Y.) 193; 4 N. Y. 345; *Carvick v. Vickery*, 2 Dougl. 653; *Ruan v. Gardner*, 1 Wash. (U. S.) 145; *Winthrop v. Union Ins. Co.*, 2 Wash. (U. S.) 7; *Pfeil v. Kemper*, 3 Wis. 318.

1. In *Oelricks v. Ford*, 23 How. (U. S.) 49, the court held that whether a usage of the kind set up existed in the trade in Baltimore, was a question of fact to be proved by persons who had a knowledge of it from dealing in the article. Opinions of persons as to what rights they might exercise in their own business fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

In *The John H. Cannon*, 51 Fed. Rep. 46, the question was as to the existence of a local usage in the port of Baltimore by which, in case of jettison of a lumber cargo lawfully carried on deck, the vessel and freight are exempted from contributing in general average. There was no witness called who could remember an instance in which the question had been mooted, and the alleged usage applied to decide it. Mr. C., an experienced average adjuster, member of a long-established firm in that business, is the principal witness, and he states that he thinks it is the usage, because he has no recollection of ever having made such an allowance in adjusting such a loss, and does not remember of ever hearing of such an allowance in the port of Baltimore.

**7. Nor by Instances.**—To establish a usage of trade it is not sufficient to prove certain particular instances. The usage must be positively established as a fact, and not left to be drawn as a matter of inference from individual transactions.<sup>1</sup>

**8. Nor by Single Instance.**—And *à fortiori*, a usage cannot be

The other witnesses have no knowledge of any instance in which a loss of this class has been the subject of adjustment, and speak of the usage very much from what they have heard from Mr. C. "It would seem that what is spoken of as a usage was, in fact, rather the prevailing belief among underwriters and adjusters in Baltimore, that the general law did not recognize the right to contribution for jettison of a deck cargo of lumber. It was rather a local understanding of the general law than a local usage of trade."

In *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633, the court said: "It must also be a usage relating to matters of fact, and not to modes of thinking as to the law. In this case the proof is simply that the wharfingers, at Evansville, after notice given, were accustomed to consider themselves as not responsible. This amounts to nothing." Other authorities to the same effect are *Adams v. Pittsburgh Ins. Co.*, 95 Pa. St. 348; 40 Am. Rep. 662; *Garey v. Meagher*, 33 Ala. 630; *Main v. Eagle*, 1 E. D. Smith (N. Y.) 619; *Southwestern Freight, etc., Co. v. Standard*, 44 Mo. 71; 100 Am. Dec. 255; *Cunningham v. Fonblanque*, 6 C. & P. 44; 25 E. C. L. 274; *Syers v. Bridge*, Dougl. 509; *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633; *Bissell v. Ryan*, 23 Ill. 566; *Slgsworth v. McIntyre*, 18 Ill. 126; *Mills v. Hallock*, 2 Edw. Ch. (N. Y.) 652; *Chenery v. Goodrich*, 106 Mass. 566; *Hagerty v. Scott*, 10 Tex. 525; *Bryant v. Kelton*, 1 Tex. 434; *Shackleford v. New Orleans, etc., R. Co.*, 37 Miss. 202; *Robinson v. Chittenden*, 7 Hun (N. Y.) 133; *Bishop v. Clay Fire, etc., Ins. Co.*, 45 Conn. 430.

**1. Usage of Trade Not Provable by Particular Instances.**—In *Cope v. Dodd*, 13 Pa. St. 33, in order to establish a usage it was endeavored to prove particular instances from which a usage might be inferred. The court refused the offer. "A usage which is to govern a question of right, should be so certain, uniform and notorious, as probably to be known to and understood by the parties, as entering into their contract, *U. S. v. Duval*, Gilp. (U. S.) 356, and it cannot be proved

by single isolated instances. *Dean v. Swoop*, 2 Binn. (Pa.) 72." And see *Amblar v. Phillips*, 132 Pa. St. 167.

In *Flatt v. Osborne*, 33 Minn. 98, the court held that the evidence of the usage of two companies within the knowledge of the witness was insufficient to support a finding by the jury of a general usage or custom binding on the plaintiff, in the absence of evidence of any actual knowledge on the subject by him. *Janney v. Boyd*, 30 Minn. 319; *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199.

So also it is held that particular instances of a certain practice in a bank, do not establish a usage, *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215; 34 Am. Dec. 289; nor instances in one or two banks other than the one concerned in the alleged usage. *Chesapeake Bank v. Swain*, 29 Md. 501.

In *Martin v. Delaware Ins. Co.*, 2 Wash. (U. S.) 254, a witness testified that he had known two instances of a certain deviation by a vessel; but this did not make a usage. And in *Trott v. Wood*, 1 Gall. (U. S.) 444. *Story, J.*, said that to constitute a usage it was not enough that a few instances could be produced.

In *Herring v. Skaggs*, 73 Ala. 446, it was said that a custom is a fact, and is capable of proof as any other fact. It may be proved by evidence of facts and instances in which it has been acted upon, but it is not proved by evidence, that it was acted upon in a few particular instances of dealing; nor is such evidence "admissible to establish its existence. Three isolated instances of sales made in the course of three or four years are not sufficient or competent evidence to establish a usage of trade, by which the rights and liabilities of parties are to be measured and determined, to the exclusion of the known and settled principles of law. Usages of trade are not recognizable, unless they have the essential elements of certainty, notoriety and continuity, bringing themselves home to the knowledge of those who are concerned in the trade or business to which they may pertain."

In *Savage v. Pelton*, 1 Colo. App.

established from a single instance. One act cannot prove a usage.<sup>1</sup>

**9. Nor by Exchange Rules.**—Rules adopted by commercial organizations have been offered in evidence to establish the existence of usages. But the rules of a “produce exchange,” or “real estate exchange,” or “clearing-house,” or other similar institutions, can have no force, as against a person not a member thereof, or who did not contract with reference to such rules.<sup>2</sup> Hence it is

148, it was held that the evidence did not tend to establish a usage. The only proof offered upon the subject was that of a few particular cases or special transactions.

In *Lowry v. Read*, 3 Brew. (Pa.) 452, it was said: “It would, therefore, be next to impossible to show that, under a constitution of a society which has been less than two years in existence, there could have grown up a usage in regard to the exercise of a right of suspension of grand chancellors of the order, which, by virtue of the usage, appertained to the office of supreme chancellor, as a right. To make good this assertion, it was necessary to have shown cases sufficiently numerous to establish a usage, in which the power had been exercised and acquiesced in by the order. To be able to cite a few instances in which a supreme chancellor had suspended a grand chancellor by his decree, would not establish a usage. For the general principle, see *Rapp v. Palmer*, 3 Watts (Pa.) 178; *Collings v. Hope*, 3 Wash. (U. S.) 150; *Stultz v. Dickey*, 5 Binn. (Pa.) 287; 6 Am. Dec. 411; *Parrot v. Thacher*, 9 Pick. (Mass.) 426; *U. S. v. Macdaniel*, 7 Pet. (U. S.) 1; *Winthrop v. Union Ins. Co.*, 2 Wash. (U. S.) 7.”

In *Ambler v. Phillips*, 132 Pa. St. 167, it was held that before a mere usage of trade, or a custom, can become so firmly imbedded in the law as to govern the rights of parties, it must be so uniform and notorious as probably to be known to and understood by the parties entering into the contract. *Corcoran v. Chess*, 131 Pa. St. 356. Such a usage or custom cannot be established by single, isolated instances, continued and acquiesced in by all acting within its operations. *Cope v. Dodd*, 13 Pa. St. 33; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264. So established, parties may be presumed to have acted with reference to it. See also *Chesapeake Bank v. Swain*, 29 Md. 483.

**1. One Act Cannot Prove a Usage.**—In *Duvall v. Farmers' Bank*, 9 Gill & J. (Md.) 31, evidence to establish a particular usage of a bank was rejected, when the officer by whom the usage was offered to be proved, spoke of but a single case of the kind referred to.

In *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300, the court held that a custom, that a payment of the premium may be made in a different manner from that provided in the policy, cannot, even upon a demurrer to the evidence, be inferred from a single act. The fact that the insurance company in one instance allowed credit to the insured for a claim for services, and accepted the balance of the premium in money, does not warrant the inference of a custom to accept pay in services. “It would be a strained and violent inference which would lead to the conclusion from one act alone, that a custom existed. A single transaction, occurring at the very threshold of the dealings between parties who have put their contract in writing, cannot be deemed proof of a custom.”

**2. Rules of Exchanges.**—In *The Innocenta*, 10 Ben. (U. S.) 410, the question was as to an alleged usage of the port of New York, limiting the time within which a vessel in this port must receive cargo from a lighter to two days. “‘The Produce Exchange,’ an organization of merchants, has adopted a rule somewhat to this effect; but no such association can, by a rule, make a custom of the port, however the members of it may, as between themselves, bind themselves to observe the rule. This is matter of contract. But to make a custom of the port, the rule must be so generally known and acknowledged and acted upon, as virtually to be applied by the whole of that part of the business community which it would affect.”

In *Overman v. Hoboken City Bank*, 30 N. J. L. 61, the court, in effect, said: Without stating that the association

held that such rules cannot *per se* establish a usage. As between the members of such bodies, the rule may be considered to enter into their contracts, but not so with outsiders contracting with outsiders or with members.<sup>1</sup>

**10. Quantum of Proof Required.**—It is said that the evidence offered to prove the existence of a usage should be clear and dis-

called the "clearing-house" is an institution authorized by special legislation, or any authority existing in such association, in any way, to alter or modify the law merchant in regard to checks or commercial papers, such association cannot be held to have power to make usages or rules to bind those who are not parties to its organization. Its usages and rules, if not in conflict with law, may, by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage of trade may bind those who deal with reference to it, and who are therefore held impliedly to adopt it. But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only.

In *Kershaw v. Wright*, 115 Mass. 361, on the issue whether a usage exists in a city to inspect a certain kind of provisions, the court held that evidence that the rules of a chamber of commerce, having the power given to it by its act of incorporation to appoint an inspector of provisions, and one of the purposes of which was declared to be "to establish and maintain uniformity in the commercial usages of the city," said nothing about the kind of provisions in question, while they provided for the inspection of many other kinds, is admissible to show the non-existence of the alleged usage.

In *Blake v. Stump*, 73 Md. 160, an action by real-estate brokers for commissions, the question was as to whether commissions should be charged upon the entire value of property, when part of the purchase-money remained on mortgage. The court said: "The rule of the real-estate exchange is that 'commissions shall be chargeable on the entire principal or value of the property,' if any 'part of the purchase-money remains on mortgage or redeemable ground rent;' and some witnesses testified that it was the custom to calculate commissions on the basis of

a fee value if mortgage rested on the property, or a lease was taken. It is very certain that the rules of the brokers' exchange cannot be allowed to control. *Taliaferro v. First Nat. Bank*, 71 Md. 218. It is a question of public and notorious usage, and whether such usage was reasonable and proper."

In *Greeley v. Doran Wright Co.*, 148 Mass. 116, it appeared that the usage of the exchange, to settle all transactions between members on or before fifteen minutes past two o'clock of the afternoon of the day following that of a bargain and sale, had no relation to the transaction between the plaintiff and the defendants. The defendants, who were members of the petroleum exchange of New York, bought oil for the plaintiff on a margin, and closed the transaction at 12:30 on the following day, because the plaintiff had failed to respond with margins at that time on notice. "The plaintiff was not a member of the exchange, neither did he buy petroleum of the defendants. He employed the defendants as brokers and members of the exchange to buy petroleum for him on a one per cent. margin. No evidence appears in the exceptions connecting this usage of the exchange with the dealings of brokers with their customers, or with the transaction between these parties." Evidence of the usage of the exchange was therefore rejected.

In *Waugh v. Seaboard Bank*, 54 N. Y. Super. Ct. 283, it was held that in the absence of any agreement to that effect between the parties, and there being no evidence that the party sought to be bound thereby was a member of the exchange, the rules or customs of the petroleum exchange and clearing house connected with it, in regard to the payment of storage charges, on a sale, or transfer of oil or oil certificates, are immaterial, and have no relation to, nor any binding effect upon, the parties, or the subject-matter of the contract.

1. See also *STOCK EXCHANGE*, vol. 23, p. 748; *TRADE, BOARDS OF*, vol. 26, p. 227.

ting, and that courts should strictly scrutinize the proof.<sup>1</sup> But it is not essential that all the witnesses should entirely agree as to its existence or scope; if the evidence be legally sufficient to establish it, the court will leave the question to the jury.<sup>2</sup>

**11. Not Proved When the Evidence Is Conflicting.**—As was stated in a preceding paragraph, whether a given state of facts establishes the usage claimed to exist, is a question of law for the court. And when the court sees that by reason of conflict of opinion as to the scope or prevalence of the alleged usage, the

**1. Quantum of Proof Required.**—In *The John N. Cannon*, 51 Fed. Rep. 46, it was said: "As to the usages of average adjusters, which do not contravene any general principles of law, but merely regulate the details of their application, it requires much less evidence to support a usage than to prove a local usage opposed to the principles of the general law. These remarks indicate with what strictness courts should scrutinize the proof by which it is endeavored to fasten an exception upon the general law by setting up a local usage."

In *Adams v. Pittsburg Ins. Co.*, 76 Pa. St. 411, it was said that to establish the custom, the evidence by which it is proposed to prove it, must be clear, uncontradictory and distinct. Custom is usage so long established and so well known as to have acquired the force of law. It is obvious, therefore, that a custom not only can, but must, be so proved as to leave no doubt upon the mind with reference to its nature and character. Doubt must be wholly eliminated from the evidence adduced or the custom is not well proved."

In *Drake v. Hudson*, 7 Har. & J. (Md.) 399, it was held that usage or custom may be proved by parol, whether arising under a public written law or not. *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 539.

In *Mackenzie v. Dunlop*, 8 Macq. H. L. Cas. 26, it was held that a mercantile usage is provable by the multiplication or congregation of a great number of particular instances, showing a given course of business, and a general established understanding respecting it.

In *Cook v. Fiske*, 12 Gray (Mass.) 491, it was held that the testimony of certain ship-brokers that they never knew of a case in which the broker's commissions had been paid when no charter-party had been executed, and that so far as they knew, it was not the

custom of ship-brokers to charge a commission under such circumstances, is not such proof of a custom as will prevent the plaintiff ship-broker from recovering his commissions.

In *Alabama, etc., Rivers R. Co. v. Kidd*, 35 Ala. 209, it was held that the fact that a railroad company had been, for about a month, in the habit of depositing in a particular warehouse freight that was not consigned to any named person, without any proof that this was generally known, or that a party dealing with the company had notice of it, is not sufficient to establish the custom as an element of a particular contract.

**2.** In *Dickinson v. Poughkeepsie*, 75 N. Y. 66, the court said that to prove a valid usage or custom, it is not essential that all the witnesses should agree; if they differ as to its existence in the same place or in all places, this presents a question for a jury.

In *Farnsworth v. Chase*, 19 N. H. 535; 51 Am. Dec. 206, it was held that the usage in question was a usage binding on the plaintiffs, if it be proved to be uniform, known and established, and whether it be so, is a question of fact for the jury, although there may be contradictory evidence on the point.

In *Winsor v. Dillaway*, 4 Met. (Mass.) 221, a contradictory evidence was offered as to the existence of a usage on which the plaintiff relied to support his action; the jury were instructed that if it was proved that the usage existed, and that the defendant knew it existed, the plaintiff was entitled to recover; the jury thereupon returned a verdict for the defendant. It was held that the plaintiff had no just cause of exception to such instruction.

In *Burroughs v. Langley*, 10 Md. 248, it was said that notwithstanding that the evidence as to the prevalence of the custom was all on one side, the question should have been submitted to the jury.



evidence is not legally sufficient to establish its existence, the jury will not be called upon to consider it. The cases in the notes are illustrations of unsuccessful attempts to establish usages.<sup>1</sup>

**1. Conflicting Evidence.**—In *Adams v. Pittsburgh Ins. Co.*, 76 Pa. St. 411, the question was as to the existence of a custom that the captain of a steamboat had authority to bind the owners by giving a premium note for insurance. Four witnesses gave their evidence. One testified that the custom is for an owner and the captain to insure for all the owners, the captain signing the premium note. Another stated simply that it was customary for the captain to execute the note; but whether under authority of one or all of the owners he did not say. The third, that it was customary for the captain to insure for the boat and owners, but added upon cross-examination that he knew of no case where the captain was not directed by the owner. The fourth, that it was the custom for the captain to insure for the owners, as in this case. "From this testimony it is impossible to say what the custom or usage is, if indeed any such exists."

*Turner v. Dawson*, 50 Ill. 85, was somewhat similar. The plaintiffs sought to prove a usage of merchants in Chicago to make certain charges. But no two of the four witnesses examined on the custom testified alike, and hence the court held it not proven.

In *The Innocenta*, 10 Ben. (U. S.) 410, the court said: "In this case, of the four witnesses called on this question, who were familiar with the trade in question, two were shown to have no knowledge of any existing custom of the port outside of the rule of the 'produce exchange,' and the strongest witness to its existence doubted its actual application as a usage to a case where, from the nature of the cargo to be received, it could not be taken on board within the period of two days. Yet to be worth anything as a custom, it should have been proved that it is actually applied and enforced where, but for the custom, the time allowed would be unreasonably short."

In *Sweet v. Leach*, 6 Ill. App. 212, defendants were wholesale merchants in the city of Chicago, and plaintiff was employed by them as salesman for the year 1877. During the year he lost some time by sickness, and defendants paid him all his salary except a certain amount deducted for the time

lost. In reply to the defense for lost time, plaintiff, on the trial, offered evidence of an alleged custom of the trade to make no deduction from the salaries of salesmen for the time lost by sickness. It was neither ancient, nor, so far as the proof shows, general, uniform, or well known. The plaintiff called numerous witnesses, salesmen in wholesale houses, who testified to instances of payments having been made to traveling salesmen when disabled by sickness, and some of them also testified as to the existence of a custom among wholesale dealers to make such payments; but they failed to show that the custom was uniform or generally known and acted upon. On the other hand, a large number of leading wholesale merchants of the city were called as witnesses, all of whom denied the existence of any such custom. Defendants both testified that they had no knowledge of any such custom at the time they employed plaintiff, or during the time he was in their service. They had been in business in Chicago many years, as had also the other wholesale dealers who were called as witnesses, and if there had been a general custom, such as was claimed by plaintiff, they would have known it. "The most that can be fairly claimed, taking the proof all together, is that in given instances no deduction was made from the salary of salesmen for lost time occasioned by sickness; but there is no ground for claiming that these instances had been so frequent and uniform, or so long continued, as to have ripened into a general custom."

In *Hinton v. Coleman*, 45 Wis. 165, it appeared that the only witness who testified to the existence of the custom in question was the plaintiff himself. On the other hand, there were three other witnesses, apparently equally competent and having equal opportunities for knowing of the existence of such custom, if it existed, who said there was no such custom. The court said that it was clear that such evidence did not establish the existence of the custom claimed. See also *Dickinson v. Poughkeepsie*, 75 N. Y. 66; *Scudder v. Bradbury*, 106 Mass. 422; *Upton v. Sturbridge Cotton Mills*, 111 Mass.

When those who would know of a usage, if one existed, know nothing of it, or when those professing to know it, are unable to agree as to its terms, it is apparent that nothing is shown meeting the requirements of the law.<sup>1</sup>

**V. KNOWLEDGE OF USAGE—1. In General.**—The question as to when it is necessary to show knowledge of a usage on the part of a person sought to be affected by it, is one of frequent occurrence. All men are conclusively presumed to know the general customs of the land—that is, the common law. In respect to these, therefore, it is of course unnecessary to offer proof of a party's knowledge.<sup>2</sup> But the practical questions regarding usages do not relate to these general customs, but to the particular usages of various trades and localities. It is in respect to these usages that the question of knowledge becomes important.

Bearing in mind that the only theory upon which usages are admitted in any case is that parties in making contracts, do so with the intention that the usages relating to the subject of their contract should enter into the contract and form part of it, it is apparent that the parties must have known of the usage in order to contract with reference to it. They could not contract with reference to a usage of which they were ignorant. So in all cases the law admits a usage upon the assumption that the parties knew of it.<sup>3</sup>

**2. Knowledge May Be Actual or Presumptive.**—Such knowledge may be either actual or presumptive. The law may require

446; *Haskins v. Warren*, 115 Mass. 514; *Winthrop v. Union Ins. Co.*, 2 Wash. (U. S.) 7; *Rushforth v. Hadfield*, 6 East 522; *Lewis v. Marshall*, 7 M. & G. 729.

1. In *The Harbinger*, 50 Fed. Rep. 941, it was held that a custom is not shown to be established at a port, where the testimony of the witnesses who aver that the custom exists is met by an almost equal number of witnesses with equal facilities of knowing, who testify to never having heard of such custom.

In *Lewis v. Ship Success*, 18 La. Ann. 1, it was said: "When the question is of a custom or usage, and it is not known to those who, from business and connections, have the best means of knowing it, the ignorance of it is, in some sense, positive testimony of its non-existence."

2. See *supra*, this title, *Customs in the Older Law—General Customs*; 1 Bl. Com. 73.

3. Various cases stating or illustrating the rule that a usage must be known to the parties, are *Van Hoesen v. Cameran*, 54 Mich. 609; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200; *Barton v. McKelway*, 22 N. J. L. 165;

*East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Park v. Viernow*, 16 Mo. App. 383; *Johnson v. De Peyster*, 50 N. Y. 666; *Martin v. Maynard*, 16 N. H. 165; *Bentley v. Doggett*, 51 Wis. 224; 37 Am. Rep. 827; *U. S. v. Buchanan*, 8 How. (U. S.) 83; 3 Wash. (U. S.) 149; *Foley v. Mason*, 6 Md. 37; *Sterling Organ Co. v. House*, 25 W. Va. 64; *Lamb v. Klaus*, 30 Wis. 94; *Rindskoff v. Barrett*, 14 Iowa 101; *Sweet v. Leach*, 6 Ill. App. 212; *Lowry v. Read*, 3 Brew. (Pa.) 452; *Bissell v. Ryan*, 23 Ill. 566; *Turner v. Dawson*, 50 Ill. 85; *Boardman v. Gaillard*, 1 Hun (N. Y.) 217; *Butterworth v. Volkening*, 4 Thomp. & C. (N. Y.) 650; *Dawson v. Kittle*, 4 Hill (N. Y.) 107; *Wheeler v. Newbould*, 5 Duer (N. Y.) 29; *Higgins v. Moore*, 34 N. Y. 425; *Bradley v. Wheeler*, 44 N. Y. 500; *Duguid v. Edwards*, 50 Barb. (N. Y.) 289; *Caldwell v. Dawson*, 4 Metc. (Ky.) 121; *McDowell v. Ingersoll*, 5 S. & R. (Pa.) 101; *Whitesell v. Crane*, 8 W. & S. (Pa.) 369; *Pitre v. Offutt*, 21 La. Ann. 679; 99 Am. Dec. 7496; *Patterson v. Benjamin Franklin Ins. Co.*, 22 Pittsb. L. J. (Pa.) 201; *Fisher v. Sargent*, 10

that actual knowledge of the usage should be shown, or may conclusively presume a knowledge where, in fact, none actually exists.<sup>1</sup> We must, therefore, consider in what cases actual knowledge must be shown, and in what cases presumptive knowledge

Cush. (Mass.) 250; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Power v. Kane*, 5 Wis. 265; *Scott v. Whitney*, 41 Wis. 504; *Scott v. Saffold*, 37 Ga. 384; *Sugart v. Mays*, 54 Ga. 554; *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Pierce v. Whitney*, 29 Me. 188; *Marsh v. Jelf*, 3 F. & F. 234; *Lansdowne v. Somerville*, 3 F. & F. 236; *Mills v. Ashe*, 16 Tex. 300; *Marlatt v. Clary*, 20 Ark. 251; *Boyd v. Graham*, 5 Mo. App. 403; *Martin v. Hall*, 26 Mo. 386; *Walsh v. Mississippi Transp. Co.*, 52 Mo. 434; *Steamboat Albattross v. Wayne*, 16 Ohio 513; *Moore v. Voughton*, 1 Stark. N. P. 487; *Sutton v. Great Western R. Co.*, 11 Jur. N. S. 879; *Buckle v. Knoop*, L. R., 2 Exch. 125; *Torrance v. Hayes*, 2 U. C. C. P. 338; *National Bank v. Burkhardt*, 100 U. S. 686; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420; *Martin v. Maynard*, 16 N. H. 165; *Lewis v. Ship Success*, 18 La. Ann. 1; *Heyward v. Seanson*, 1 Spears (S. Car.) 249.

1. In *Park v. Viernow*, 16 Mo. App. 383, the court said of the usage in that case: "It must be shown to be so general and well established that the parties must be presumed to have had knowledge of it and to have contracted with reference to it. *Martin v. Hall*, 26 Mo. 386. It must be either directly known to the parties, or else so general in its character that knowledge of it may well be presumed. *Southwestern Freight, etc., Co. v. Stanard*, 44 Mo. 82; 100 Am. Dec. 255. Or, applying to this case the language of the supreme court in another case, it may be said that, 'If the plaintiff had no personal knowledge that it existed, it would be necessary to show that it was so universal and notorious that it was presumed that all were conversant with it.' *Walsh v. Mississippi Transp. Co.*, 52 Mo. 438."

In *Dodge v. Favor*, 15 Gray (Mass.) 82, it was held that no exception lies to the admission of evidence of a custom existing in a trade, without direct evidence that it was known to the opposite party, if the party offering it contends that he can prove, from all the evidence in the case, that it must have been known to him, and that question is argued and submitted to the

jury under proper instructions in the matter of law.

In *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; 25 Am. Dec. 363, it was said that the fact that a local usage, as well as general usages of trade, may materially affect the construction of a contract, cannot be denied; but to have this effect such usage must appear to be so well settled and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that the contract was made in reference to it. Such a presumption is the only basis on which any local or particular usage can be sustained, so as to effect the construction of a contract. The usages or customs of particular places are not binding, unless the parties contract in reference to them.

In *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611, it was said that the true question for the consideration of the jury in such case, is, whether the usage was so generally known and acted upon that the parties, from that and the other facts and circumstances proved, must be presumed to have had reference to it; as in such case it would become, as it were, a part of their agreement, and binding upon them.

**Brokers and Agents.**—In *Harrell v. Zimpleman*, 66 Tex. 292, it was held that where a custom exists among real-estate agents and their customers, which entitles the agents to commissions on the sale of lands placed in their hands, whether the sale is made by them or others during the period it is under their control, such custom amounts to a contract, when it is known to their customers.

In *Irwin v. Williar*, 110 U. S. 499, the action was to recover a balance alleged to be due, growing out of certain sales for future delivery. The court held that a custom among brokers not to perform the original contracts of sale actually made, but to deliver equal quantities of grain or its market value, in fulfillment of contracts of purchase made by them for others, does not bind the seller without evidence that he had knowledge of it. The question is, there being no evidence that Irwin and Davis had any knowledge of the exist-

is sufficient. The importance of the element of knowledge in the law of usages seems, in some cases, to be underestimated. But in others, the courts have given due weight to the matter, as will appear from the extracts in the note.<sup>1</sup> The presumption of

ence of these customs, whether they were bound by them. The relation between the parties to this litigation was that of principal and agent; and the defendants in error, acting as brokers, in executing the orders to sell, undertook to obtain, and, as they allege in their declaration, did obtain a responsible purchaser; so that the plaintiff in error would, upon the contract of sale against such purchaser when disclosed, have been entitled to maintain an action in case of default in his own name. Although the broker guaranteed the sale, it was not a sale to himself; for, being agent to sell, he could not make himself the purchaser. The precise effect, therefore, of the custom proved was, that at the time of the settlement, in anticipation of the maturity of the contracts, the brokers, by an arrangement among themselves, by a process of mutual cancellation, reduced the settlement to a payment of differences, exchanging contracts, so as to substitute new purchasers and new sellers respectively for the balances. The question is not whether, in a given case, without the assent, express or implied, of the principal, this change of his rights and obligations can be effected (for that proposition is not doubtful), but whether the fact of his transacting business through a member of the exchange, without other knowledge of the custom, makes it part of his contract with the broker. The principle of this decision seems to us to be incontrovertible, and applies in the present case. The ground of the action is, that the defendants in error, at the request of Irwin and Davis, had made certain contracts for the sale and future delivery of grain; that these contracts were made in the name of the brokers, on which therefore they were personally liable, but in which Irwin and Davis were the principals; that the latter were bound to perform them, or to place in the hands of their brokers means of performance within the proper period, or to indemnify them against the consequences of non-performance; that Irwin and Davis in all these particulars became in default, and the plaintiffs were required to perform out of

their own means, which they did by purchasing grain for delivery at the market price, or paying the difference between that and the contract price. The custom proved was offered to show this performance and consequent loss; and in doing so it disclosed that the brokers did not perform the original contracts of sale actually made, but delivered equal quantities of grain, or its market value, in fulfillment of contracts of purchase made by them for others, and which, by the process of mutual exchange authorized by this custom, had come into their hands for that purpose. This exchange and substitution, and payment of differences to effect it, working as it does a complete change in the nature of the seller's rights and obligations, cannot be made without his assent, and that assent can be implied only from knowledge of the custom which it is claimed authorizes it.

In *Blake v. Stump*, 73 Md. 160, which was an action by a real estate broker for commissions, the rate of which was based upon an alleged usage in Baltimore, the court said: "To bind the defendant to any such rule, it must appear to have been of such public notoriety that he must be presumed to have knowledge of it, and therefore dealt expecting to be bound by it."

In *Smith v. Hess*, 83 Iowa 238, which was a counterclaim by defendant for commissions for the sale of real estate, the court held that though there was evidence of a custom in the neighborhood that commissions at a certain rate should be allowed, there was no presumption that the plaintiff knew of the custom, or that the parties contracted in reference thereto, where the alleged usage was left uncertain by the evidence.

1. In *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407, the plaintiff contracted to furnish materials and do the work in certain plastering for defendant at 80 much per square yard, and then charged him for the full surface of the wall, without deducting for doors, windows, etc., alleging a usage of plasterers to that effect. The defendant had no knowledge of such a usage. *Folger, C. J.*, said: "There are many cases in which the language used would seem

knowledge is the only basis upon which a usage can be sustained so as to affect the construction of a contract; and the usage becomes binding only upon that presumption.<sup>1</sup>

**3. Usages of Carriers.**—The usages of particular carriers, in so

to indicate that the existence of a usage of a trade, profession or locality having been shown, the presumption indisputable arises that the parties did contract in reference to it. Thus, in *Sewell v. Corp*, 1 C. & P. 392; 11 E. C. L. 432, Best, C. J., says: 'If there is a general usage applicable to a particular profession, parties employing an individual are supposed to deal with him according to that usage.' So in *Pittsburg v. O'Neill*, 1 Pa. St. 342, it is said: 'All trades have their usages; and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes part of it, except when its place is occupied by particular stipulations.' It is apprehended that this form of expression means only this: that the facts and circumstances of the case are such, that the usage is of so long continuance, so well established, so notorious, so universal and so reasonable in itself, as that the presumption is violent that the parties contracted with reference to it, and made it a part of their agreement. There are cases, too, where such form of utterance has been used in which both parties were of the same trade or kind of business; and, therefore, the usage proven was of the technicalities of their calling, of which it was held they might not profess ignorance. . . . Doubtless, if a custom is ancient, very general, and well known, it will often be a presumption of law that the party had knowledge of it. See *Clayton v. Gregson*, 5 Ad. & El. 302; 31 E. C. L. 342. It would seem, however, that upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence. For upon what basis is it that a contract is held to be entered into with reference to, or in conformity with, an existing usage? Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract, wherever their contract in that regard was silent or obscure. . . . Frequent are the expressions in the later

authorities that, where the usage is of a particular trade or locality, it must appear that it was known to a party before he is bound by it, so as to make it a part of his contract. . . . We have seen that there are usages which have become so general and so universally received and acted upon, as that they have become a part of the common law, and no one can be heard to profess ignorance of them. But it is equally true that there are usages so restricted as to locality, or trade, or business, as that ignorance of them is a valid reason why a party may not be held to have contracted in reference to them."

1. In *Isaksson v. Williams*, 26 Fed. Rep. 642, the court said that the very existence of the alleged usage, and the customary omission of certain words of limitation in the contract in controversy, when that limitation is intended by the resident parties, "suggests no little suspicion that this practice is maintained, if it did not originate, from a willingness to mislead and to take advantage of foreign masters of vessels who are ignorant of the usage, and in consequence accede to lower freights. At best, the usage is but a usage of persistent carelessness and inaccuracy in expression, or else of intentional misrepresentation. In any aspect, it is directly calculated to deceive those who are ignorant of it, because it serves as a material limitation on the natural import of the contract. It is therefore entitled to no favor, and can have no legal support, except upon proof that both parties had knowledge of the usage, and contracted in reference to it."

In *Caldwell v. Dawson*, 4 Metc. (Ky.) 121, the court said: "There is a strong and increasing disinclination of the courts to allow the general laws of the country to be varied by proof of local usages. Such a usage is binding only on the ground that the party sought to be charged, contracted with reference to it. It must appear that he had actual knowledge of it, or the evidence must be such as to clearly authorize the presumption that he had knowledge of it. The fact that one party had knowledge of the usage, and supposed it would enter into the contract, is not

far as such usages tend to limit the common-law liability of the carrier, can be valid only against those who have knowledge of such usages, and assent to them. These usages are chiefly those regulating the mode of delivery of merchandise.<sup>1</sup>

sufficient, nor can it enter into the contract, though both parties had knowledge of it, if it appears they did not contract with reference to it."

So, in *Kendall v. Russell*, 5 Dana (Ky.) 501; 30 Am. Dec. 696, the same court said, that a usage must be generally known, or it might thwart, rather than carry into effect, the intention of the parties, or impose an obligation upon one which he never intended to take upon himself.

1. In *North Penn. R. Co. v. Chicago Commercial Bank*, 123 U. S. 727, it was held that when a railroad company receives live-stock for transportation, and delivers the property safely to the next connecting line, from which it finally passes into the possession of the connecting company on whose line the point of destination is, the latter company is bound to deliver the property there to the consignee or to his order, if they are made known to it on receiving the freight; and it is not released from that liability by reason of a practice or custom to deliver all such freight to a drove-yard company without requiring the production of the bill of lading or receipt, or other authority of the shipper, knowledge of the practice or custom not being brought home to the holder of such receipt, bill of lading, or other authority.

In *Packard v. Earle*, 113 Mass. 280, it was held that a usage on the part of expressmen to leave packages at a way-station, and to substitute a notice of the arrival of the goods for a personal delivery, could not bind the consignor unless known to him.

In *Torrance v. Hayes*, 2 U. C. C. P. 338, the plea was that according to the custom and usage of forwarders and carriers existing at Toronto, consignees are authorized to pay wharfingers the amount due from them to such forwarders and carriers, for the forwarding and carrying of their goods. It was, however, held by the court that assuming the alleged custom to be valid, notice thereof to the plaintiff, if not acquiesced therein, should be alleged.

In *The Mary Washington v. Ayres*, 5 Am. L. Reg. N. S. 692, the carrier landed certain merchandise at its

wharf, and there being no one to receive it, placed it in its warehouse on the wharf, where it was injured before its removal by the consignees, who had no notice of its arrival. The court, by Chase, C. J., held the carrier liable, and said that if exceptions are to be made on the ground of usage to the general rule in regard to delivery and notice, the usage must be proved to be known to the consignee. "In the present case the respondents allege that it was not their practice to give notice to consignees; but, instead of giving such notice, to deposit goods in their warehouse, where the consignees were expected to call for them, on learning from their correspondents, or otherwise, of their arrival. They insist that this arrangement was for the benefit of the owners of the goods, and was understood and agreed to by them. The evidence does not sustain this claim. It shows clearly enough the practice of the respondents, but it does not show any understanding on the part of the owners of the goods that the respondents were to be relieved from their responsibility as carriers until its actual delivery, or its equivalent deposit in their warehouse, with information conveyed to the owners in some way that their goods had arrived. The warehouse arrangement was rather for the convenience of the carriers than of freightors or consignees."

In *Croucher v. Wilder*, 98 Mass. 322, it was held that if the master of a vessel hires a berth for her at a wharf, without notice of any rule of that wharf concerning the mode of discharging cargoes different from the usage at similar wharves in the same port, a stevedore whom he employs to discharge his cargo may do so according to such usage, and, if prevented by the wharfinger, may maintain an action against him for damages. "If an agreement is made by virtue of which something is to be done in a city or town, and the same act or service is uniformly done or performed in a certain way, by persons of like occupation in that place, it is just and reasonable to suppose that the intention of the parties was that it should be done in that way and in no other. Hutton

**4. Usages Between Employer and Employee.**—In the relation of the employer and employee, it has been held that no usage of the employer is valid against the employee, unless known by the latter at the time of entering the service. The usage must have been a

*v. Warren*, 1 M. & W. 475; *Potter v. Moreland*, 3 Cush. (Mass.) 384; *Putnam v. Tillotson*, 13 Met. (Mass.) 517; *Lamb v. Parkman*, 1 Sprague (U. S.) 351. . . . In the absence of any evidence to prove any notice to the master of the vessel of the existence of any special rule as to the mode of unloading cargoes at the wharf at which he had hired a berth, or any knowledge by him of such a rule, before or at the time the bargain was completed, the agreement for the use of the wharf would draw with it such incidents of such a contract as usually attach to it in the port of Boston. He would have a right to discharge his cargo, or to contract with another person to perform the service, in the mode and by the use of means which were ordinarily adopted in unloading vessels at wharves in the city, provided the usage was reasonable and proper, and adapted to the business to which it related."

In *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79; 93 Am. Dec. 208, the court said: "Knowledge in plaintiffs of defendant's usage to make restrictive contracts cannot control the present case. Knowledge of such usage can in no case of the kind be allowed force beyond that which could be given to notice of an intention on the part of the carrier to restrict his liability, brought home to the party in any other mode; and we have already seen that the force of such notices is exceedingly circumscribed. And it can hardly be seriously claimed that the plaintiffs, by accepting restrictive contracts in some cases, have thereby debarred themselves from insisting upon their common law rights thereafter."

In *Pitre v. Offutt*, 21 La. Ann. 679; 99 Am. Dec. 749, it was held that a steamboat engaged in carrying cattle and other live stock from different parts of the country to New Orleans for market, is responsible for the loss of the cattle while on board, when it has occurred through carelessness or negligence. "It is no defense, in case of loss while the stock is on board, for the boat to show a custom to the effect that they took no risk in case of losses of

this kind. To make the defense good that such a custom prevailed, it must be shown that the shipper had full knowledge of the custom at the time of shipment, and that he delivered the stock on board with reference to the custom."

In *Farmers', etc., Bank v. Champlain Transp. Co.*, 16 Vt. 52; 18 Vt. 131, the defendants, common carriers on Lake Champlain, received a package of bank bills to be carried from B. to P., addressed to the cashier of the bank at P. They delivered the bills to the wharfinger of the wharf at P., at which place their boat touched; the package was stolen from the wharfinger. In an action for its loss, it was held to be competent for the defendants to prove that it was their uniform usage to deliver such packages of money to the wharfinger, without giving any notice to the consignee, and moreover that to constitute a valid defense it was not necessary to show that the plaintiffs had actual knowledge of this usage. Upon the first point, the court held that the usage of carriers may be received to show when their liability ceases, as well as when it commences. Upon the second point, as to notice, the court said: "It is not necessary to prove that the plaintiff had personal knowledge of the usage in order to make it available to the defendants. The case of *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157, has a direct bearing upon the case at bar. The doctrine of that case is, in substance, this: that where goods are delivered to a carrier, marked for a particular place, without any directions as to their transportation and delivery, except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of such usage or not. With the reasoning and authority of that case we are well satisfied. It is founded in good sense and is sustainable upon principle. The case at bar was put to the jury by the county court upon the supposition that, in order to enable the defendants to avail themselves of the usage upon which they relied as a de-

part of the contract of employment, and this assumes that the employee had knowledge of the usage when making the contract. If, however, he was in fact ignorant of the usage, it could not have entered into the contract, and hence can have no weight.<sup>1</sup>

**5. Usages in Contracts for Labor and Services.**—So also in contracts for labor and services, a usage not known to one of the parties, cannot authorize any charges or justify any acts as a part of the contract.<sup>2</sup>

**6. Usages of an Individual.**—In regard to the usage of a particular individual, it may be said that no person without knowledge of such usage can be bound by it in his dealings with the individual. It would be unfair to hold that the business usage of a particular bank, or merchant, or manufacturer, or hotel-keeper, could

fense, the jury must find that the plaintiffs had knowledge of such usage. This, we think, was clearly erroneous, and for this error the judgment of the county court is reversed."

**Knowledge of Agent.**—The owner of goods shipped by an agent is chargeable with notice of a usage of the carrier with which the agent is chargeable. *Robertson v. National S. S. Co.*, 139 N. Y. 416.

1. In *Stevens v. Reeves*, 9 Pick. (Mass.) 198, it appeared that it was a rule in a certain factory in A, and some neighboring factories, that no person employed should leave their service without giving a fortnight's notice of his intention to quit. A weaver who did not know of this rule worked in the factory without any agreement as to the terms of service. He left the factory without giving any previous notice. "There was no stipulation for any particular time of service, so that there is no express or implied contract that he would remain for any certain time, unless such contract is to be implied from what is set up in evidence as a usage of this and the neighboring factories. In order to make this a part of the contract, as the usage supposed is a particular one, and not a general custom, it should have appeared that the defendant knew of the usage when he entered upon the work or before he left it. This is required in order to give effect to a particular usage so as to operate upon a contract. It is so with the usage of banks, and all other usages not of so general a nature as to furnish a presumption of knowledge. There is no evidence of knowledge in this case; on the contrary, it appeared that the defendant was a stranger in the county and that no no-

tice of it was posted up among the rules and orders of the factory."

In *Collins v. New England Iron Co.*, 115 Mass. 23, there was evidence of a custom in a trade to have printed rules and regulations requiring workmen to give notice a certain number of days before leaving, and to work out the time, or else to forfeit the wages due. This was held inadmissible, unless the party seeking to avail himself of the custom offers to show that the other party knew of it. "The custom which the defendant offered to prove cannot affect the plaintiff unless he had knowledge of it. As the defendant did not offer to show that the plaintiff knew of such custom, the court properly rejected the evidence of its existence." Other cases are *Bradley v. Salmon Falls Mfg. Co.*, 30 N. H. 487; *Collins v. New England Iron Co.*, 115 Mass. 23; *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447; 58 Am. Dec. 718; *Morrison v. Allardyce*, 2 Scotch Sess. Cas. 387; *Marhan v. Eliote*, Hume 393.

2. In *Ambler v. Phillips*, 132 Pa. St. 167, the plaintiff, by a written contract, agreed to do certain excavating for fifty cents per cubic yard. The work was measured by the plaintiff, not by the actual number of cubic yards, but by a rule adopted by a local bricklayers' association, which was designated as a "constructive measurement." It was not alleged that the defendants knew of any such rule. The court said: "It is almost needless to say that the defendants cannot be bound by a rule of the bricklayers' association of which they had no knowledge."

So, in *Kendall v. Russell*, 5 Dana (Ky.) 501; 30 Am. Dec. 606, an action for services in building a house, the plaintiff claimed that the usage was to



have any effect upon the rights of a person dealing in ignorance of such usage.<sup>1</sup> But if the usage be known and assented to, and

compute the contents of walls having doors, windows, and other openings as if they were solid. The court said: "Now, to make a custom or usage of trade obligatory, it must be sufficiently ancient to be generally known. . . . If not so ancient as, by intendment of law, to be generally known, if it could avail at all, it certainly should not do so, without it was brought home to the contracting obligator by actual notice. Otherwise, it might be made an instrument in the hands of the craftsmen of the trade, to delude the unwary. We cannot understand that the custom or usage was of sufficiently long standing, or general prevalence, as to imply that Kendall had knowledge of it; nor was there any proof of express notice."

In *Scott v. Maier*, 56 Mich. 554; 56 Am. Rep. 402, it was held that a usage of architects if unknown to customers, will not entitle them to pay for preliminary sketches and estimates on the basis of a percentage on their own estimates. The only claim the architects could have would be for such time as was actually spent in their work, with the fair understanding that they should be paid for so much as they did. But no custom of architects can be received to fix it on any such basis as is here set up. Such a custom, if it prevails, can bind no one who is not made in some way aware of and assenting to it. It is too unreasonable to stand alone. It would put every employer at the mercy of an architect's extravagance in taste and license of guessing at estimates which have nothing to measure them.

In *Celluloid Mfg. Co. v. Chandler*, 27 Fed. Rep. 9, a usage was claimed by defendant, an attorney employed by the plaintiff, that docket fees and fees allowed for travel and attendance should be taken and treated by the solicitor or attorney as his own. This usage was not shown to prevail generally, but appeared from the evidence to be confined to a few states. It was not shown to exist in the community where the complainant resided, nor was it shown that complainant had any knowledge of such usage in the communities where the services were to be rendered. It was held that under this state of facts the complainant could not be held bound by any such usage.

1. In *National Bank v. Burkhardt*, 100

U. S. 686, the court approved a ruling of the court below that when a deposit is made in a bank without anything being said about it, the law makes the deposit a debt against the bank in favor of the depositor. The bank sought to establish a usage to return deposits which were found not to be good and charge them against the depositor. There was nothing to show that the depositor knew of this usage of the bank. The court held that the proposition submitted by the bank was fatally defective in not including as one of its terms that the depositor knew of the special and particular usage mentioned. Without such knowledge the usage was entirely ineffectual. *Moore v. Voughton*, 1 Stark. N. P. 487.

In *Keogh v. Daniell*, 12 Wis. 163, the above case was followed in regard to a usage in the city of Milwaukee.

In *Berkshire Woolen Mills Co. v. Proctor*, 7 Cush. (Mass.) 420, it was held that a usage at an inn, for the guests to leave their money or valuables at the bar, or with the keeper of the house or his clerk, otherwise the landlord would not be responsible for their loss, is not binding upon a guest, unless he has actual knowledge or notice of it. "Proof of knowledge is required to give effect to any and all particular usages, not of so general a nature as to furnish a presumption of knowledge. There certainly can be no legal presumption that every traveler who alights at an inn has knowledge of the particular usages of that particular inn, of which there is no notice in any way given to him."

In *Saint v. Smith*, 1 Coldw. (Tenn.) 51, it was held that, in the absence of a special agreement, a livery-stable keeper has no lien, by the general law, upon a horse delivered to him to be fed and kept. "Nor can such a lien be created by the force of any usage prevailing in a particular town or city. But to acquire the force of law, such usage or custom must have been established, and have become general, so that a presumption of knowledge by the parties can be said to arise."

In *Wormersley v. Dally*, 23 L. J. Exch. 219, it was held that the rule of law, as to importing into the terms of a tenancy the custom of the country,

does not admit of evidence of the usage of a particular estate, or the property of a particular individual, however extensive it may be, unless it is shown that the tenant was aware of it.

*Nonotuck Silk Co. v. Fair*, 112 Mass. 354, was an action to recover the price of goods sold, and it appeared that upon the bill of parcels accompanying the delivery of the goods, was the clause, "terms cash, five per cent. off;" the defendant introduced evidence of the plaintiff's usage to allow other parties upon similar sales a credit of thirty days. "The evidence was not offered to show a general usage of trades binding upon the parties without proof of knowledge. Its purpose was to prove a custom or practice of the plaintiff in its dealings with others. Evidence of a particular custom or course of dealing of an individual is admitted upon the ground that, being known to both parties, it is presumed that they contracted in reference to it, and it therefore enters into and forms part of the contract." In this case, however, the evidence was rejected, as it appeared that the defendant himself was not at the time aware of the usage of the plaintiff, and could not therefore have bought the goods in reliance upon this usage.

So in *Loring v. Gurney*, 5 Pick. (Mass.) 15, it was held that a usage of an individual, which is known to the person with whom he deals, may be given in evidence, as tending to prove what the contract was between the parties. But the usages of individuals cannot affect their contracts, unless it appears that the usage was known to the persons with whom they contracted. "The usage is an independent fact, which, if proved, could not avail the plaintiffs, unless they could also bring a knowledge of it home to the defendant."

In *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420, the plaintiffs ordering goods of the defendants, knew of the usage of the defendants to supply orders as fast as the article could be made, and according to a list kept in a book, there being a demand for the goods in excess of the supply, this evidence showed that the plaintiffs were chargeable with notice of the defendants' custom to fill their contracts only in the order in which they were accepted. The court said that the custom of a party to deliver a part of a quantity of goods contracted

to be delivered, though invariable, cannot excuse such party from a full compliance with his contract, unless such custom is known to the other contracting party, and actually enters into and forms a part of the contract. "Mere knowledge of such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract. But when it appears that such custom was well known to the other contracting party as necessarily incident to the business, and actually formed a part of the contract, then it may furnish a legal excuse for the non-delivery of such a proportion of the goods as the general course of the business and the usage of the seller authorize, for the reason that such general usage, being a part of the contract, has the effect to limit and qualify its terms."

In *Hyde v. St. Louis Book, etc., Co.*, 32 Mo. App. 298, it was held that one selling goods to be paid for on delivery is not bound by a custom of the purchaser to take goods "on sale only," unless it be shown that he had knowledge of such custom.

In *Stevens v. Smith*, 21 Vt. 90, it was held, that proof of the custom of the defendant to deduct from the weight of iron purchased by him that which, upon trial, was found unsuitable for use, would not avail the defendant, it not appearing that the plaintiff had knowledge of such customs at the time of the sale, and there being no evidence of any such general usage.

In *Stout v. McLachlin*, 38 Kan. 121, it was held in an action by machine manufacturers against mill-owners for machines furnished which the defendants denied being ordered, that it would make no difference, even if the plaintiffs had adopted a custom by which they charged all mill-owners for the machinery ordered by millwrights or contractors, required in changing or repairing mills, unless they also show that such custom was known to the mill-owners, and that they contracted for such repairs with reference thereto.

In *Hyde v. St. Louis Book, etc., Co.*, 32 Mo. App. 298, it was said that a party is not bound by the private business custom of one with whom he deals, unless it be shown that he had knowledge of such custom at the time of his dealing.

In *Womersley v. Dally*, 26 L. J. Exch. 219, it was held that the rule of law as to importing into the terms of a

dealings are had with such knowledge and assent, the usage impliedly forms a part of the contract between the parties, and is therefore binding.<sup>1</sup>

This is well illustrated by the rule in respect to interest charges made by a vendor against a purchaser.<sup>2</sup> If the usage of a particular vendor is to charge interest on accounts after the expiration of a certain period, the validity of such usage, as against the purchaser, will depend upon whether or not the usage was known to the purchaser and assented to by him. If the usage was not known, it did not form a part of the contract, and therefore cannot sustain the charge of interest;<sup>3</sup> but if it was known and acquiesced in by the purchaser, it formed a part of the contract and is binding.<sup>4</sup>

**7. Usages in Contracts of Insurance.**—In numerous actions upon policies of insurance, the usages of particular insurers, or the local

tenancy the custom of the country does not admit of evidence of the usage of a particular estate or the property of a particular individual, however extensive it may be, in the absence of knowledge of the custom by the tenant. It was argued that the usage was admissible on the same principle as that on which evidence of the "custom of the country" is admitted.

1. In *Nonantum Worsted Co. v. North Adams Mfg. Co.*, 156 Mass. 331, it was said: "Evidence by the plaintiff of its custom of dealing, and that the defendant knew it, is admissible."

In *Norris v. Fowler*, 87 N. Car. 9, it was held that the usage of one in conducting his own business, if known to the party dealing with him, is competent evidence of the terms of the contract between them. "It tended to show his general usage, or habit of trade, and thus afforded some evidence of the terms of his contract with the plaintiff. His manner of dealing with others being a fact or circumstance from which the extent or purport of his agreement in this instance may be made out, and consequently the evidence with regard to it was pertinent. See also the cases cited under the following section.

2. See *Trotter v. Grant*, 2 Wend. (N. Y.) 413; *Fellows v. New York*, 17 Hun (N. Y.) 249; *Liotard v. Graves*, 3 Cai. (N. Y.) 226; *Rayburn v. Day*, 27 Ill. 46; *Ayers v. Metcalf*, 39 Ill. 307; *Turner v. Dawson*, 50 Ill. 85; *Loring v. Gurney*, 5 Pick. (Mass.) 15; *Barclay v. Kennedy*, 3 Wash. (U. S.) 350; *Wood v. Smith*, 23 Vt. 706; *Langdon*

*v. Castleton*, 30 Vt. 285; *Birchard v. Knapp*, 31 Vt. 679.

3. In *Wood v. Hickok*, 2 Wend. (N. Y.) 501, it appeared that there was no evidence that the defendants knew that it was the uniform custom of the plaintiffs to charge interest after ninety days, and it appeared that no charge of interest had ever been made in any of the accounts rendered to the defendants except the last, nor was the length of credit stated in any of them. There was nothing, therefore, from which the defendants were bound to infer that any interest would be claimed from them as long as the account remained open and unliquidated.

In *Sugart v. Mays*, 54 Ga. 554, it was held that where the question is as to whether a particular transaction was a loan with an absolute deed to land taken as security, and bond for titles given by the lender, it is not competent to prove that the alleged lender's custom and practice were to lend on such security, there being no evidence suggesting such a prior course of dealing between him and the present alleged borrower.

In *Goodnow v. Parsons*, 36 Vt. 47, it was held that the plaintiff's practice or custom in this respect would not take the case out of the operation of the ordinary rule, or become binding upon the defendant, until the defendant was informed of it, and would then be applicable only to the subsequent dealings between them.

4. In *Reab v. McAlister*, 8 Wend. (N. Y.) 109, it was held that a merchant or manufacturer whose uniform custom it was after a limited period of

insurance usages of particular places, have been set up in defense of the demands of the insured. In perhaps all the cases, the usages have been disallowed unless the insured was shown to have knowledge of them. The insured is entitled to have the policy interpreted in accordance with the general principles of law, unless his contract was made with reference to a particular usage.<sup>1</sup>

credit, to charge interest upon articles sold or manufactured by him, might charge interest accordingly to those who were in the habit of dealing with him with a knowledge of such custom.

In *Meech v. Smith*, 7 Wend. (N. Y.) 315, it appeared that it was the uniform custom of all those engaged in the same business to charge interest. It was the custom of the plaintiff to charge it; he had charged it in former accounts against the defendant, and it had been paid without objection, before the contract was made on which this suit was brought.

In *Fisher v. Sargent*, 10 Cush. (Mass.) 250, it was held that in an action for goods sold, the jury may allow interest on the account, upon proof of a custom among merchants to charge interest in similar cases, with the knowledge of the defendant.

In *Esterly v. Cole*, 3 N. Y. 502, it was held that an agreement for interest may be inferred from the course of dealing between the parties; as where interest has before been charged and allowed under the like circumstances. Also where the creditor has a uniform practice of charging interest, which was known to the customer at the time of the dealing. And where there is a general usage in any particular trade or branch of business to charge and allow interest, parties having knowledge of the usage are presumed to contract in reference to it; and if the usage does not conflict with the terms of the contract, it will be deemed to enter into and constitute a part of it. Knowledge of the usage may be established by presumptive as well as by direct evidence. It may be presumed from the fact that both parties are engaged in the particular trade or branch of business to which the usage relates; and also from other facts, as the uniformity, long continuance, and notoriety of the usage.

In *Mayes v. Power*, 79 Ga. 631, it was held that evidence that it was the universal custom of the intestate to lend money in this way, without taking any note for it, was inadmissible; but evidence that the intestate had

previously dealt with the defendant in the same way, was competent.

In *Knickerbocker L. Ins. Co. v. Pendleton*, 115 U. S. 339, on an issue whether demand of payment of a draft had been waived by the payees in order that they might communicate with the drawer, it was held that evidence of the custom and usage of the bank holding it, if offered in support of the evidence (not objected to) of the cashier of the bank of his conviction and belief (founded on such custom and usage) that the draft had been so presented, comes within the rule which allows usage and the course of business to be shown for the purpose of raising a *prima facie* presumption of fact, in aid of collateral testimony; and, taken together, they are sufficient to be presented to the jury. "The public character of the business of a bank, the strict regulations under which its business is usually transacted, the care required of its officers and agents in performing their duties, bring the case fully within the operation of the rule which allows usage and the course of business to be shown for the purpose of raising a *prima facie* presumption of fact in aid of collateral testimony. We have no hesitation in holding that the evidence offered was competent to corroborate the testimony of the cashier."

In *Veiths v. Hagge*, 8 Iowa 163, it was held that if it be the creditor's custom, known and acquiesced in by the debtor, to charge interest, or if such be the uniform usage of the trade, such facts, if proved, are evidence of an agreement, and interest will be allowed. *Meech v. Smith*, 7 Wend. (N. Y.) 318; *Williams v. Craig*, 1 Dall. (U. S.) 313.

1. *Insurance Usages.*—In *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, which was an action upon a policy of insurance, the court held that evidence of a local custom amongst insurers, not communicated to the insured, or of such notoriety as to afford any presumption of knowledge on his part, is not admissible. "The general

principles of law, he is taken to know; and he has a right to have the contract interpreted and enforced by them, unaffected by any local custom, unless it plainly appears that such custom was understood by the parties, and the contract made in reference to it. *Chase v. Washburn*, 1 Ohio St. 252; 59 Am. Dec. 623." See also *Carter v. Boehm*, 3 Burr. 1905.

In the following cases evidence of the usages of insurance companies were rejected, because the particular usage was not known to the assured. These cases, also, all state the general rule as above explained.

In *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297; 7 Am. Rep. 522, evidence of its agent that it was its custom to charge extra premiums on occupied dwelling houses.

In *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.) 433, evidence of a usage to require, as proof of death, a certificate from the deceased's attending physician.

In *Washington Fire Ins. Co. v. Davison*, 30 Md. 91, evidence of a usage in the office of the company that the term "carpenters," in a policy, referred to the employment and work of carpenters in erecting or adding to buildings insured.

In *Illinois Mut. Fire Ins. Co. v. O'Neille*, 13 Ill. 89, evidence of a usage in their office to require notice of additional insurance to be given by the insured.

In *Hill v. Hibernia Ins. Co.*, 10 Hun (N. Y.) 26, evidence that the words "standing detached," in a policy, meant, "among insurance men generally," that the subject of insurance should be at least twenty-five feet from external exposure.

In *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169, the testimony of the president as to the practice of the company in requiring applications for consent to additional insurance to be in writing.

In *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 619, a usage of the company to require a survey of the goods damaged by the port wardens, as a preliminary proof of the loss.

In *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.) 632, it was held that evidence of a usage at New York, that, upon the occurrence of any circumstance by the act of the insured after effecting the insurance, whereby the risk is increased, the insured should give notice

thereof to the insurer, so that he might have the option of continuing the policy or of annulling it, could not be received to alter the legal effect or alteration of the contract.

In *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, evidence of a local usage among insurers in the county where the property destroyed was situated, to reject an application for insurance on a building which had previously been fired by an incendiary, or to charge a higher premium thereon.

In *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448, a custom of the company not to deliver or send policies to agents for delivery, except upon the condition that the person whose life was insured was in good health.

In *Williams v. Niagara Fire Ins. Co.*, 50 Iowa 561, a usage of the company as to the mode of adjusting losses.

In *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 399, a usage of the insured, not known to the insurer, in relation to keeping a watchman on the premises, was rejected.

In *Cobb v. Lime Rock Fire, etc., Ins. Co.*, 58 Me. 326, the court held the insurer not bound by a certain customary construction of certain terms in the policy, not having known of such usage.

In *Hermann v. Niagara Fire Ins. Co.*, 100 N. Y. 412, it was held that a clause in the policy declaring that any person other than the assured procuring the policy should be deemed an agent of the assured, not of the company, "in any transaction relating to this insurance," did not constitute the agents procuring the policy continuing agents, or make the notice to them binding upon the plaintiff. The plaintiff resided in New York; the property insured was in Troy. "The local custom in Troy, that notice of cancellation may be given to the broker who procures the insurance, was unknown to the plaintiff, and in so far as it assumes to make the broker an agent of the insured to receive notice of cancellation, although he had no such authority in fact, it is an attempt to override the legal construction of the contract, and was inadmissible to control it."

In *Adams v. Manufacturers', etc., Ins. Co.*, 17 Fed. Rep. 630, it was held that evidence that it was customary for the agent who procures a policy of insurance on the one side, and the local agent who grants it, to receive notice of the cancellation of policies,

In addition to the cases in the *United States*, the English decisions hold that persons insured with Lloyd's insurance offices in London are not bound by the usages at Lloyd's, unless the contract of insurance is made with knowledge of such usages.<sup>1</sup>

**8. Usages Between Vendor and Purchaser.**—Usages prevailing among merchants in various trades can have no validity as against those who buy in ignorance of the existence of such usages. Purchasers are entitled to rely upon the letter of their contracts, and cannot be affected by usages known only to vendors.<sup>2</sup>

and notify each other in regard thereto, was admissible if proved by the most clear and unequivocal evidence, and be brought home to the actual knowledge of the party who is to be bound by it. "It purports to make an agent for the respective parties whom they have not made for themselves. The policy provides that the defendants may cancel the policy by notice. This, of course, means notice to the plaintiff; and notice to the authorized agent of the plaintiff must be notice to him. To make S. the plaintiff's agent for this purpose the usage is invoked. If there is such a usage, it provides for a fictitious or arbitrary notice; as much so as if publication in a certain newspaper or proclamation at some public exchange were the mode of notice. . . . A usage which adds to or varies the contract must be proved to be known to the party sought to be bound by it; and this should clearly be the case where an artificial agency is to be made out. . . . We find that the addition of an arbitrary authority to a person other than the principal, to receive a notice which is to annul the contract, should be proved by the most clear and unequivocal evidence, and be brought home to the actual knowledge of the plaintiff or defendant who is to be bound by it."

**1. Usages at Lloyd's.**—In *Ward v. Harris*, 8 L. R. Ir. 365, it appeared that, in accordance with a well-known custom of Lloyd's, any money which might become due under the policy was payable at Lloyd's, and not elsewhere. The plaintiff alleged that he had no notice or knowledge of that custom before effecting the policy. The court held that, having no such notice or knowledge, the plaintiff was not bound thereby; and that the defendants were bound to pay the amount due on the policy to the plaintiff in Belfast. "It has been established by several cases, *Gabay v. Lloyd*, 3 B. & C. 797;

10 E. C. L. 229; *Scott v. Irving*, 1 B. & Ad. 606; *Sweeting v. Pearce*, 9 C. B. N. S. 534; 99 E. C. L. 532, that the usages of Lloyd's as to the mode of construing policies, or as to the mode of settlement between insurance brokers and the insurers, were not binding on the insured, unless known to him and assented to by him. In the present case the plaintiff denies that he knew of this alleged usage. But it is argued that the London brokers, through whom the policy was effected, must have known of this usage, and that their knowledge must be imputed to the plaintiff, and he must be deemed to have assented to the usage. But the plaintiff gave general authority to the agent to effect an insurance on his vessel, and not an insurance at Lloyd's in particular; and I do not think that he can be held bound by the knowledge of the broker's sub-agent of his agent, he himself being ignorant of the usage."

In *Bartlett v. Pentland*, 10 B. & C. 760; 21 E. C. L. 163, it was held that as to a supposed usage at Lloyd's, the usage in a particular place, or of a particular class of persons could not be binding on other persons, unless those other persons are acquainted with the usage and adopt it.

**2. Usages Between Buyer and Seller.**—In *Ransom v. Masten* (Supreme Ct.), 4 N. Y. Supp. 781, it was held that a custom among dealers in lamp-black to deal in packages weighing only a half-pound as a pound will not bind a consumer buying of a trader by the pound, unless it appears that the former dealt with reference to that custom. The custom permits the vendor to sell half a pound as the equivalent of a pound. "Such a custom may be well known among traders, but it is one which apparently benefits the trader at the expense of the consumer, and manifestly would not be tolerated by the latter unless attended by advantages which would be compensatory of his actual

**9. Usages of Particular Places.**—When the usage is a local one, that is, the usage of particular persons in a particular place, it can be operative only in respect to those persons who are shown to have knowledge of it. There can be no presumption that a stranger is cognizant of a usage prevailing in a particular place; and therefore there can be no presumption that he contracted in reference to it. Hence, in order to make such a usage effective, it must appear that it was known.<sup>1</sup>

loss in quantity. To bind the latter by such a custom it ought to appear that he dealt with reference to it."

In *Scott v. Whitney*, 41 Wis. 504, an action for lumber sold, the court said: "The lumber sold being, at the time of sale, piled in a certain city in another state, evidence of a custom in that city that when lumber had been estimated in the pile, the seller should deduct from the estimate one-half the sheeting contained therein, was inadmissible without proof that the custom was known to the parties, or had existed so long as to warrant a presumption that they contracted with reference to it."

In *Miller v. Moore*, 83 Ga. 684; 20 Am. St. Rep. 329, it was held that a custom of trade in the city of Augusta, by which, contrary to the general law of the state, acceptance of corn in bulk and paying for it after inspection are considered as waiving or releasing all claims upon the seller to answer for any defects of quality, is not binding, except upon those who have recognized it in their own transactions, and thus adopted it for their own dealings.

In *Gallup v. Lederer*, 1 Hun (N. Y.) 282, the defendant was asked whether, at the time of the sale, there was a custom among brokers to sell goods in their own name and receive pay therefor. This evidence was properly excluded. "It was not proposed to prove a general custom upon that subject, but simply a custom of brokers, which might very well be unknown to all other persons. To render a custom valid and binding upon a party to a transaction included within it, the proof should show it of such long continuance, or general application, as reasonably to warrant the conclusion that it was known to the party designed to be affected by it, or that he had actual knowledge or notice of its existence."

A local custom or usage recognizing and upholding a rescission of a contract of sale made through a broker, by the action of the purchaser and such broker, will not affect the seller. *Kelly v.*

*Kauffman Mining Co.* (Ga. 1894), 18 S. E. Rep. 363.

**1. Usages at Particular Places.**—*Strong v. King*, 35 Ill. 9; 85 Am. Dec. 336; *Mason v. Franklin F. Ins. Co.*, 12 Gill & J. (Md.) 468; *Parkhurst v. Gloucester Mut. Fishing Ins. Co.*, 100 Mass. 301; 1 Am. Rep. 105; 97 Am. Dec. 100. And see *Camden v. Doremus*, 3 How. (U.S.) 515; *Walker v. Barron*, 6 Minn. 508; *Barnes v. Ingalls*, 39 Ala. 193; *Natchez Ins. Co. v. Stanton*, 2 Smed. & M. (Miss.) 340; 41 Am. Dec. 592; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Nichols v. De Wolf*, 1 R. I. 277; *Mears v. Waples*, 3 Houst. (Del.) 581; *Ober v. Carson*, 62 Mo. 209.

In *Cobb v. Lime Rock F., etc., Ins. Co.*, 58 Me. 326, the court said: "A usage may be local or general. But if local, the contracting parties are not bound by the usages of other places, unless they are referred to or made part of the contract. It is immaterial what may be the usage or the construction given to particular words in Boston, they will not affect a contract at Rockland, *Maine*, unless a similar usage or the same construction to the same words is shown to exist there, if the contract is there made. The usage must be definite and brought home to the knowledge of the parties to be affected, or so general and well established that there must be ground to presume the parties had knowledge of it, or that they were bound to be informed of it."

In *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, the court said that where a custom is universal or general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him; "but we are inclined to think that where it is a purely local custom, like this, a person who resides in *Europe*, and who, so far as the evidence discloses, has never been to the particular locality before, is not bound, unless he has knowledge of the custom. Carver on

*Carriage by Sea*, p. 184; *Gabay v. Lloyd*, 3 B. & C. 793; 10 E. C. L. 229; *Hathesing v. Laing*, L. R., 17 Eq. 92."

In *Coffman v. Campbell*, 87 Ill. 98, it was held that proof of a particular usage among commission merchants in Chicago, in respect to the acceptance of drafts, not extending to bankers, nor to a foreign state where a draft is negotiated, fails to establish any binding usage as defined in *Bissell v. Ryan*, 23 Ill. 566, in which it was said that a usage must be generally known and established, and so well settled and so uniformly acted upon, as to raise a fair presumption that it was known to both contracting parties, and that they contracted with reference to it and in conformity with it.

In *Kirchner v. Venus*, 12 Moo. P. C. 361, it was held that evidence of the usage of a particular place, to add to or in any manner to affect the construction of a written contract, is admitted only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the agreement with reference to it. No such presumption arises, if one of the parties is ignorant of such usage or custom.

In *Chateaugay Co. v. Blake*, 144 U. S. 476, it was held that a local usage cannot affect the meaning of the terms of a contract, unless it is known to both contracting parties.

In *Rindskoff v. Barrett*, 14 Iowa 101, it was held that when the custom is general, there is a presumption of knowledge on the part of the contracting parties; if local, knowledge must be shown before it will avail to affect the contract.

In *Bradley v. Wheeler*, 44 N. Y. 500, it is said, though not perhaps absolutely necessary to be said in the decision of the case, that local custom could not affect the plaintiffs without proof that they had knowledge or notice of it.

In *Higgins v. Moore*, 34 N. Y. 425, it is said (with the same qualification, it is to be received, however): "The usage being local, its existence must be clearly proved to have been known to the plaintiffs at the time."

In *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, it is said that usage is used as a mode of interpretation, on the theory that the parties knew of its existence, and contracted with reference to it; and that the conduct of the parties in

that case showed clearly that they did not know of this custom, and could not therefore have dealt with reference to it.

In *Marshall v. Perry*, 67 Me. 78, the court said: "The usage was local. If not known to the parties, it could in no event affect their rights and liabilities. The only evidence on the part of the plaintiff, tending to show that the parties had knowledge of the usage, was that in regard to its universality. There was evidence by defendants tending to show that they had no knowledge of it. If the usage was one that could affect the rights and liabilities of the parties, the jury should have been instructed to give it no effect, unless they found, from the whole evidence, that it was known to the defendants when the contract was made."

In *Sawtelle v. Drew*, 122 Mass. 228, it was held in an action for breach of an agreement in writing to hire the plaintiff's house, where the defense was that the plaintiff failed to cleanse the house as he agreed, that evidence "that a universal custom and usage prevailed in the locality in which said house was situated, by force of which a lessor was required to cleanse a leased house before the lessee entered into possession of it," is inadmissible, in the absence of evidence that the plaintiff knew of such custom and usage. "We are of opinion that the offer was of so peculiarly a local custom as to require the defendant to prove the plaintiff's knowledge of it."

In *Bentley v. Doggett*, 51 Wis. 224; 37 Am. Rep. 827, it was held that it was immaterial what the private orders of the principal were to the agent, or that he furnished him money to pay the charges in controversy, so long as the person furnishing the service was in ignorance of such facts. "In order to relieve himself from liability, the principal was bound to show that the plaintiff had knowledge of the restrictions placed upon his agent, or that the custom to limit the powers of agents of this kind was so universal that the plaintiff must be presumed to have knowledge of such custom."

In *Sewells Falls Bridge v. Fisk*, 23 N. H. 171, which was an action for damages done to a bridge, caused by the defendants putting a large quantity of logs into the river and negligently running the same against the plaintiff's bridge, it was held that evidence of the usage and custom in run-



ning logs in the State of *Maine*, was incompetent. "What custom and usage may have tolerated or sanctioned in *Maine*, in the particular manner of the running of logs, could not be held binding in *New Hampshire*, unless it had been adopted here and become so general as to be known and established."

In *Coquard v. Bank of Kansas City*, 12 Mo. App. 261, it was held that evidence of a custom among brokers of one place, is inadmissible as against the defendant, a resident of another place, when unaccompanied by an offer to show that the latter knew of the custom and contracted with reference to it.

In *German-American Ins. Co. v. Commercial F. Ins. Co.*, 95 Ala. 469, it was held that a custom among underwriters in New York City to class certain stores as distinct buildings for purposes of insurance, and to insure them severally as separate risks, is not binding on an insurance company domiciled in *Alabama*, without proof that the latter had knowledge of such custom when a contract was made with another company for reinsurance in that city.

In *Byrne v. Massasait Packing Co.*, 137 Mass. 313, which was an action for the breach of a written contract, made by an agent of the defendant in another state for the sale of goods to the plaintiff, it was held that evidence of a custom among dealers in such goods in *Massachusetts* to accept or reject contracts made by their selling agents is inadmissible, in the absence of evidence that such a custom was known in the place where the contract was made, or that any notice of it was given to the plaintiff.

In *Plaice v. Allcock*, 4 F. & F. 1074, it was held that in order to prove that a particular usage exists in a trade carried on at A, evidence that the usage prevails at B when the same trade is carried on, is admissible, provided B is in the vicinity of A, and there is an interchange of the trade in question between the two places.

In *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 112, the court held a usage irrelevant, because the proof related to "dealings between the parties to this suit at Detroit, and to usages understood by the plaintiffs there, while the contracts here in question were in each instance made with consignors at a distance, and in most

cases by other railroad companies whose usages do not seem to be uniform."

In *Stringfield v. Vivian*, 63 Mich. 681, the court said: "There was evidence aimed at showing that *New York* wholesale houses had a custom of retaining dishonored drafts to their debtors from whom they received them. But this was a foreign bill, drawn and indorsed in *Michigan*, and payable in Chicago. It is difficult to see how *New York* business usages could apply to such an instrument."

In *Mears v. Waples*, 3 Houst. (Del.) 581, the court said: "It does not follow that, because a custom or usage is recognized as obligatory in Philadelphia or New York, that it is recognized as such in Baltimore or New Orleans, or has any force or effect in these latter cities. The custom or usage in one state may not be the same in another. The states of the Union, in regard to commercial purposes, stand in the relation of foreign states toward each other, so that a custom or usage in one state is not necessarily binding or obligatory upon persons engaged in the same trade in another state."

In *Mason v. Franklin F. Ins. Co.*, 12 Gill & J. (Md.) 468, it was held that a policy of insurance against fire, upon a vessel building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other ports of the Union. Such usage could not be considered as entering into the views of the parties in the present contract.

In *Natchez Ins. Co. v. Stanton*, 2 Smed. & M. (Miss.) 340; 41 Am. Dec. 592, it was held that the usages of the insurance offices at New Orleans, *Louisiana*, cannot affect the insurance offices at Natchez, *Mississippi*.

In *Parkhurst v. Gloucester Mut. Fishing Ins. Co.*, 100 Mass. 301; 1 Am. Rep. 105; 97 Am. Dec. 100, it was held that a usage of the marine underwriters of Boston to expressly except barratry of the master from the risks which they assume on any vessel, whenever the assured is her owner, could not import such an exception by implication into a policy of marine insurance underwritten at Gloucester.

In *Cobb v. Lime Rock F., etc., Ins. Co.*, 58 Me. 326, it was held that the usage or the construction given to particular words in Boston, *Massachusetts*, will not affect a policy of insurance upon a vessel made at Rockland, *Maine*, con-

**10. Usages Where the Parties Are Not in the Same Trade.**—There can be no presumption that the usages of a particular trade are known to persons not in that trade. Hence, in order to bind an outsider, his knowledge of the usage of the particular trade must be shown; as otherwise the usage could not have entered into the contract.<sup>1</sup>

**11. Proof of Knowledge of Usage—*a.* QUESTION FOR JURY.**—In some cases it is difficult to prove a person's knowledge of a

taining the same words, unless a similar usage or the same construction is shown to exist in the latter place. "The construction of a policy is to be governed by the law of the place where it is made."

In *Allen v. Lyles*, 35 Miss. 513, it was held that where the inquiry was as to the custom of merchants in a particular place, it is incompetent to show that the alleged custom does or does not exist in other localities; and hence, when the defense relied on was an alleged custom of merchants in Cincinnati, to insure all goods shipped to their customers, unless otherwise ordered, it was incompetent to show what was the custom of merchants in that respect in New Orleans, New York, etc. "The custom of merchants on a particular subject, will affect such transactions only as take place in the locality where it is shown to exist; and hence, when a duty is alleged to be imposed, or an exemption allowed, by the custom of merchants in reference to a particular transaction, the custom must be shown to exist in the place where the transaction was concluded."

In *Anglesey v. Hatherton*, 10 M. & W. 218, the court held that on the question as to the existence of a custom in a particular manor, evidence of a like custom in an adjoining manor, though within the same parish and leet, is not admissible.

In *Steamboat Albatross v. Wayne*, 16 Ohio 513, it was held that a local custom at Memphis regulating the mode of delivering goods there, is not binding on shippers at Cincinnati, unless known to merchants and shippers there.

In *Insurance Co. of N. A. v. Hibernia Ins. Co.*, 140 U.S. 565, it was held that a local custom cannot affect a contract made elsewhere.

1. In *Brown v. Strimple*, 21 Mo. App. 338, it was said that evidence of a custom of a particular class is inadmissible in construing a contract made with one not of that class, unless he is shown

to have had notice of the custom at the date of the execution of the contract. *Walsh v. Mississippi Transp. Co.*, 52 Mo. 434; *Coquard v. Bank of Kansas City*, 12 Mo. App. 261.

Again, in *Long v. Armsby Co.*, 43 Mo. App. 253, the same court said: "Evidence showing that by the local usage a term possesses a special commercial sense is inadmissible when both parties to the contract in which the term is employed are not of the same trade or kind of business. In such case there is no presumption that both parties contracted with reference to such local usage and made it a part of their agreement. There is a distinction, therefore, between a case of this sort and one where both of the contracting parties are engaged in the same kind of trade or business. The distinction is noted in many of the local usage cases."

In *Keavy v. Thuett*, 47 Minn. 266, the defendants did not attempt to show an understanding or custom as to the use of the terms so well established and so notorious that the plaintiffs ought to have known them, and, perhaps as a consequence, bound thereby; nor did they propose to show a special understanding or custom in reference to the terms in existence among persons engaged in a different line of business, of which the plaintiffs had knowledge. The offer was simply to show a usage in the live-stock trade, of which the plaintiff, who was not in that trade, had no knowledge. The usage was therefore rejected. The plaintiffs were not dealers in live stock, a fact which seems to have been overlooked by the counsel when undertaking to show an established custom existing among that class of business men.

So in *Van Hoesen v. Cameron*, 54 Mich. 609, it was held that a custom among horse dealers that a warranty shall not extend to latent defects, cannot be shown to affect a horse trade with a man who was not accustomed to dealing in horses.

But in *Fleet v. Murton*, L. R., 7 Q. B.

126, M. and W., fruit brokers in London, being employed by F., a merchant in London, to sell for him, gave him the following contract note, addressed to F.: "We have this day sold for your account to our principal" . . . tons of raisins. (Signed) "M. and W., brokers." The principal having accepted part of the raisins, and not having accepted the rest, F. brought an action on the contract against the defendants and sought to make them personally liable by the custom of the trade. On the trial, in addition to evidence of a custom in the London fruit trade that if brokers did not give the names of their principals in the contract they were held personally liable, although they contracted as brokers for a principal, they offered evidence of a similar custom in the London colonial market. It was held that the latter was also admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. Cockburn, C. J., said: "I own I entertain somewhat more doubt as to the admissibility of evidence of a similar custom in other trades than the particular trade which was the subject-matter of this contract. This case seems to me to go further than the case of *Noble v. Kennoway*, 2 Doug. 510, which related to the admissibility of evidence of custom in the trade of *Newfoundland* as applicable to the custom of the trade in *Labrador*. *Labrador* had been recently annexed to *Newfoundland* and the trade in each was of the same description, it being a trade that related to fishing. By the terms of the contract (a policy of insurance), the ship was to be at liberty to call at *Newfoundland*, and it might be fairly inferred by the persons entering into a contract with reference to the trade of *Labrador* that what was the custom of the trade of *Newfoundland* would extend to the trade of *Labrador*. But this case goes further. . . . If there exists a custom to the effect that the agent makes himself liable, under given circumstances, in a large and extensive trade, like the colonial trade, it makes it more probable that in the fruit trade in the Mediterranean, or elsewhere, a similar custom would obtain. . . . There is no doubt that it would be useful in elucidating the truth; and, therefore, on general principles, I think the evidence was admissible." Blackburn, J.: "What was proved was this: that the

trades were very closely allied to each other. All brokers are very closely connected with each other; they all deal with merchants, and with much the same merchants in the general way of business; and they buy and sell, sometimes fruit, sometimes wool, and sometimes other things. And it struck me where the question was, Does a broker in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence? That it would be proper evidence for a jury to consider and weigh that such a custom existed in other trades, and that in those other trades the broker did incur a personal liability." Mellor, J.: "I am of the same opinion. . . . I cannot help thinking that the evidence was relevant to this case, and admissible on the ground that, showing, as it did, what was the custom in other trades, though not so analogous, no doubt, to the trade in question, as was the trade in *Noble v. Kennoway*, 2 Doug. 510, it tended to show the probability, that in the fruit trade as well as in the colonial trade the broker did, under given circumstances, undertake a similar responsibility." And see also *Falkner v. Earle*, 3 B. & S. 360; *Milward v. Hibbert*, 3 Q. B. 120; 43 E. C. L. 659; *Plaice v. Allcock*, 4 F. & F. 1074.

In *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398, it was said that a custom or usage in a business will not bind the parties to a contract, unless it appears that they had knowledge of its existence, or that it is so general that they must be presumed to have contracted with reference to it.

In *Martin v. Maynard*, 16 N. H. 165, it was said that a usage of a particular trade could not be given in evidence to show the true construction of a contract, unless it was further shown that the party to be affected by the usage was conversant with it or in some way chargeable with notice of it.

In *Moore v. Michigan Cent. R. Co.*, 3 Mich. 23, it did not appear from the facts found, nor from anything of record, that the plaintiffs had any knowledge of the particular manner in which the defendant company transacted its business. "If the defendants seek to modify this contract by a custom, they must show that both parties acted in reference to it. It is analogous to those cases where a party seeks to avoid an implied legal obligation by a particular usage or custom. To do that so as to make the general law

usage. If there is any evidence of the existence of knowledge, the jury must pass upon its weight and decide whether the party did, in fact, know of the usage.<sup>1</sup>

*b. PREVIOUS COURSE OF DEALING.*—In such cases the previous course of dealing between the parties is very material, and may often clearly show knowledge of the usage, even in the face of a denial of such knowledge by the party sought to be charged.<sup>2</sup>

yield to a particular one, it is essential that he should not only show the particular custom and usage to exist, but he should show enough to warrant the presumption that both parties acted in reference to it."

In *German-American Ins. Co. v. Commercial F. Ins. Co.*, 95 Ala. 469, the court said: "Proof of local usages will not raise up a presumption of a knowledge of their existence on the part of one engaged generally in the business to which they pertain in a certain city, at least where the domicile of a party sought to be charged is elsewhere; or, in other words, that, in order to create even a *prima facie* presumption that a party has knowledge of a usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, in such sort as that it would be unreasonable to suppose he was ignorant of it."

In *Isaksson v. Williams*, 26 Fed. Rep. 642, the court said: "If a usage is general, both parties are presumed to know it and to contract in reference to it. If it is special, and confined to a particular business, or has reference to a particular port only, there is no such presumption; and it is manifest that it would be unjust to admit it in order to restrict the natural meaning of a written contract, except upon proof that both parties were aware of the particular usage and intended to be governed by it. Even if, as respects a special custom in a particular trade, or between particular ports, there is a presumption that parties who are engaged in that trade contract in reference to the particular custom, this presumption is at best but a *prima facie* one, liable to be rebutted by proof that it was unknown to the party against whom it is set up; and, on that being proved, no weight ought to be given to it."

1. Compare *supra*, this title, *Proof of Usages*. In *Shove v. Wiley*, 18 Pick. (Mass.) 558, it was held that evidence that the indorser of a note was frequently at a certain bank, transacting

business there, and that he frequently paid notes there, was sufficient proof of his being conversant with the usage of the bank to give notice to promisors to pay at the bank, instead of sending the notes to them and demanding payment.

In *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, it was held that where, as in that case, upon taking charge of the vessel, the shipping firm informs the master that, by the custom of the port, custody, commission, and attendance fees are charged in such cases, and the master makes no protest, it cannot be said that the master was ignorant of the custom when he made the contract.

In *Mott v. Hall*, 41 Ga., 117, the court said: "If, as the witness stated, it had been the universal practice for thirty years for clerks to make notes for necessary expenses, and to make contracts by direction or authority of the captain for building or repair accounts, we think the owners of this boat are presumed to have had knowledge of that custom, and to have given the clerk of their boat, by implication, authority to make such contracts as were universally made by other clerks of other boats running on the same river."

In *Walsh v. Frank*, 19 Ark. 270, it was held that when a special custom at the place of shipment, different from the general custom, is proved; and the question is, whether the purchaser had knowledge of the special custom, and contracted in reference to it, the previous course of dealing between the same parties—such as the order, shipment and receipt of several invoices of goods, without any charge for insurance—is sufficient evidence from which the jury may infer knowledge of the special custom.

**Burden of Proof.**—The burden of proof is upon a party to a contract, seeking to avoid being bound by a notorious and uniform usage to show his ignorance of it. *Robertson v. National S. S. Co.*, 139 N. Y. 416.

2. In 2 *Parsons on Contracts*, pt. II, § 9, p. 544, the point is well

**12. When Knowledge Is Presumed.**—There are various instances in which it has been held that knowledge of a usage will be imputed to a party, although he may not, in fact, have actually been informed of it.<sup>1</sup>

This is, of course, the rule with regard to the general customs or principles of the common law, which are presumed to be known of all men. But some of the cases go to the extent of holding that persons in a particular trade, are charged with notice of all the usages prevailing in that trade, and cannot be heard to deny that they had no knowledge of such usages. In the insurance business, for example, it is settled that insurance companies are bound to inform themselves of the usages of the particular business insured, and that there is a conclusive presumption of such knowledge.<sup>2</sup>

It cannot be laid down as an established rule of law, that this

expressed and illustrated: "As a general rule, the knowledge of a custom must be brought home to a party who is to be affected by it. But if it be shown that the custom is ancient, very general and well known, it will often be a presumption of law that the party had knowledge of it; although, if the custom appeared to be more recent, and less generally known, it might be necessary to establish by independent proof the knowledge of this custom by the party. And one of the most common grounds for inferring knowledge in the parties, is the fact of their previous similar dealings with each other. The custom might be so perfectly ascertained and universal, that the party's actual ignorance could not be given in proof, nor assist him in resisting a custom. If one sold goods, and the buyer, being sued for the price, defended on the ground of a custom of three months' credit, the jury might be instructed that the defense was not made out, unless they could not only infer from the evidence the existence of the custom, but a knowledge of it by the plaintiff. But if the buyer had given a negotiable note at three months, no ignorance of the seller would enable him to demand payment without grace, even where the days of grace were not given by statute."

1. In *Bank of Columbia v. Fitzhugh*, 1 Har. & G. (Md.) 239, the usage was to present negotiable paper for payment on the fourth instead of the third day of grace. Fitzhugh indorsed certain paper made negotiable at the bank. The court held that he was a dealer with the bank and said that the next inquiry was, Is he bound to take notice of the

usage, and will the law presume his knowledge of it? The argument was, that he was placed in a situation to know, and was therefore presumed to know. There are usages analogous to this, which have been resorted to in the interpretation of contracts, where it will be found from the authorities, the party has been deemed to be bound without personal or special knowledge. Such, among others, is the case of *Noble v. Kennoway*, 2 Doug. 511, where the distinguished judge, who pronounced the opinion of the court on the construction to be given to a policy of insurance, said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that, whether it is recently established or not. If he does not know it, he ought to inform himself; it is no matter if the usage has only been for a year." See *supra*, this title, *Knowledge May Be Actual or Presumptive*.

2. In *Fulton Ins. Co. v. Milner*, 23 Ala. 420, it was held that the insurer will not be allowed to repudiate a custom in reference to which he is presumed to have contracted, and under which the insured had a right to expect that his loss, if any occurred against which he was protected by the terms of the policy, would be adjusted and settled. "To give validity to a usage of this kind, it is not necessary that it should extend to the whole state; if it is generally known and acted upon in the port, city or town in which the policy is given, it will be sufficient. In this case, the usage is shown to be not only general, but universal, both with insurers and insured in the city of Mobile. And as the parties do business in

that city, and this policy was effected there, they must be presumed to have known of its existence, and to have contracted in reference to it."

In *Howard v. Great Western Ins. Co.*, 109 Mass. 384, it was said that, "In contracts of a commercial nature, a reference usage is implied. *Clark v. United F., etc., Ins. Co.*, 7 Mass. 369; 5 Am. Dec. 50. When the meaning of a word, used to designate an article of trade, is to be fixed by proof of mercantile usage, it may be by the usage of the trade among merchants dealing particularly in that article. Underwriters insuring by certain words are bound to know the mercantile meaning of the words, and are liable according to that meaning. *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202. The presumption is, that they mean to deal according to the general usage, if any exists, in relation to the subject-matter. It may be local, but must be in force among persons engaged in the trade."

In *Vallance v. Dewar*, 1 Camp. 503, the action was upon a policy, and in giving it an interpretation, Lord Ellenborough adjudged, that a usage which was notorious must be presumed to be equally within the knowledge of both parties; and if a usage be general, though not uniform, the underwriters are bound to take notice of it.

In *Merchants' Mut. Ins. Co. v. Wilson*, 2 Md. 217, it was held that a usage of universal prevalence becomes a part of the existing law, and is to be noticed *ex officio* by courts of justice; but a particular usage must be supported by proof, and where well established it is as obligatory as the general law. Where a particular usage is presumed to be in the knowledge of the party, it enters into the contract and becomes part of it, and must be regarded in the interpretation of it. The proposition that a usage must be general in order to bind the parties, applies exclusively to cases where the knowledge of the parties and their intention to adopt the usage are inferred merely from the fact of its existence, but when their knowledge or intentions are established by other direct or circumstantial proof, their contract will be governed by the usage, however local or partial, in reference to which it is proved or presumed to have been made.

**Other Cases.**—In *Patterson v. Crowther*, 70 Md. 124, the court said: "A usage of universal prevalence becomes

a part of the existing law, and is to be noticed *ex officio* by the courts of justice; but a particular usage has a circumscribed and limited application, and must be supported by proof. Where it is well established, it is as obligatory on the objects of its operation as the general law." *Bank of Columbia v. Fitzhugh*, 1 Har. & G. (Md.) 248. Unless it is of such great notoriety that knowledge and adoption of it may be presumed, it must be proved to be known to the party whose contract is to be brought within its operation. In *Bank of Columbia v. Fitzhugh*, 1 Har. & G. (Md.) 239, on the proof in the case showing an established and notorious usage of the banks in the *District of Columbia*, to allow four days of grace on promissory notes, it was held that where a party indorsed a note for the purpose of being discounted at one of these banks he must be presumed to know the usage, and that his contract must be considered as made in reference to it, and not under the general law which allowed three days of grace. In *Powell v. Bradlee*, 9 Gill & J. (Md.) 277, this court approved of a ruling which left it to the jury to find the fact of usage, and to decide whether the delivery of certain goods had been made in reference to it. And in regard to the custom set up in *Burroughs v. Langley*, 10 Md. 250, a similar opinion was given. In *Merchants' Mut. Ins. Co. v. Wilson*, 2 Md. 241, it was said: "The proposition that a usage must be general in order to bind the parties, refers exclusively to the cases in which the knowledge of the parties and their intention to adopt the usage, are inferred merely from the fact of its existence; but when their knowledge or intentions are established by other direct or circumstantial proof, their contract will be governed by the usage, however local or partial, in reference to which it is proved or presumed to have been made."

In *Lyon v. George*, 44 Md. 295, L. & S., appellants, employed G., appellee, as agent to sell their glassware in Baltimore City and the *District of Columbia*. The suit was for commissions alleged to be due to G. It was admitted that the rate of commission to be allowed was five per cent., but the appellants claimed that this was chargeable only on goods ordered through the appellee or sold by him, while he insisted, that he was also to be entitled to a commission on all goods sold by

conclusive presumption extends to any other business than that of insurance. But in the various trades there is a *prima facie* presumption of knowledge on the part of those engaged in the trade, of such usages as prevail in it.<sup>1</sup> Where the usage is

them in the territory of his agency, whether through his intervention or not. To sustain his claim, the appellee offered proof that he was the sole agent of the appellants in the city of Baltimore and the *District of Columbia*; that he had made sales of their goods to several dealers in those places, and that commissions had been allowed and paid by them to the agent, who immediately preceded him in their employment, upon all their glassware sold in the territory of his agency, whether the order went directly from him or not. He then offered to prove that there was a uniform custom and usage, among manufacturers of glassware, to allow their local agents commissions both upon goods ordered directly through such agents, and upon goods ordered by buyers, living in the territory of the agent, directly from the manufacturer. The court said: "The objection to the admissibility of the evidence, that its offer was not accompanied with an offer to prove that the usage was known to the plaintiffs cannot be sustained. The defendant was under no legal obligation to offer such proof. The contract was entered into with a member of the plaintiff's firm, since dead, and the knowledge of the usage, on his part, when the agreement to employ the defendant as agent was made, will be presumed in law. This doctrine is so strongly recognized in the case of the *Bank of Columbia v. Fitzhugh*, 1 Har. & G. (Md.) 248, that it may now be considered a settled question in this state, and it is unnecessary to refer to other cases in support of it."

In *Lowe v. Lehman*, 15 Ohio St. 179, the court said: "It is not error, in such case, to instruct the jury, that if they find such custom to have been certain, uniform, and generally acquiesced in, in the city where the parties resided, and where they made the contract, they may interpret the contract in the light of the custom, although the custom was of only seven years' standing, and although the plaintiff had not actual notice of its existence."

In *Janney v. Boyd*, 30 Minn. 319, it was said: "A usage, to be binding

simply as such, must be established, general, and uniform, as applicable to the particular business with reference to which it is sought to be set up. It must be the mode in which persons in that line do their business, so that the law will presume knowledge of it. *Porter v. Hills*, 114 Mass. 106; *Trott v. Wood*, 1 Gall. (U. S.) 443; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Hall v. State*, 48 Ga. 607."

1. In *Munn v. Burch*, 25 Ill. 35, it was said that such customs as are universally known to exist, enter into, and form a part of every contract to which they are applicable, although not mentioned nor alluded to in the contract, and the courts will take judicial notice without proof, of a custom which is so universal and of such antiquity that all men must be presumed to know it. "Of this character, is the custom of banks to allow their depositors to withdraw their funds in parcels. Courts will not pretend to be more ignorant than the rest of mankind, but will recognize and act upon it. The general rule is, that the creditor cannot divide up his demand against the debtor and require the latter to pay it in parcels. But everybody knows, and the courts no less than commercial men, that an exception to this rule exists as to deposits in banks. It has been so long and so universal a custom with bankers to receive deposits from time to time, as the convenience of the depositor may require, and to allow him to draw out his funds on checks, in parcels, in such sums as he sees fit, that the mere fact of opening a deposit account with a banker implies a contract on the part of the banker, to allow the depositor to withdraw his deposits in parcels."

In *Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399, it was said: "Usage is a fact; and, if it is a particular usage, it must be known to the parties, and, if a general usage, it must be so well established and known that it must be considered that parties reasonably well acquainted with the trade or business either knew it, or ought to have known it."

In *Hardeman v. English*, 79 Ga. 387, it was held that to make proof of a custom as such proper testimony, it

general, in the technical sense, this presumption is certainly a reasonable one. The cases in the notes illustrate the principle in a practical way and reference should also be made to the paragraphs stating the rule that a usage should be general.<sup>1</sup>

**VI. A USAGE MUST BE REASONABLE—1. In General.**—A usage

should appear by the proof itself that such custom is a general one, and that it is so well known and recognized within the sphere of its operation, as to be usually considered a part of all contracts made in that particular locality, in business transactions to which such custom relates. "A custom, for instance, which was observed and practised in the usual course of their dealings by all warehousemen in the city of Macon, and which was well known and understood generally by persons sending cotton to such warehousemen, would be one of which proof could be properly introduced on a trial of this kind. But evidence of the alleged custom of a particular firm in its dealings with its own customers should not primarily be allowed."

1. In *Herring v. Skaggs*, 73 Ala. 446, it was held that a custom from which the authority to make warranty or representation may be implied, must be a usage of sellers, so well settled, notorious, and continuous, as to raise a fair presumption that it was known to the buyer and seller, and that sales were made in reference to it.

In *Boyd v. Graham*, 5 Mo. App. 403, it was held that to support a recovery on the ground of negligence in failing to comply with an alleged business custom, it must appear that the custom was general and well established, so as to raise a presumption that the defendant knew it, or that he had actual knowledge of it.

In *Sturges v. Buckley*, 32 Conn. 18, the defendant was engaged in the business of forwarding farmers' produce by a railroad running into New York, and selling it on commission. He took of the plaintiff a quantity of cider in barrels, disposed of it with the barrels, and returned other barrels equal in number and value. These the plaintiff refused to receive and brought trover for the original ones. It was held that a custom existing among forwarders of produce, by that and other roads and by vessels to New York, of leaving the barrels with their contents in such case, and returning other barrels equal in number and value, was a general

custom, of which the plaintiff would be presumed to have knowledge. The plaintiff contended that, "Evidence of a particular custom is inadmissible without proof of actual knowledge of it by the party to be affected. This leads to an inquiry as to the character of the usage in question. And however difficult it may sometimes be to distinguish between the two kinds, the usage relied upon in this case is undoubtedly of the class of general customs. It is described as such in the notice. It pertains to a very important kind of business, employing many persons, existing over a large extent of country, and centering in the city of New York. Various cases have come before this court wherein a custom has been held to be binding on a party without actual notice, and in none has the usage been more palpably a general one than in the present instance."

In *Ocean Steamship Co. v. McAlpin*, 69 Ga. 437, it was held that the custom of a business or trade is binding when it is of such universal practice that it becomes by implication a part of the contract. To render a custom thus binding, it is not necessary to show that it "was in the minds of both parties," before it becomes a part of the contract. The custom, as testified to by the defendant's witnesses, was in substance, that carriers, in consideration of the low rate of freight, were not responsible for the condition or quality of perishable articles on arrival, but that the custom did not restrict the carrier's liability for negligence. The plaintiff testified that he knew of no usage of the port as to the liability of common carriers for vegetables, and shipped the peas in contemplation of no such usage. The addition to the charge requested in this case to the effect that the custom must have been in the minds of both parties, "would import that this presumption could not arise, unless at the time of making the shipment, the custom or usage was in the minds of both the shipper and the carrier; indeed, this charge asserts that it must be in the minds of both the parties before it can be deemed a part of



must be reasonable; <sup>1</sup> otherwise it is void. But instead of saying that a usage must be reasonable, it is more accurate to say that it must not be unreasonable.<sup>2</sup> Usages are presumed to be reasonable. A usage is therefore good, unless it is shown to be bad.<sup>3</sup> In considering a usage, the courts do not so much determine whether it is supported by satisfactory grounds, as whether it is necessarily unreasonable. If the usage is not actually unreasonable, it is reasonable. A person asserting a usage need not assign good reasons for its existence; it is enough if it cannot be shown to be unreasonable. In other words, the question to be decided in a particular case is not whether the usage is reasonable, but whether it is unreasonable.<sup>4</sup>

the contract. This qualification destroys the implication which the law raises, that a universal custom enters into and forms a part of the contract."

1. It must be reasonable, not against the law or public policy, nor opposed to any express term of the contract, and must be so general and well known as to justify the presumption that the parties knew of it and contracted in reference to it. *Buyck v. Schwing*, (Ala. 1894), 14 So. Rep. 48.

2. 1 Bl. Com. 77.

3. Indeed some judges have thought that no unreasonable usages could grow up in modern times.

In *Baxter v. Rodman*, 3 Pick. (Mass.) 435, it was said in reference to a usage in the whaling trade: "Perhaps there could be no better evidence of the reasonableness of a custom than its antiquity and uninterrupted prevalence. This is a custom coeval with the trade in which it is made."

In *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 376; 8 Am. Rep. 264, it was thought that it was not likely that any unreasonable practice would grow into a usage.

In *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517; 9 Am. Dec. 720, the court said: "We frequently say that a usage to be binding must be reasonable; but I very much doubt whether this is not a mistaken view of the subject, and drawn from a supposed but not real analogy between commercial usages and common-law customs. I doubt whether there can be a commercial usage which can be deemed so palpably unreasonable as not to be binding. A usage so unreasonable cannot grow up. That it is a usage is itself a proof of its reasonableness, so irrefragable that no abstract reasoning can explain it away."

In *Cox v. Charleston, etc., Ins. Co.*,

3 Rich. (S. Car.) 331; 45 Am. Dec. 771, it is said of a general usage: "Proof of a general custom furnishes a strong reason why we should regard it as reasonable. It must be sanctioned by general concurrence in its use for several years before it can be said legally to exist. From proof of it as the general custom of the trade we are bound, at least *prima facie*, to conclude that it is reasonable."

In *Mulliner v. Bronson*, 14 Ill. App. 355, the court said: "In regard to usages of trade, men engaged in any particular line of business are generally as capable of exercising an intelligent judgment as to what is reasonable in the manner of transacting their business among themselves, as are courts and juries; and if a well-established usage is found to exist among them, it ought not to be rejected as unreasonable without full inquiry into the reasons upon which it rests." Similar expressions are found in other cases.

In *Crocker v. People's Mut. F. Ins. Co.*, 8 Cush. (Mass.) 79, it was said: "If it is done in the manner in which men of ordinary care and skill, in similar departments, manage their own affairs of like kind, this is one strong ground to hold it reasonable, and to warrant the admission of evidence of usage. What is common and usual, under given circumstances, is evidence tending to show what is reasonable."

4. In a preceding paragraph (*supra*, this title, *Customs in the Older Law—Particular Customs*), we quoted in part the words of Blackstone, Com. 77, in reference to the unreasonableness of particular common-law customs: "A custom may be good, though the particular reason of it cannot be assigned; for it sufficeth if no good legal reason can be assigned

**2. Reasonableness a Question of Law for the Court.**—Whether a usage is reasonable or not, is to be determined as a matter of law by the court and not by the jury.<sup>1</sup>

against it. Thus, a custom in a parish that no man shall put his beasts into the common till the third day of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable and therefore bad; for peradventure the lord will never put in his, and then the tenants will lose all their profits." This equally applies to the usages of trade. *Jones v. Waters*, 5 Tyrwhitt 361, is an illustration of the manner in which courts determine the reasonableness of a custom, *i. e.*, not by determining that it is good, but by deciding whether it is positively bad. In that case there was a custom within a borough and corporate town, that the town-crier should have the exclusive right to proclaim by the sound of a bell, the sale of all goods brought within the borough to be sold by auction there. Lord Abinger, in holding this not to be a bad custom, said: "It appears to us that there are no legal grounds upon which we can say that such a custom must be bad. It may have had a good commencement, and as it probably existed long before the art of printing was known, must have been formerly a much greater benefit to the public than at present. We see no reason to prevent the corporation from appointing a town-crier. We cannot affirm that a custom conferring on him the exclusive privilege of proclaiming by sound of bell all sales by auction about to take place within the borough, is bad in law."

In *Miller v. Eschbach*, 43 Md. 1, the court said in reference to a church custom attacked as unreasonable: "It cannot be expected that the courts will hold such a custom and usage to be bad, because it may be abused, and upon that ground declare it to be inapplicable and void."

In *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354, it was said: "When a question is first presented as to giving legal effect to a usage proved to exist, where its binding force or its admissibility is denied by one of the parties to the cause, a court will not enforce or sanction it unless it be reasonable and convenient, and adapted, not only to

increase facilities in trade, but to the promotion of just dealings between parties."

In *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.) 305, the court said: "If a usage leads to consequences which are absurd, or which could not be fairly presumed to have been contemplated by the parties, the presumption is repelled which the law might otherwise make, that it was intended to be adopted as part of the contract. Therefore, courts of law will not enforce unreasonable or absurd usages, however uniform and well known. Parties, in framing their contracts, have a right to disregard them, and cannot be held to have entered into written stipulations with any reference to them."

In *Robinson v. Mollet*, L. R., 7 H. L. 802, the court said: "When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favor of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavoring to enforce some rule of conduct which is so entirely in favor of their side that it is fundamentally unjust to the other side, the courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void."

1. In *Bourke v. Kneeland*, 4 Mich. 336, it is said: "Whether a custom of merchants sought to be established is unreasonable or otherwise, is a question of law for the court; but user, which is the evidence of custom, is a matter for the jury, which the court will submit or not, as it shall find the custom reasonable, and not illegal, or otherwise." To the same effect are *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306; *Bowen v. Stoddard*, 10 Met. (Mass.) 381; *Smith v. Tyson*, 1 P. & D. 307; *Bastard v. Smith*, 2 M. & Rob. 120; *Rockey v. Huggans*, Cro. Car. 220; *Chicago Packing, etc., Co. v. Tilton*, 87 Ill. 547; *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611; *Codman v. Armstrong*, 28 Me. 91; *Randall v. Smith*, 63 Me. 105;

In considering the question of reasonableness, or the contrary, the reader must remember that the judges are guided in rendering their decisions by their individual ideas of morality, public policy, the necessities and conveniences of business, etc. It is not strange therefore, that the cases should not entirely agree upon such points. Moreover, business methods may change with business development, and what is unreasonable at one time may, at another time, by reason of the adoption of new methods, become very reasonable. The whole matter is one of judicial opinion on business and other questions not entirely legal; and what one judge may think of the reasonableness of a certain usage, can scarcely have the usual weight of a judicial authority to bind another judge who considers the usage under changed conditions.

**3. Usages of Banks.**—A usage of incorporated banks to honor the occasional overdrafts of customers in good standing is said to be unreasonable;<sup>1</sup> and so is a usage, in collecting drafts for non-resident parties, to surrender the drafts to the drawees at maturity, and, relying upon the good credit of the drawees, to take in exchange their checks in settlement;<sup>2</sup> and a usage of banks not to rectify mistakes after the person leaves the room is palpably bad.<sup>3</sup> But it is easy to understand that a usage requiring every depositor in a savings bank to produce his pass-book when demanding payment of a deposit, is reasonable and valid.<sup>4</sup>

18 Am. Rep. 200. But in *Mulliner v. Bronson*, 14 Ill. App. 355, the court questioned whether the reasonableness of a usage was to be determined by the court or the jury. And in *Paxton v. Courtenay*, 2 F. & F. 131, Keating, J., at *nisi prius* left it to the jury to decide whether the usage was fair and proper and such as reasonable, honest, and righteous men would adopt.

1. In *Lancaster Bank v. Woodward*, 18 Pa. St. 357; 57 Am. Dec. 618, the court said: "If the officers might pay checks, which are properly drafts on funds deposited, when there were no funds of the drawer on deposit, the capital of banks would be liable to perversion to purposes, and in modes, that were never contemplated, either by the legislature, or the stockholders. That the practice of paying overdrafts has prevailed to some extent is quite likely, and it may be true that boards of directors have in some instances sanctioned it; but it has no authority in sound usage or in law."

2. In *Whitney v. Esson*, 99 Mass. 308; 96 Am. Dec. 762, the court said: "In this case it is agreed that it is a common practice for holders of drafts to accept the check of the drawee in exchange for the draft, though it is not

claimed to be a general established usage. It is undoubtedly true that men who keep bank accounts are accustomed to give checks for their debts, and in most cases their standing is such that these checks are taken by their neighbors as readily as cash. This may make a common practice among men who are dealing on their own account, in respect to such dealings; but such a practice falls short of a usage applying to the collection of drafts for absent parties. And it is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check which may turn out to be worthless."

3. In *Gallatin v. Bradford*, 1 Bibb (Ky.) 209, the court said: "If such a custom does exist, it is contrary to law and ought not to meet with the sanction of a court of justice. The law declares that money received through mistake shall be refunded. Such a custom in banking institutions may be an evidence of avarice, but not of the practice of justice."

4. *Warhus v. Bowery Sav. Bank*, 5 Duer (N. Y.) 67.

**4. Usages of Carriers.**—In the law of carriers, the usages passed upon by the courts have been principally those asserted by the carrier against the customer, especially in reference to the delivery of goods.<sup>1</sup>

1. In *Christian v. First Div. St. Paul, etc., R. Co.*, 20 Minn. 21, it was held that a regulation requiring a consignee to receipt for grain belonging to him weighed for him in a delivery bin, before taking the same from such bin, and before he can ascertain, except from the defendant's statement, whether the quantity of grain receipted for is there or not, is unreasonable and void. "It would give the carrier the unjust advantage of forcing the consignee to admit that to be true, the truth of which he has no means of ascertaining. The enforcement of such a regulation would be neither more nor less than a species of duress in spirit, if not in letter. It would attach to the consignee's right to the possession of his property a condition which we have no hesitation in pronouncing to be not only unreasonable, but tyrannical."

In *Reed v. Richardson*, 93 Mass. 216; 93 Am. Dec. 155, a usage that in order to constitute a delivery of goods by the carrier, it is necessary for a receipt to be given by the consignee or his agent, and that until then the liability of the carrier continues, was held to be unreasonable and void. "The usage would relieve parties from responsibility for property consigned to them, although there might be evidence offered that the property had been received by the consignee or his agent. It is too plain for argument that no usage can be valid or be recognized, the effect of which is to shut out legal and competent evidence of any facts material to the trial of an issue. It is unreasonable because it imposes on a carrier the burden of procuring an act to be done by another person, the performance of which he has no power to compel or enforce, or which from design or accident on the part of others it may be difficult or impossible for him to cause to be accomplished."

In *Blossom v. Champion*, 37 Barb. (N. Y.) 554, there was a custom at the port of New York to deliver bills of lading for merchandise shipped for transportation, only to the party holding the receipt of the master or agent of the vessel, which is usually signed and handed to the lighterman or carman at the time of the shipment. The cus-

tom appears to be not unreasonable. It does not invalidate the custom because the vessel cannot be compelled to give receipts, or the shipper to take them. The shipper may still insist that he will ship only by such vessels as will give receipts, and the vessel may also refuse to receive freight, unless the shipper will receive receipts, or conform to the custom. It is a custom that tends to the protection of the shipper, as well as the shipowner.

In *Kohn v. Packard*, 3 La. 224; 23 Am. Dec. 453, it was held unreasonable that a notice published in three newspapers in a city, of the time and place of landing goods, should be sufficient to place them at the risk of the consignee. In *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264, there was a custom that a railroad company should deliver freight on the platform of minor stations, whose business would not justify a warehouse, to be received there by the consignee on discharge from the car. This was held to be a reasonable custom.

In *Sullivan v. Thompson*, 99 Mass. 259, the defendant carrier delivered an express package addressed to the plaintiff, to a clerk in the office of the government bakery where the plaintiff was employed. This delivery was made in accordance with a usage that all packages addressed to any of the parties employed at the bakery should be delivered to one of the clerks in the office, taking his receipt, without notice to the consignee. It was held that this was a reasonable usage. The court said that all the reasonable usages of express companies "would enter into their contract and become a part of it, and their liability would be limited by such usages. These usages consist in methods of doing business; and when a party employs them to carry a package, and asks for no special stipulation, his implied proposal is that they shall carry and dispose of the package in the same manner as they are accustomed to do with such packages, provided it is reasonable; and this is the proposal which they impliedly accept, and it constitutes the contract, except so far as it is varied by express stipulations. The usage

Others are usages tending to limit the liability of the carrier toward the passenger,<sup>1</sup> usages limiting the time during which claims for damages against the carrier may be made,<sup>2</sup> and various

may relate to the delivery of goods. The usage of the defendant in this respect is stated in the report. The only question that can arise respecting it is, whether it is reasonable. This must depend somewhat upon the character of the property to be delivered. If it were a heavy article, of no great value, and which might safely be left exposed, it might be reasonable to leave it on the premises where the consignee resides, in an exposed position. On the other hand, if it were a package of money, or article of similar value, it might not be reasonable to deliver it even at the office or counting-room of the consignee without putting it in the care of some reliable person. In the present case it was a box of clothing. It was delivered within business hours at the office of the government bakery, which was the only part of the bakery where the defendants' agents could go, to a government clerk there employed, who alone occupied the office and had charge there, and who received the parcel for the plaintiff and gave a receipt therefor. This was in conformity with the well-known usage of the managers of the bakery and with the usage of the defendants. Considering the nature of the property and the circumstances, the court are of opinion that the usage was not unreasonable, and that the defendants fulfilled their contract if they delivered the box in conformity with it."

1. In *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y. C. Pl.) 229, the court said: "It seems, that regulations forbidding a passenger who pays an extra price for a state-room or private chamber, from taking his baggage with him into it, except at his own risk, is not a reasonable regulation, so far as it would apply to light baggage or hand satchels containing articles required for present use in travel."

In *Central R., etc., Co. v. Anderson*, 58 Ga. 393, the court held unreasonable a custom of a railroad company not to be responsible for the conduct of its agents in regard to the contents of chartered cars, of which the agents held the keys.

In *Miller v. Pendleton*, 8 Gray (Mass.) 547, which was an action

against a ferryman for the loss of a horse and wagon by his neglect to put up the chain at the end of his boat, the court rejected as evidence a custom at other ferries on the same river to put up the chain at the request of passengers, and not otherwise. The usage sought to be proved would not be a good usage; it would make the safety of the passenger depend upon his own conduct, and not on the care and vigilance of the ferryman.

In *Law v. Botsford*, 26 Fed. Rep. 651, it was held that a custom to deduct from the freight earned the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the carrier shall not be permitted to show that he delivered all he received, is unreasonable and invalid. "It is a custom which has been repeatedly held void by the courts, and one which has been submitted to by shipmasters because the amount of shortage is usually too small to justify the expense of litigation."

In *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 184, the court, by Cooley, J., decided the same question as to an intermediate carrier in the same way, holding the custom to be unreasonable. "If the custom in question were confined to vesting in the intermediate consignee the same power to refuse to pay freight in cases in which the owner would be justified in doing so, it would not exceed the reasonable province of a mercantile usage. But it goes very much further when it makes the bill of lading conclusive in favor of the intermediate carrier, and allows him to make deductions for supposed deficiencies, not in fact existing, which the owner himself would not be required to make."

2. In *Browning v. Long Island R. Co.*, 2 Daly (N. Y.) 117, a usage of a railroad company requiring all claims against it for damages, by reason of loss or injury to goods transported by it, to be made within ten days after the delivery at the station, was held to be unreasonable. As a regulation, it would be unreasonable, as more than ten days might elapse before a party knew of the loss of his property. Similarly in *Memphis R. Co. v. Holloway*, 4 Law & Eq. Rep. 425, a usage of

others, of a more or less miscellaneous character, and growing out of the contract of carriage.<sup>1</sup>

**5. Usages Between Employer and Employee.**—The relation of master and servant, or employer and employee, imposes certain legal rights and obligations, which cannot be annulled by any usage to the contrary; and any such usage established in disregard of such obligations is unreasonable and void. For example, where the employer is entitled to the exclusive service of the employee for the former's benefit and advantage, a usage violative of that right is unreasonable.<sup>2</sup> Similarly, a usage for an employee

a railroad company requiring claims for losses to be made at the time goods are delivered.

1. In *Loveland v. Burke*, 120 Mass. 139; 21 Am. Rep. 507, the court held that it is competent for a carrier, in defense of an action for injury to goods, in their delivery, by the breaking of the requisite apparatus, to show a local usage that such apparatus is to be furnished by the consignee of the goods; and, if such usage is shown, the carrier is not liable for injury to the goods, occasioned by a latent defect in the apparatus furnished by the consignee. This usage was not unreasonable in itself, nor was it in contravention of any rule of law.

In *Jelison v. Lee*, 3 Woodb. & M. (U. S.) 368, a usage for a consignee of a vessel, who was also owner of the cargo, to charge a commission on the freight paid by himself to the captain was held unreasonable, and therefore not binding. Such a usage is not just in a case like this, where neither service, risk, nor duty is performed, to earn commissions. A debtor in all cases might as well charge commissions for paying his own debts.

In *Turnbull v. Citizens' Bank*, 16 Fed. Rep. 145, it was alleged that according to the usage of the port of New Orleans, it was the business of the ship to deliver a cargo of iron where the custom-house authorities designated. Such a usage is not reasonable, for the customs authorities might designate a particular pair of scales, or a particular warehouse, for the government weighing.

In *Clark v. Gifford*, 7 La. 524, it was held that no usage of steamboats and towboats, that the first coming alongside of a ship, on a signal made for steam, has thereby an absolute towage contract to tow the vessel into the port of New Orleans, is binding, when such custom has only prevailed

five or six years, among those having an interest in establishing it. "It would be an extraordinary occurrence in legislation, established by custom and usage, to give to a few steamboat captains, and the owners of towboats, authority to make laws, in consequence of a usage which relates solely to their own interests, of a duration of not more than five or six years, to have a binding force on the owners of vessels over the whole world."

Other usages among carriers are as follows: In *Emery v. Dunbar*, 1 Daly (N. Y.) 408, a usage was held unreasonable that freight paid in advance should not be recovered back, even though not earned. In *Clark v. Gifford*, 7 La. 524, a usage was rejected which required persons making a lawful use of waters as a highway, to yield to others who were using them unlawfully. In *Stone v. Rice*, 58 Ala. 95, the court could not uphold as reasonable a usage allowing a steamboat carrier to put goods out on the river bank, without protection, when the landing to which they had been consigned had been destroyed.

In *Bertellot v. Part of Cargo of Brimstone*, 3 Fed. Rep. 661, it was held that the custom of a port to stop discharging cargoes of brimstone when there is a high wind is not unreasonable.

2. In *Stoney v. Keyport's Farmers' Transp. Co.*, 17 Hun (N. Y.) 583, the defendant ran a freight boat, receiving country produce, selling it, and returning the proceeds to the customers, less the freight and commissions. The plaintiff was hired by the defendant to act as freight salesman on the boat for one year. He was discharged, because he had opened a business of the same kind on the boat, selling produce for customers, and retaining the commissions for himself. A custom or usage allowing the plaintiff to conduct such a business would be unreasonable in itself, for it

to make an extra profit out of his employer without the latter's consent.<sup>1</sup> Other instances are given in the note.<sup>2</sup>

The above instances are usages held unreasonable as against the employer. Examples are also to be found where the employee is guarded against attempts to enforce unreasonable usages against him.<sup>3</sup>

**6. Usages Between Landlord and Tenant.**—In the relation of landlord and tenant, the courts have rejected as unreasonable, a usage that the tenant might use certain property of the landlord's with-

would be inconsistent with his duties. The defendant was entitled to the exclusive service of the plaintiff in the business in which he was employed, for its own advantage and benefit, and to allow him to engage in a similar business on his own account, and to bring his interests into competition with those of the defendant in which he was employed, would be unreasonable and unjust.

1. In *Kedian v. Hoyt*, 33 Hun (N. Y.) 145, the court quotes Wharton on Agency, §§ 238, 240, as follows: "In undertaking his employment, the agent pledges his integrity and his fidelity to his principal; and it is a fraud upon his principal to attempt to make use of his position to promote his own advantage, at the expense of his principal, and any usage by which an agent claims to appropriate such profits is nefarious and fraudulent, and as such will be repudiated by the courts."

In *Wadley v. Davis*, 63 Barb. (N. Y.) 500, a custom that a person employed to cut staves from another's bolts has a right to take, and appropriate to his own use, the clippings, corner-pieces, and culls, without the consent of the owner, was held not to be sustained. Such a custom is not only not in harmony with law, but is manifestly against public policy. To allow a mechanic or artisan, who works up the materials of another, to keep so much of such materials as is not used for the benefit of the owner of the materials, is to array his interests in direct opposition to those of his employer. Such a custom, as a custom, binding upon the owner of the property, is unreasonable, contrary to public policy, and cannot have the sanction of law. A different principle was applied in *McDonnell v. Ford*, 87 Mich. 108, in which evidence of a custom among contractors and builders to charge, for each man working on a job taken by the day, an advance over the price paid him by the contractor, was held admissible; it appearing that the

men were general employees of the contractors, and that their labor was worth the price charged therefor.

2. In *Sweet v. Leach*, 6 Ill. App. 212, the plaintiff was employed by the defendants as salesman for a year. During the year he lost some time by sickness, and the defendants refused to pay for the time lost. The plaintiff offered evidence of a custom of the trade to make no deduction from the salaries of salesmen for time lost by sickness. This was held to be unreasonable. If the custom contended for in the present case was binding, it would follow that an employer must pay for the entire period of time covered by the contract of hire, however small might be the amount of services rendered. Such a custom would be void for unreasonableness, and it is not to be supposed that any business man, of ordinary prudence, would contract for the services of a salesman in reference to it.

In *Cooper v. Purvis*, 1 Jones (N. Car.) 141, a custom that if a female slave, hired by the month or week, should be delivered of a child during the term, the hirer should be allowed the sum of ten dollars, was thought very unreasonable.

In *Bean v. Bolton*, 3 Phila. (Pa.) 87, a custom for sawyers to ship the lumber intrusted to them, and by them converted into logs, to lumber factors to be sold, in order to realize money to pay for the sawing, without the owner's consent, was held unreasonable. A custom that those who have a lien for work may sell the property on which it rests after a demand of the debt and a reasonable notice of the time and place of sale, may perhaps be good; but under the custom alleged here no man could send his logs to a saw-mill without the risk of having them sent for sale to a distance, without giving him an opportunity to pay the sawyer what he owed and resume possession of his property.

3. In *Nolte v. Hill*, 36 Ohio St. 186,

out paying for it ; also one that imposed on the tenant, in favor of the landlord, an obligation which did not arise as matter of law from their relation to each other. These and other instances are given in the note.<sup>1</sup>

H. employed N. to underpin his house, to protect it against injury from the excavation of a cellar then being dug on an adjacent lot by the owner thereof; but before N. commenced work under his contract, the house was injured by the excavation. The local custom which was injected into this contract, which in terms bound the defendant to underpin the plaintiff's building, and nothing more, obligated him also to contract with the excavator of the cellar upon the adjacent lot, so that the excavating of the cellar and the underpinning of the plaintiff's house should be wrought together; and the failure to make such arrangement with the excavator, whether he was willing or unwilling to enter into the arrangement, would constitute a breach of the defendant's contract. Such a custom, however uniform and long continued, should be declared unreasonable, and therefore of no binding force.

In *Metcalfe v. Weld*, 14 Gray (Mass.) 210, it was held that a custom of a particular port that seamen's advance wages, due under shipping-articles, shall be paid to the shipping agent, to be paid by him to the boarding-house keeper bringing the seamen, for their benefit, is unreasonable, and does not bind the seamen, although known to them at the time of signing the articles. "It is a custom for one of the contracting parties to put himself under the tutelage or guardianship of a particular class of men, and interferes with his right to the direct control and enjoyment of the fruits of his own labor. It seems to require that the sailor should be in the charge of some boarding-house keeper, and either be in debt to him or bound to deal with him for the future. Unfortunately, this is too often the actual fact. The power which the keepers of boarding houses for seamen practically exercise over their customers is liable to great abuse, and we cannot think it wise or salutary that it should receive any extension or encouragement. A custom is not reasonable which allows a payment by the owners to their own agent, with a payment by him to some boarding-house keeper to whom the sailor is under no legal obligation, and may not choose to

constitute and trust as his agent. A principle nearly analogous was applied in the case of *Bowen v. Stoddard*, 10 Met. (Mass.) 381."

1. In *Anewalt v. Hummel*, 109 Pa. St. 271, the court held unreasonable a custom that an incoming farm tenant is entitled to the hay and stubble found on the premises. It was so wholly unreasonable that it could not be set up as a defense. It was a custom that the tenant might use the property of his landlord without making compensation. The tenant might with equal propriety have set up a custom that his landlord should pay his debts or give him his share of the crops.

In *Bradburn v. Foley*, 3 C. P. Div. 129, a custom was alleged that the out-going tenant of a farm should look exclusively to the incoming tenant, and not to the landlord, for compensation for seeds, tillage, etc. This was held unreasonable because it imposed upon the out-going tenant, as his debtor, a person not of his choosing, and exonerated the landlord from his liability.

In *Tucker v. Linger*, L. R., 8 App. Cas. 508, a farm was let under an agreement reserving to the landlord "all mines and minerals, sand, quarries of stone, brick earth and gravel pits." A local custom allowed tenants of farms let in this manner, to take away the flints that were turned up in the ordinary course of good husbandry, and to sell them for their own benefit. If the flints were not turned up and removed, such farms could not be properly cultivated. It was held that the custom was reasonable and valid.

In *Watherell v. Howells*, 1 Camp. 34, the action was on the case in the nature of waste against his late tenant, for ploughing up certain strawberry beds. The defense was that the strawberry roots which had been grubbed up were the property of the defendant, and that he had a right to dispose of them as he thought fit. In support of this, evidence was given of a general practice of appraising and paying for strawberry beds as between an incoming and an out-going tenant; and the fact was established that the defendant had paid to the person who assigned to him the lease of the ground a sum



**7. Usages Between Principal and Agent.**—In the relation of principal and agent, various usages have been held to be unreasonable and others have been allowed. The cases embrace usages tending to violate the duties imposed by law upon agents for the benefit of their principals;<sup>1</sup> usages to enlarge the agent's authority beyond that given him by his principal;<sup>2</sup> usages respecting the

of money for these very strawberry beds, which were valued to him with the other stock upon the premises. But Lord Ellenborough said, that though by custom the tenant might remove some things which by the general law, as affixed to the freehold, belonged to the landlord, this could never extend to enable him to sterilize the soil. Strawberry beds might have been appraised in the manner described, because people rather than suffer mischief from another, would sometimes pay him a sum of money to observe the law.

1. In *Fuller v. Robinson*, 86 N. Y. 306; 40 Am. Rep. 540, the defendant was permitted to prove, by persons engaged in the tobacco trade, that, by the custom and usage of that business, no reliance is placed by manufacturers and sellers of cigars upon the representations of brokers employed to sell, in respect to the credit of purchasers. This was held to be error. The broker was bound to the utmost fidelity in the business of his employers. His relations to them were such, that naturally, his representations in respect to the commercial credit and pecuniary ability of his customers, would carry weight and influence. The custom and usage which was allowed to be shown, proceeds upon the theory, that a broker in the tobacco trade, is unworthy of the confidence of his employer, and that this is so well understood, that it has become the rule of the relation between them, that the employer ignores and disregards the representations of the broker, upon the vital question of the financial credit of customers, although the representation was made in the course of his duty.

Other usages passed upon by the courts are these: An unreasonable usage by which an insurance agent is entitled, for three years after the end of his employment, to receive commissions from the company on the renewal premiums on all policies obtained by him. *Castleman v. Southern Mut. Ins. Co.*, 14 Bush (Ky.) 197. A reasonable usage for commission mer-

chants to give a credit of six months, crediting the amount of sales to the principal, charging back to the principal debts lost without negligence on the part of the commission merchants, and to be indulgent in collecting from country purchasers. *Dwight v. Whitney*, 15 Pick. (Mass.) 179.

In *Wallace v. Morgan*, 23 Ind. 399, it was held that a local custom authorizing the local factor in his own discretion, without the assent or knowledge of his principal, to ship goods consigned to him, for sale in his own market, to a factor of his own choosing, unknown to the principal, in a different and distant market, is unreasonable. The legal inference, arising from consignments to a local factor is, that he is to sell to the best advantage in the local market where he is doing business; this rule is violated by the usage set up. To ship the goods consigned to him for sale in his own market to a factor of his own choosing, unknown to his principal, in a different and distant market, at his principal's risk, and, in case of loss, without any responsibility upon himself, is unreasonable and void.

But in *Wallace v. Bradshaw*, 6 Dana (Ky.) 382, a somewhat different view was adopted. "It is not unreasonable, or unjust," said the court, "that a commission merchant, receiving goods on general consignment from a distant owner, and making advances therefor, should, in consideration of the interest he has acquired in the goods, and for his own safety, be authorized, under certain circumstances, at his discretion, and for the benefit of himself and the consignor, to ship the goods to a more advantageous market, or one which may in good faith be presumed to be so; and especially when, as the evidence conduced to prove, a sale at New Orleans (the residence of the commission merchant) might not have indemnified them for their advances."

2. In *Dodd v. Farlow*, 11 Allen (Mass.) 426; 87 Am. Dec. 726, it was held that a merchandise broker can have no implied authority, from the usage of trade, to warrant goods sold by

payment of commissions to agents;<sup>1</sup> usages as to the powers of masters of vessels to sell the cargo or vessel;<sup>2</sup> and other instances.

**8. Usages Between Vendor and Purchaser.**—Numerous usages in the relation of vendor and purchaser have been held to be unreasonable, and others have been decided to be proper. The

him to be of merchantable quality. "It is conceded that the broker who made the contract in this case had no express authority from the principals to warrant the articles sold to be of merchantable quality. Nevertheless, such a warranty was inserted in the sale note delivered to the plaintiffs by the broker. It was contended that an authority to make such warranty is derived from the usage of trade. But we are clearly of opinion that the alleged usage is unauthorized by law, and cannot be regarded as valid. It is unreasonable, and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise. Even if the usage was known to the vendor, he would have a right to disregard it, and to disavow a contract made in conformity to it. *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.) 314. We have very great doubt whether a usage can be regarded as reasonable which invests an agent with power to bind his principal by a contract into which the latter had not, by any word or act, either express or implied, of his own, authorized the agent to enter. The effect of the usage in question is not merely to give authority to a person acting as broker for another to make a sale in the ordinary way with the usual stipulations and incidents of such a contract; but it extends the authority of the agent and invests him with power to insert a special agreement, which fastens on the vendor a liability not usually included in a sale of chattels in the regular course of business."

In *Carr v. Callaghan*, 3 Litt. (Ky.) 372, a usage was held bad that a man without authority from the owner, or his consent or knowledge, and without knowing whether he wishes to sell or not, may dispose of land and thereby bind the owner.

1. In *Loud v. Hall*, 106 Mass. 404, it was held that a general usage of a seaport, that if the seller of a ship there

accepts the services of a broker, who introduces him to and brings him into negotiation with the ultimate buyer, and who is ready to continue his services until a sale is effected, he shall pay the broker a commission, whether or not the sale is completed through his agency, is a reasonable usage, and binds such a seller, notwithstanding his residence elsewhere and ignorance of the usage. There is nothing unreasonable in allowing a commission to be recovered for such services accepted and rendered, independently of the question whether the sale is finally effected by the same or by another broker.

In *Green v. Wright*, 36 Mo. App. 298, the court held that it cannot be declared, that a custom whereby real-estate dealers receive commissions on all sales made by them for others, but receive nothing for their services when no sales are made, is unfair, unreasonable, or in violation of any legal right. It seems entirely reasonable that men engaged in such an employment should undertake to effect sales of property on the condition of receiving a commission upon the proceeds of the sale in the event of success, and of receiving nothing in the event of failure.

In *Winsor v. Dillaway*, 4 Met. (Mass.) 221, the court did not express any opinion on the reasonableness of the custom alleged for ship-brokers to receive a commission of the seller of a vessel, when they introduce a purchaser to him, without being employed in the negotiation.

2. In *Bowen v. Stoddard*, 10 Met. (Mass.) 375, it was held that the relation between the master of a vessel and the owners is not such that they thereby become liable as acceptors of bills of exchange, drawn on them by him in a foreign port, for supplies furnished to the vessel. A usage to accept such bills cannot charge the owners as acceptors; for a usage, to be legal, must be reasonable as well as convenient, and that usage cannot be reasonable, which puts at hazard the property of the owners at the pleasure

instances cannot be satisfactorily classified. All that can be said is, that any usage between a vendor and a purchaser which is unjust, or tends to wrongdoing, or leads to bad results, will be rejected; while those of different character will be approved.<sup>1</sup>

of the master, by making them responsible as acceptors on bills drawn by him, and which have been negotiated on the assumption that the funds were needed for supplies or repairs.

In *Clark v. Humphreys*, 25 Mo. 99, the court followed *Bowen v. Stoddard*, 10 Met. (Mass.) 375, and held that a custom that a master of a boat, by a bill of exchange on the clerk of the same boat, may bind the owners for any sum he may see fit to draw, would be so inconvenient and unreasonable that no wise system of law could sanction it. Prudent men would scarcely consent to become owners of vessels under such a state of law. There is no hardship in this, for if it is necessary that a master should have such authority, it is a very easy matter to confer it on him by express words. The owner then, knowing in whom he confided, would not be in danger of being ruined by the acts of his agents.

In *Hewett v. Buck*, 17 Me. 147; 35 Am. Dec. 243, a custom that the master of a vessel may purchase a cargo on account of the owners, without their authority, was rejected.

In *Henshaw v. Clark*, 2 Root (Conn.) 103, a practice that a master may sell the vessel without the owner's authority was disapproved as unjust and impolitic.

In *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 131, it was held that a usage for the master of a standard vessel, to sell the cargo, without necessity, is void. The usage could not have any lawful commencement or continuance, in any case where there was no necessity to make the sale. It was against common faith and honesty. Necessity will only authorize the sale. A usage to sell without necessity would be void. It would be of no more validity, than would be a usage for the master and people to turn pirates when the vessel should take the ground.

In *The Middlesex*, 11 Law Rep. N. S. 14, the court did not believe there was any usage which made wharfingers the agents of the consignees to accept consignments for them; and if such a usage were proved, it could not admit that it was a reasonable or lawful

usage. It would be inconsistent with the nature of the employment, and would lead to too much confusion of rights to be tolerated.

1. In *Haskins v. Warren*, 115 Mass. 514, it was held that a usage that no title passes upon an ordinary sale and delivery without actual payment of the consideration, would require all such transactions to be construed as mere bailments or mandates. "The inevitable uncertainty of all titles to goods transmitted from hand to hand in the usual methods of sale and purchase, and the embarrassments to which commercial transactions would be constantly exposed from the operation of a usage which would so restrict the effect of a contract of sale apparently executed by delivery, are sufficient to justify, if not to require, its rejection as unreasonable. *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.) 305."

In *Chicago Packing, etc., Co. v. Tilton*, 87 Ill. 547, there was a usage of the Chicago Board of Trade giving the buyer the privilege, on cash sales, of having the goods inspected at his own expense; but if he took them without inspection, he took them at his own risk. This does not seem to be an unreasonable rule, if confined to a certain class of cases. Where two parties are each speculating in produce, where the vendor does not seem to have better means of knowledge as to the condition or quality of the article sold than the vendee has, it seems very reasonable that if the vendee, having the means of inspection, chooses to accept the goods without inspection, his mouth should forever after be closed. But where the vendor apparently occupies a position where he is reasonably supposed to know the condition and quality of the goods sold, and where the vendee might reasonably rely upon such supposition, it would seem a very unreasonable rule.

In *Henkel v. Welsh*, 41 Mich. 664, the court, in approving a usage that the storing of herring when receiving it, without immediate examination, does not waive objections to quality, said: "Indeed, a usage that should require a dealer at his peril to open and inspect every package before receiving it would be so burdensome and unreason-

**9. Miscellaneous Unreasonable Usages.**—Numerous other usages of various kinds have been considered by the courts and held to be unreasonable, or the reverse. The cases are collected in the notes. It is impossible to classify them logically. They embrace

able that we might well say no one could be bound by it. It would be fixing a condition to a business which would almost preclude its successful management."

In *Randall v. Kehlror*, 60 Me. 37; 11 Am. Rep. 169, it was held that it was proper to show there was a custom among flour merchants of Portland, that if, after sale, flour proves musty and unsound, it is no sale, and the vendee has the right to rescind the sale and return the flour. The custom is not an unreasonable one.

In *Paxton v. Courtenay*, 2 F. & F. 131, which was an action against executors for work done and materials furnished by the plaintiff as an undertaker. Evidence was tendered of a usage in the undertaking business, that undertakers in each funeral charge the entire original cost of certain articles used (gloves, bands, etc.), although they might be used at other funerals. The court held that a custom or usage of trade must, to be binding, be reasonable, and is not so if it is such as honest and right-minded men would deem unfair and unrighteous. The jury brought in a verdict for the defendants.

In *Schnitzer v. Oriental Print Works*, 114 Mass., 123, evidence was held admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represents the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately. The plaintiff contended that there was a custom in Boston that if the average quality of an entire lot of berries sold corresponded with the sample, the purchaser was bound to take them, although some bags were better than, and some inferior to, the sample. The court admitted the evidence, and said: "We cannot see that, as matter of law, a custom in a particular trade, to regard a sample as representing the average quality of an entire cargo or lot of merchandise, may not have a reasonable foundation, and be a good and valid custom entering into the contracts of parties. To a greater or less degree, it is necessarily so in all cases where the sale is of articles in their nature not entirely uniform in quality. A sample

represents the character of a larger mass only approximately."

In *Everingham v. Lord*, 19 Ill. App. 565, a usage was alleged on the Chicago Board of Trade, that corn sold by sample must be inspected by the purchaser within twenty-four hours after the purchase, and rejected if it is faulty; upon a failure so to inspect and reject within said time, the purchaser is held to have accepted the corn, and cannot thereafter complain that the bulk was not equal to the sample. This was held to be a reasonable usage. "In great centres of trade," said the court, "where the volume of business is immense, usages which facilitate the completion of transactions and speed the final settlement of accounts between the parties interested, are natural and indeed necessary, and when proved to exist, the courts apply them to the parties as the law of their dealings."

And in *Sanders v. Jameson*, 2 C. & K. 557; 61 E. C. L. 555, a custom of the Liverpool corn market that when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk and reject it, he cannot afterward reject it, or refuse to pay the whole price, was held to be a reasonable custom. "The custom as stated is, that the vendee must make his objection on the spot, and at the time; and that custom, if it exist, is, I think, a perfectly reasonable one, and one to be much approved of."

But in *Webster v. Granger*, 78 Ill. 230, the court took a different view of the matter. "There can be no custom giving a purchaser, by sample, twenty-four hours, or any other time, to examine the goods. He purchases by sample, and if the goods do not prove equal to the sample, he may return them, or sue for and recover the difference. It would be impossible to do business in any great mart of trade in any other way. Millions are involved in purchases by samples, and they, with tickets, pass as readily as current bank notes. It is absurd to say, such purchasers have twenty-four hours, or any other time, in which to inspect the goods."

In *Lehman v. Marshall*, 47 Ala. 362, a local usage among cotton dealers

questions depending for their solution upon common sense and plain justice as well as more technical matters of law. Questions of public policy, freedom of trade, the natural rights of property owners to the use of their property undisturbed by others, and various other considerations of different kinds enter into the decisions of the courts.<sup>1</sup>

making a warehouse receipt transferable by delivery without indorsement, and such mere transfer to pass the cotton, unless notice is given that a receipt has been lost, or got into the hands of some one not entitled to hold it, is not a good custom. "None but good customs have any validity. A custom that has a tendency to tempt parties to acts of wrongdoing, bad faith, or dishonesty, cannot be a good custom. A bad custom ought to be abolished. It is certainly an act of bad faith and dishonesty for a party intrusted with a warehouseman's receipt for cotton, to be handed to the owner, to transfer by delivery to a third person, without the owner's knowledge or consent."

In *Beals v. Terry*, 2 Sandf. (N. Y.) 127, a usage authorizing, on a contract for goods of a specified character, the delivery of different goods, or on the sale of the goods of one mill the delivery of the goods of another mill, was held unreasonable.

A custom that when a note is given for a gold mine, and the mine proves unproductive or does not turn out according to expectation, the note is given up, was rejected in *Leonard v. Peeples*, 30 Ga. 61. "If there be such a custom," said the court, "it is so unreasonable that it was probably enforced by the bowie-knife."

In *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196, a usage that sales of certain classes of goods are subject to the approval of a public inspector, but if there is no such inspection, the buyer may rescind his purchase at his pleasure, was held unreasonable.

In *Gallup v. Lederer*, 1 Hun (N. Y.) 282, the unreasonable usage was for merchants to sign receipts presented by cartmen with goods, without inquiry by the receiving clerk or porter as to their ownership.

In *Prescott v. Hubbell*, 1 McCord (S. Car.) 94, it was a usage that when the vendor of goods receives a note of the consignee of goods, without the indorsement of the purchaser, the latter

is discharged and the maker alone remains liable. And in *Jacobs v. Shorey*, 48 N. H. 100; 97 Am. Dec. 586, it was a usage among merchants to have their goods sent to their stores by long and circuitous routes when purchased at the stores of near neighbors.

In *Casco Mfg. Co. v. Dixon*, 3 Cush. (Mass.) 407, an action was brought by the buyer of cotton in bales, against the seller, for a false and fraudulent packing thereof; the defendant was allowed to prove usage in the cotton trade, that, in order to entitle the buyer to an indemnity, he should give the seller notice of the fraud, as early as possible after the discovery of the false packing, in order to afford the seller an opportunity to examine the cotton and to ascertain the identity of the bags, and the marks and numbers thereon. It was held that the plaintiff, having used up the cotton, without preserving the marks and numbers of the bags, or affording the defendant an opportunity to examine it, or giving him any notice of the false packing, until six months after the discovery of the fraud, was not entitled to recover. The seller cannot know of the supposed defects until the bags have passed out of his hands, and gone to the manufacturer's to be opened and used. It is a reasonable condition of the seller's responsibility, and of the buyer's right to indemnity, that the latter shall give the former such notice, and furnish him with such proofs and means of recourse.

In *Mure v. Donnell*, 12 La. Ann. 369, it was held that any custom, which would authorize the buyer of cotton, after delivery and payment of the price, to throw back the cotton upon the hands of the vendor, and rescind the sale because cotton of a finer quality than the sample had been mixed in the bale in packing, would be an unreasonable custom, and could not be enforced in a court of justice.

**1. Unreasonable Usages.**—The following are miscellaneous usages and customs held to be unreasonable:

A custom to charge for the insertion

of an advertisement in a newspaper, long after the object of it has, on the face of it, manifestly ceased, merely because its discontinuance has not been ordered. *Thomas v. Graves*, 1 Mill (S. Car.) 308.

A custom for public warehouse-keepers in London to have a general lien on all goods housed in their warehouses, in the name of the merchants by whom such public warehouse-keepers are employed, for all moneys due from such merchants to such warehouse-keepers for expenses about goods consigned from abroad. The custom would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor. Such a custom is at once unreasonable and unjust, and, therefore, bad in law. It is obviously prejudicial, in a direct manner and in a very high degree, to foreign trade; for no foreign merchant would be content to consign his goods to this country for sale, if they could be made liable to satisfy a debt already due from the factor to the warehouse-keeper in respect of other goods. *Leuckhart v. Cooper*, 3 Bing. N. Cas. 99; 32 E. C. L. 55.

A custom on the Connecticut river that, when any person clears a place for seine fishing, he holds it during the season against the world. *Freary v. Cooke*, 14 Mass. 488; *Lufkin v. Haskell*, 3 Pick. (Mass.) 356.

A custom of mine owners to dispose of water pumped therefrom by allowing it to flow into the adjacent natural water-courses, polluting the streams of adjacent proprietors; this would authorize the injury or destruction of the rights of riparian owners. *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302; 39 Am. Rep. 785.

As to certain customs held to be void on account of immorality, see *Seagar v. Sligerland*, 2 Cai. (N. Y.) 219; *Hollis v. Wells*, 3 Clark (Pa.) 169; *Holmes v. Johnson*, 42 Pa. St. 159; *State v. Bukner*, 76 N. Car. 118; *State v. Lewis*, Add. (Pa.) 279; *Bankers v. State*, 4 Ind. 114.

In *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55, it appeared that H., in excavating coal, removed the "ribs," composed of coal, which supported the roof of the mine, causing the surface to sink and crack, so that water from the surface flowed into his mine, and

thence into the mine of W. The court held that H. was liable to W. for any injury done by such flow of water, although resulting from the customary practice of mining in that region, and that a custom that in mining the owner may remove the "ribs" and allow the surface to sink, is not reasonable. "This point was raised in the case of *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385, where it was held, that of common right the mining right was servient to the surface to the extent of sufficient supports to sustain it, and that there could be no custom to the contrary. The reason was that the business of mining in this state was of a date too recent to give such a custom the age necessary for its validity. We are willing, however, to go one step further and say, that the alleged usage lacks reasonableness. It is not reasonable that that which the law grants as of common right should, not merely be modified, but abrogated by custom or usage. . . . In the case of *Hilton v. Lord Granville*, 5 Q. B. 701; 48 E. C. L. 699, the defendant pleaded a prescription to take the coals under any lands in the manor, without liability for damages that might occur in consequence of the taking thereof. It was held that such a prescription or custom was void because unreasonable. . . . Reference was had to the opinion of Willes, C. J., in *Broadbent v. Wilks*, Willes 360, in which it is said that 'the true objection to the custom pleaded was that it was uncertain and unreasonable.'" Later English cases cited to the same effect were *Humphries v. Brogden*, 12 Q. B. 739; 64 E. C. L. 758, and *Blackett v. Bradley*, 1 B. & S. 940; 101 E. C. L. 940. The case was followed in *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93.

In *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, the action was for deceit in using the plaintiff's trade-marks on the defendant's goods; and selling them as and for the plaintiff's. The court excluded evidence of a general custom in the *United States, England, Germany, and France*, for the last twenty years, to use and imitate the marks of foreigners with impunity, and that such custom was generally known in the commercial world and not contrary to the laws of such countries, and held that there was no principle by which a usage in this or a foreign country is competent evidence in defense of a

wrong. "A custom ought to be, at least, moral and reasonable in order to be upheld. Bacon's Abr., 'Custom' C. A party can hardly set up his own bad conduct or character in defense to an action, nor justify them when prosecuted, because they may not have been materially worse than those of some other persons."

In *Gano v. Palo Pinto Co.*, 71 Tex. 99, it was held that it was the duty of the county commissioners' court to select such agents as might be necessary to assist them in the discharge of their duties. Such duty should not be delegated. A custom to do so would be unreasonable and should not be obligatory.

In *Cropper v. Cook*, L. R., 3 C. P. 194, it was held that a usage in the wool trade in Liverpool, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller, may, without communicating the fact to his principal, make himself personally responsible for the price, was a good and reasonable usage. "It may be material to the broker to conceal from the seller the buyer's name, though the same reason may not exist for concealing the name of the seller. The custom may therefore be a reasonable one."

In *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, it was held that a custom allowing a custody commission fee of two and one-half per cent. for taking charge of a vessel on fire in port, and preserving her cargo, an undertaking that requires great skill, is not unreasonable. But a custom allowing commission to the person in charge of the ship on disbursements not actually made by him, is void. It would be absurd to hold that a person is entitled to two and a half per cent. commission on disbursements which he never made, and did not have the money to make, and had made no arrangements to procure the money to make.

In *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 619, a usage was alleged to require a survey, by the portwardens, of goods damaged, as a preliminary proof of the loss in order to charge the insurance company. The court held this to be unreasonable. "The survey, when produced, is not to conclude either party, as to any fact stated in it. It is not to be evidence on the trial, even *prima facie*, for or against either party. The non-produce-

tion of it is to be fatal to the plaintiff's action; but when produced, it is to prove nothing."

In *M'Gregor v. Pennsylvania Ins. Co.*, 1 Wash. (U. S.) 39, the court rejected as unreasonable, a usage of marine insurance to pay only two-thirds of the gross freight on a total loss.

In *Wilkes v. Broadbent*, 1 Wils. 63, it was said that a custom is void which is unreasonable, uncertain, savours too much of arbitrary power, and tends to make a lord of a manor a judge in his own cause. Other cases are *Graham v. Williams*, 16 S. & R. (Pa.) 257; 16 Am. Dec. 569; *Dixon v. Dunham*, 14 Ill. 324; *Jordan v. Meredith*, 3 Yeates (Pa.) 318; 2 Am. Dec. 373; *Pickering v. Dementitt*, 100 Mass. 421; *Foley v. Bell*, 6 La. Ann. 760.

**Reasonable Usages.**—The following are miscellaneous usages and customs held to be reasonable.

The usage was for the consistory of the church to make nominations for elders and deacons, and for the officiating minister to announce the names of the nominees from the pulpit for two successive Sundays previous to Easter Monday, the day of the election; and none could be voted for except those who had been proclaimed from the pulpit as nominees. *Miller v. Eschbach*, 43 Md. 1.

A custom for the owner of a lot of land, after giving notice to the owner of an adjoining lot to build his half of a partition fence, and his refusal to do so, to build the whole, and hold the party refusing liable for his share of the expense. The party refusing should have notice to join in the work; and, if he fails to do so after a reasonable time, he ought to contribute his proportion of the expense. *Knox v. Artman*, 3 Rich. (S. Car.) 283.

Fishermen pursue whales in open boats, and shoot them. When killed, they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. The usage on Cape Cod, for many years, has been that the person who kills a whale, in the manner and under the circumstances described, owns it. *Ghen v. Rich*, 8 Fed. Rep. 159.

In *Swift v. Gifford*, 2 Low. (U. S.) 110, Lowell, J., decided that a custom among whalers in the Arctic seas, that the iron holds the whale, was reasonable and valid.

A usage among printers and book-sellers, that a printer, contracting to

print for a bookseller a certain number of copies, shall not print from the same types while standing, an extra number for his own use, is reasonable and not in restraint of trade. *Williams v. Gilman*, 3 Me. 276.

An ordinance which calls for "a pavement of granite blocks, eight inches deep," may be construed in the light of a custom prevailing at the time of its adoption, and defining the dimensions of the granite blocks used, as not less than seven, nor more than eight inches deep. Such custom is not unreasonable, if it be impracticable to construct the pavement called for by the ordinance with granite blocks all exactly eight inches deep, and the provisions of the ordinance be substantially complied with by a pavement in conformity with such contract. *Cole v. Skrainka*, 37 Mo. App. 427.

In *Adams v. Pittsburgh Ins. Co.*, 95 Pa. St. 348; 40 Am. Rep. 662, the court held that a custom so general and notorious may exist as to authorize the captain of a steamboat to effect an insurance on it for the benefit of the owners, without their express directions, is well settled by authority. It would not be in conflict with any statute, nor would it be unreasonable or contrary to public policy.

In *Ward v. Vosburgh*, 31 Fed. Rep. 12, it was held that the custom of "ringing up," in vogue among brokers and commission merchants, is founded in commercial convenience, and when not adopted to promote a gambling transaction, is not in contravention of the law.

In *Knowles v. Dow*, 22 N. H. 387; 55 Am. Dec. 163, it was held that a custom for the inhabitants of a town to haul seaweed from the margin of the water and deposit it upon the close of the plaintiffs, and afterward haul it away when convenient, was not unreasonable. Here it was said that a valid custom must have existed from time immemorial; but a regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A customary right to do anything upon the land of another is a right adverse to that of the owner of the soil, and must have been acquiesced in by him, and its existence must not have been the subject of contention and dispute. It must be certain and definite, and must also be open and public. To prove a custom for all the inhabi-

tants of Hampton to deposit seaweed upon the close of the plaintiffs, the defendants offered evidence that thirty of the inhabitants had done so for many years. This was held to be competent evidence to be submitted to the jury to prove the custom. A plea alleged a custom in the inhabitants of Hampton to deposit seaweed upon the plaintiffs' close. The evidence was that only those inhabitants of Hampton exercised the right who lived at a convenient distance from the sea-shore. This too was competent evidence of the custom. The custom alleged and substantially proved, was to deposit upon the beach or sand-hills of the plaintiffs the seaweed gathered between high and low water mark. In this there seems to be nothing unreasonable. It is for the benefit of the inhabitants of Hampton. *Tindal*, Lord Ch. J., in *Tyson v. Smith*, 9 Ad & El. 406; 36 E. C. L. 163, said: "The custom is in favor of the many, and the only party against whom it is set up, and by whom it is now opposed, is the lord of the manor."

In *Huston v. McArthur*, 7 Ohio, pt. 2, p. 54, the custom was, in making surveys for government lands granted to a settler, to extend the lines five per cent. beyond the length called for, and it was insisted that this custom had been so long and so uniformly persevered in, as to become, in fact, a part of the law by which titles and claims to land within the district must be regulated. The court said: "Is this pretended custom reasonable? If it be reasonable that a man to whom the government makes a donation of one thousand acres of land, and suffers him to locate it himself, should, instead of the one thousand acres, appropriate to himself twelve or fifteen hundred acres, then this pretended custom is reasonable. But if by such conduct he commits a fraud upon the government and upon other individuals in the same situation as himself, it is unreasonable, and ought not to be sanctioned."

In *Carr v. Callaghan*, 3 Litt. (Ky.) 372; *Watkins v. Eastin*, 1 A. K. Marsh. (Ky.) 402, and *Bodley v. Craig*, 1 T. B. Mon. (Ky.) 77, certain customs respecting settlements and pre-emption warrants were rejected as unreasonable.

In *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457, it was held that a usage or custom for the inspector of flour, who by the statute is to receive a specified money compensation, to take to his



**VII. A USAGE MUST NOT BE CONTRARY TO LAW—1. In General.**—This is perhaps the most difficult branch of our subject. In discussing the meaning of the word “custom,” in a note to a previous paragraph, allusion was made to the matter; it will now be referred to at length.

The expressions of the courts are perhaps unanimous to the effect that the operation of settled rules of law cannot be changed by proof of a usage having a contrary effect. If, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom.<sup>1</sup> The applications of this rule

own use the flour drawn from the barrel in the process of inspection, called the draft flour, as an additional compensation or perquisite, would be bad, as being unreasonable, unjust, and contrary to the policy of the law. The court said: “Such a custom, when invoked for the benefit of a public functionary by transferring to him a portion of the goods of the citizen, with which he is called upon to deal in the discharge of his office, by way of additional compensation or perquisite, over and above what the law expressly provides, would be bad, as being unreasonable, unjust, and contrary to the policy of our laws. It would be unjust and unreasonable that a public officer, having a specified duty to perform in relation to the property of others for a prescribed fee, should by the discharge of that duty acquire a right, not only to the fee allowed, but also to a part of the property itself. It thus makes him the sole judge of the compensation which he shall receive.”

Other cases stating or illustrating the rule that a usage must be reasonable are *Hammerton v. Honey*, 24 W. R. 603; *U. S. v. Buchanan*, 8 How. (U. S.) 83; *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Sweet v. Leach*, 6 Ill. App. 212; *Mulliner v. Bronson*, 14 Ill. App. 355; *Bissel v. Ryan*, 23 Ill. 566; *Gilbert v. McGinnis*, 114 Ill. 28; *Kendall v. Russell*, 5 Dana (Ky.) 501; 30 Am. Dec. 696; *Castleman v. Southern Mut. Ins. Co.*, 14 Bush (Ky.) 197; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200; *Dwight v. Whitney*, 15 Pick. (Mass.) 179; *Page v. Cole*, 120 Mass. 37; *Scott v. Maier*, 56 Mich. 554; 56 Am. Rep. 402; *Barton v. McKelway*, 22 N. J. L. 165; *Somerby v. Tappan*, *Wright* (Ohio) 570; *Lowry v. Read*, 3 Brew. (Pa.) 452; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374;

8 Am. Rep. 264; *Ambler v. Phillips*, 132 Pa. St. 167; *First Nat. Bank v. Fiske*, 133 Pa. St. 241; 19 Am. St. Rep. 635; *Sterling Organ Co. v. House*, 25 W. Va. 64.

1. *Palmer v. New York, etc., Transp. Co.*, 57 N. Y. St. Rep. 307; 27 N. Y. Supp. 561; *Pickering v. Weld* (Mass. 1894), 34 N. E. Rep. 1081.

In *Latimer v. Alexander*, 14 Ga. 259, the court said: “A mere local usage in a small part of the country cannot change the law and give a person a remedy against a person, when the law does not, and generally it will be found that the idea that crops out in some of the cases that a usage or custom that conflicts with the common law, cannot prevail, is after all nothing more than a well-recognized rule that the common law will prevail against a mere usage, unless the usage is of such a character and of such long standing and notoriety as to indicate that the parties must have contracted in reference to it.”

In *Dickinson v. Gay*, 7 Allen (Mass.) 29; 83 Am. Dec. 656, it was said: “But if no peculiar habits, modes, or courses of business were allowed to affect the legal rights of parties, it is difficult to see how there could be any valid usages. In all the cases where usages are sustained, they do in fact operate to give effect to contracts different from that which the common law would have done, and they operate in contravention of the rules of the common law.”

In *Broussard v. Bernard*, 7 La. 211, it was said that the custom which the defendants attempted to prove, was not, as the plaintiff objects, contrary to the general law of the land, but an exception to the ordinary rules which regulate partnerships. If the proof of customs could be rejected, because it established something different from

are illustrated by the cases in the notes to the several succeeding sections.<sup>1</sup>

**2. Reasons for the Rule.**—The reasons given for this rule are that if the common law of the land is to be overruled by local usages of particular trades, embarrassments of serious nature would surely result. The law would become unsettled and conflicting. Upon a given state of facts, there might be one law in one county, and a different law in another county. The establishment of the law would be withdrawn from the courts and the legislature, and placed in the hands of persons not authorized to declare it. It is against public policy that such things should be.<sup>2</sup>

the law, no custom could be proved, for if it were not different, it would make a part of the law.

**1. Distinction Between this Title and Unreasonableness.**—In many cases it is difficult to determine whether an objectionable usage should be classified under the head of unreasonableness, or whether it should be considered as contrary to law. The cases do not discriminate clearly between the two divisions. In one case a usage of agents which violates the rights of principals may be disallowed as unreasonable; and in another case a similar usage may be held to be void, as contrary to the established principles of law. Some usages are so bad that they may properly be rejected upon either or both, of these grounds. The reader will therefore notice that the cases tend to overlap each other; and it will be advisable for one desiring to learn whether the reasonableness of a given usage has ever been passed upon by the courts, to also examine the appropriate sections treating of usages contrary to law, and *vice versa*.

**2. In Gordon v. Little, 8 S. & R. (Pa.) 533; 11 Am. Dec. 632, Gibson, J., said:** "I know not a greater or a more embarrassing evil than a law of merely local obligation. The rule of the carrying business of the Ohio ought to be that of the Juniata, the Susquehanna, the Delaware, and their tributary streams. Suppose a different usage to exist in respect to each, is there to be a different law in respect to each? In fact, that result would be inevitable; for I understand the evidence to have been offered to a custom peculiar to the Ohio, and it will hardly be expected that a usage the same in every particular should prevail with respect to all our rivers. It is impossible to get away from the conclusion that by giving the usage any further effect than

that of a convenient subject of reference to explain a latent ambiguity in the expressions of the parties, where their meaning would be otherwise doubtful, we repeal an established principle of the common law—a matter which, I apprehend, is not open to us."

In *Lawrence v. State, 20 Tex. App. 536*, the court said: "A rule of law can never be subverted by local custom. To sanction the doctrine that it could would be to unsettle the law, would open for discussion and neighborhood proof, not the facts, but the law, and allow such neighborhood the right to claim a distinct law of its own, thereby destroying the beauty of the law which consists in the uniformity of its action throughout the land. *Lockhart v. De-wees, 1 Tex. 535; McKinney v. Fort, 10 Tex. 220; White & Wilson's Ct. App. Civ. Cas., §§ 272, 353, 696.*"

In *Winder v. Blake, 4 Jones (N. Car.) 332*, the court said: "We did not import from the mother country any of the special customs, which, in particular localities, are allowed to supersede the common law. All legislative power is vested in our general assembly. We can recognize no other law-making power, and there is no intimation to be met with in any of our decisions, that special customs can grow up among us, whereby rights may be affected, or the common law be in anywise changed."

In *Barnard v. Kellogg, 10 Wall. (U. S.) 383*, the court said: "Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the

**3. Usages of Carriers.**—Although usages may, in many cases, be received to determine the proper method of conducting the business of carriers, they cannot be admitted to overturn a settled rule of law applicable to such business. Thus, it is well settled that no freight is payable upon goods lost by peril of the sea; and this rule cannot be changed by a usage of carriers to the contrary.<sup>1</sup> Similarly, other usages of carriers limiting their liability contrary to the established rules of law, have been rejected.<sup>2</sup> And, conversely, local usages requiring the carrier to do something more than the law imposes have been disallowed, as contrary to law.<sup>3</sup>

**4. Usages Regarding Commercial Paper.**—The rules of law regarding commercial paper and the rights of bankers and depositors

place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one."

In *Rogers v. Allen*, 47 N. H. 529, it was held that usages or customs are not permitted to have effect to contravene any established general rule of the law, and therefore evidence in proof of any such usage is ordinarily inadmissible. "This rule excludes both general and local usage, when the evidence offered is opposed to, or alters, the well-settled principles, either of the common or statute law."

In *Foley v. Mason*, 6 Md. 37, the court said: "Nor is evidence of usage admissible to oppose or alter a general principle or rule of law, and upon a fixed state of facts, to make the legal rights or liabilities of the parties other than they are by the common law."

1. In *Frith v. Barker*, 2 Johns. (N. Y.) 327, the question was whether a custom was valid that freight must be paid on goods lost by peril of the sea, the custom being contrary to the legal rule that no freight is due in such cases. Chief Justice Kent held the custom invalid, saying: "Though usage is often resorted to for explanation of commercial instruments, it never is, nor ought to be, received to contradict a settled rule of commercial law."

In *Emery v. Dunbar*, 1 Daly (N. Y.) 408, a previous case, the same point had been determined adversely to the custom set up. The court said: "Where a general rule, a principle of law like this, has been long and well established, it cannot be controlled by proof of any usage to the contrary."

2. In *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 184, the court refused to allow a custom to contradict the rule of law that a carrier's bill of lading, like any other receipt, may be contradicted by parol in respect to whether the goods were received or not by the carrier.

In *Cranwell v. Ship Fanny Fosdick*, 15 La. Ann. 436; 77 Am. Dec. 190, the court rejected a custom which, contrary to law, would relieve the carrier of all responsibility toward the shipper in certain cases.

In *Kohn v. Packard*, 3 La. 224; 23 Am. Dec. 453, it was held that notice to the consignee of the time and place when and where goods are to be landed, is indispensably necessary. "The usage, as proved in evidence, is this: that notice in the newspapers of the time and place of landing goods from a vessel, is such notice as places the goods at the risk of the consignee. In other words, that constructive notice binds the party as effectually as personal notice would. If this be the custom, then it is one which this court is prepared to say, it cannot sanction."

3. In *Boon v. Steamboat Belfast*, 40 Ala. 184; 88 Am. Dec. 761, the court said: "The rule which makes the common carrier in the nature of an insurer, and answerable for every loss not attributed to the act of God or public enemies, according to Lord Holt, 'was a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliged them to trust that sort of persons.' The same public policy which established this rule, and which has continued it in existence for ages, forbids its destruction at this day in any locality, by any pretended

cannot be controlled by a contrary usage.<sup>1</sup> Whether or not a particular note or bond, for example, is negotiable or not, is a matter of law, and no usage can alter the legal character which the law fixes upon it.<sup>2</sup> Similarly, questions regarding the legal

custom; especially when the business of common carriers has so much increased, and the necessity for the rule, instead of being diminished, is also increased. The custom then sought to be established in this case, is contrary to law, in contravention of a sound public policy, and cannot receive our sanction."

In *Schieffelin v. Harvey*, Anth. (N. Y.) 76, a usage was offered in evidence to the effect that as soon as a custom-house officer was put on board a vessel, the goods were at the risk of the shipper. It was said that this was the custom of merchants. The evidence was rejected, the court saying: "The established principles of law cannot be controlled by custom."

In *Reed v. Richardson*, 98 Mass. 216; 93 Am. Dec. 155, it was held that a usage of a port that, in order to constitute a delivery of goods by the carrier, it was necessary for a receipt to be given by the consignee or his agent, and that until then the liability of the carrier continues, is illegal and void, for it tends to contravene the fixed rule of law. By the common law, a carrier is discharged of his duty when he has made an actual or constructive delivery at the proper time and place. "Doubtless usage may regulate the manner of delivery or the time when and the place where it may be made. This would be within the legitimate range of the operation of a usage. But it cannot prescribe or determine that acts which the law declares to be a delivery shall not be sufficient to constitute it."

1. In *Thompson v. Riggs*, 5 Wall. (U. S.) 663, a usage of bankers in Washington in respect to drafts by customers for "coin" or "currency" was offered. The usage was rejected as contrary to law, and the court said that the general rule of law is that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control the general rule of law, as it is not pretended that the evidence showed a special deposit. Viewed in any light

consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible, as tending to control the well-settled rules of law.

2. In *Vermilye v. Adams Express Co.*, 21 Wall. (U. S.) 139, a number of *United States* treasury notes, which had been stolen from the express company, were purchased by a firm of bankers after the date at which, on their face, they were payable or convertible into bonds. It appeared that the company, after the loss, had been prompt in giving warning of the theft, by advertising in the newspapers and delivering notices to the principal brokers, including the defendants. The latter introduced evidence to show that notes of the kind in question continued to be bought and sold by bankers and brokers after they had become due; that it was not customary for dealers in government securities to keep records or lists of the numbers or descriptions of the bonds alleged to have been lost, stolen, or altered, or to refer to such lists before purchasing such securities; that it would be impracticable to carry on the business of dealing in government securities if it were necessary to resort to such lists and make such examination previous to purchase; and that the purchase of the notes in question was made in the ordinary and usual mode in which such transactions are conducted. It was held by the Supreme Court of the *United States* that, as to such overdue paper, a purchaser takes subject to the rights of antecedent holders, to the same extent as in the case of other paper bought after maturity, and that the notes could be recovered from the defendants. "Bankers, brokers, and others," said the court, "cannot, as was attempted in this case, establish by proof a usage or custom, in dealing in such paper, which in their own interest contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences, nor establish a different law."

In *Bowen v. Newell*, 8 N. Y. 190, it was held that the usage of banks in *Connecticut* to regard drafts drawn

nature of other written obligations are not subject to the operations of usages contrary to legal rules. Nor can the usages of bankers be valid when in conflict with the rules of law determining the mutual rights and obligations of bankers and depositors.<sup>1</sup>

**5. Usages Between Landlord and Tenant.**—In the relation of landlord and tenant, it is held that when the law determines that certain articles are fixtures, evidence cannot be received to show a usage to regard them as personalty. The legal character of articles as fixtures cannot be evaded by proof of a usage contrary to the law.<sup>2</sup>

**6. Usages Between Principal and Agent.**—In the relation of principal and agent, the law imposes certain duties and obligations upon the agent from the very fact of his employment to act on behalf of his principal. These may be summarized in the general statement that the agent must always act for the benefit of his principal, and never against him. Such being the law, the validity

upon them payable at a day certain as checks and not entitled to days of grace, is inadmissible as evidence to control the rules of law in relation to such paper. See also *Woodruff v. Merchants' Bank*, 25 Wend. (N. Y.) 673; *Morrison v. Bailey*, 5 Ohio St. 13.

In *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249, the court said: "Nor can the special custom of banks in a particular locality change the laws of the land regulating the value of the currency and fixing the standard value of the current coins. That parties may contract to receive any commodity in lieu of money in payment of indebtedness, is undeniably true. This can only be done by special agreement, and not by usage. No custom can compel a creditor, in the absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of the particular place have been in the habit of receiving depreciated paper money in payment of their demands by no means proves that all creditors in that locality have agreed to receive the same, much less a person residing hundreds of miles distant. To have such an effect, a special agreement must be proved."

In *Strong v. King*, 35 Ill. 9; 85 Am. Dec. 336, the court said: "It can hardly be supposed that a usage in New York City, that checks may be received as a means of payment for a bill, and the bill be held over until the next day without protest, for the purpose of ascertaining whether the check will be paid, could alter the general commer-

cial usage of the world, however long or well established. If such a custom does obtain in New York, it cannot affect the law of other places."

1. In *Gunn v. Bolckow*, L. R., 10 Ch. 491, it was held that wharfingers' certificates were not documents of title, and their delivery passes no right to the goods; and no custom of trade can give them the effect of warrants or documents of title as against vendors.

In *Crouch v. Credit Foncier*, L. R., 8 Q. B. 374, the court said that the contract in controversy prevented the debenture from being a promissory note, even if it had been under hand only; and that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law.

In *Hathesing v. Laing*, L. R., 17 Eq. 92, the court rejected a local custom of trade, which was alleged to exist at Bombay, by virtue of which the mate's receipts for goods shipped on board a vessel are negotiable instruments, and pass the property in the goods in the same manner as bills of lading.

**2. Usages as to Fixtures.**—In *Richardson v. Copeland*, 6 Gray (Mass.) 536; 66 Am. Dec. 424, it was held that a steam engine set upon a granite block, and a boiler set in bricks in such a manner that they become a part of the

of any usage in conflict therewith, cannot be recognized, in the absence of clear proof that the principal assented to such usage. In other words, no usage in the relation of principal and agent is valid if it conflicts with the fundamental rules of law defining the rights of such persons.

It is an elementary rule, that an agent cannot act as such when his own interest conflicts with that of his principal. Therefore an agent to buy, cannot sell his own property to his principal. If the agent was to act as vendor, the intrinsic character of his relation to his principal would necessarily be changed. Now the question arises whether an agent employed to buy, may, by the usage of a particular place or trade, be authorized to sell his own goods to his principal; in other words, whether the rule of law above stated may be abrogated by a usage to the contrary. The decisions are clear that, unless the principal is proved to have assented to such a usage, he cannot be bound by it.<sup>1</sup>

Similarly, it is contrary to the principles of the law of agency

realty, could not be regarded in law as personality by reason of a usage and custom between manufacturers and purchasers of such property to regard it as personality. The court said that the evidence of usage was rightly rejected; it could not be received to control the operation of law, arising from the actual annexation of the engine and boiler to the freehold.

In *Christian v. Dripps*, 28 Pa. St. 271, it was held that certain machinery in a mill were fixtures and belonged to the realty, and that their legal character as such could not be evaded by proving that there was a custom in opposition to the rule of law.

In *Thomas v. Davis*, 76 Mo. 72; 43 Am. Rep. 756, a distinction was drawn between custom as to fixtures in cases of landlord and tenant, and grantor and grantee: "As between landlord and tenant, evidence of custom with respect to chattels annexed to the realty, by which they are treated as personality, is admissible; but not so with respect to articles thus annexed by a mortgagor or grantor, before the execution of his conveyance. He has absolute dominion over the property, both real and personal, and his intention in making the annexation is to be determined by a consideration of the character of the annexation, and its appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. A custom which might be clearly established, as between landlord and tenant, could not possibly affect a conveyance by the

owner of the fee who had annexed the chattels to the realty."

1. *Robinson v. Mollett*, L. R., 7 H. L. 802; L. R., 7 C. P. 84; L. R., 5 C. P. 646, is the leading modern English case upon this subject. In the court of common pleas, the four judges were equally divided in opinion; on appeal to the exchequer chamber, the six judges there were also equally divided; finally the House of Lords pronounced a unanimous judgment, which may be given somewhat fully. The decision was that a custom in a particular market that a broker who has purchased, and is purchasing, goods of a particular kind, in his own name, may take portions of those goods and supply them to principals who have employed him in his character of broker to buy such goods for them, is one of a peculiar nature, and cannot be supported as against a principal not proved to have been acquainted with it when he gave his order. And it was questioned whether it applies at all except as between brokers in that particular market. Furthermore, the mere fact of employing a broker to execute a commission as a broker, in a market where such a usage prevails, will not make the principal liable under it. And the rule that a usage which really changes the character of the broker and the nature of the dealing cannot be supported. The facts were that R., a merchant in Liverpool, gave orders to a tallow broker in London to buy certain quantities of tallow for him. The broker did not buy the specified quanti-

for an agent to act for both vendor and vendee in a sale of property. In such a case the agent's interests would be antagonistic to those of his employers. A usage permitting the agent to occupy such a position, which the law has determined he should not occupy, is void, unless the principal assents to the usage.<sup>1</sup>

Nor can the rule that profits made by an agent out of his principal's property, belong to the principal, and not to the agent, be

ties from any person, though he sent bought notes in the usual form, "Bought of A. on your account;" but, both before and after the order, he bought from various persons, in his own name, larger quantities of tallow, proposing to allot to R., the quantities R. had desired to be bought. On R.'s refusal to accept, the broker sold the tallow, and brought an action for the difference. It was held that, though the evidence showed such a mode of dealing to be the usage in the London tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence. The following are extracts from the judgments of the judges in the House of Lords: "In the language of my brother Hannen, in the court below, L. R. 76, p. 98: 'It appears to me to amount to a custom for a broker in the tallow trade in London, to do something entirely inconsistent with the character of a broker, viz., to convert himself, from an agent to buy for his employer, into a principal to sell to him.' It is said by Willes, J., in his judgment in the court of common pleas, L. R., 5 C. P. 655, that, 'It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper; a different rule would give the broker an interest against his duty.' I agree in this, and think that although a custom of trade may control the mode of performance of a contract, it cannot change its intrinsic character. Agents cannot act so as to bind their principals where they have an adverse interest in themselves. I submit that this fundamental and important rule cannot be defeated by a usage, or, as Mr. Justice Willes calls it, a lax practice of brokers, which is plainly of their own creation for their convenience and advantage in the settlement of speculative dealings."

In *Irwin v. Williar*, 110 U. S. 499, the Supreme Court of the *United States*, following the above case, held that a custom among brokers in the settlement of differences which works a substantial and material change in the principal's rights or obligations is not binding upon the principal without his assent; and that assent can be implied only from knowledge of the custom which it is claimed authorizes it.

1. In *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494; 79 Am. Dec. 756, the court declared that a custom that a real-estate broker could act both for the vendor and vendee in the same transaction, without the knowledge of either, was void, as contrary to the principles of the law of agency. "The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell at the highest price; of the agent of the purchaser, to buy it for the lowest. The broker commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound in the exercise of good faith to disclose to them. The usage on which the plaintiff relied was wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfillment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents."

In *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66, the court decided a similar case in the same manner, saying: "It is hardly necessary to add that the usage or custom relied on cannot avail. A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice."

annulled by a usage that such profits belong to him. Such a usage would override the established rule of law.<sup>1</sup>

In numerous other cases, various usages of agents have been held void as contrary to the principles of the common law. Thus where, by the established law, an agent has no authority to do a certain act, usage will not confer such authority as against the principal, unless known and assented to by the principal; and conversely, where, by established law, an agent has authority to do a certain act, such authority cannot be withdrawn by the usage of a particular place.<sup>2</sup>

1. In *Jacques v. Edgell*, 40 Mo. 77, it was held that where an agent acts for an agreed salary or compensation, he will be held bound by the agreement; "and where there is no positive or express contract, a reasonable compensation will be implied; but in neither case will he be allowed to retain profits incidentally obtained in the execution of his duty, even though it may have the sanction of usage. *Lees v. Nuttal*, 1 R. & M. 53; 2 M. & R. 819; *Reed v. Warner*, 5 Paige (N. Y.) 650; *Massey v. Davis*, 2 Ves. Jr. 317, and the learned note by Mr. Sumner."

In *Diplock v. Blackburn*, 3 Camp. 43, the plaintiffs, executors of the captain of a ship, sued the defendant, who was the owner of the ship. It appeared that, when at the Cape of Good Hope, the captain drew a bill upon *England* on account of the ship, and on account of the exchange at the time, he received as premium the sum of £134. The plaintiffs contended that this money belonged to the testator, and offered to call witnesses to prove that it was usual for the captain of a ship, in such cases, to be allowed for his own benefit any advantage arising from the state of the exchange. But the court by Lord Ellenborough ordered a nonsuit, and said: "I am clearly of opinion that this premium belonged to the owner, and not to the captain. If a contrary usage has prevailed, it has been a usage of fraud and plunder. What pretense can there be for the agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty. I believe that in this very way servants of the public abroad have been guilty of enormous peculation. The testator was undoubtedly bound to debit himself for the £134 as much as for any other sum of money he received on the defendant's account."

In *Minnesota Cent. R. Co. v. Morgan*,

52 Barb. (N. Y.) 217, the court held that a custom, according to which, among agents employed in the business of insuring for others, the former are entitled to all dividends declared by mutual companies, in lieu of all other compensation for effecting such insurance, is in contravention of the well-settled principle of law, that an agent cannot appropriate to his own use any portion of the profits arising from the business of the agency, and therefore invalid. "No custom can be established which contravenes a well-settled principle of law. It has been the settled doctrine of the courts, both of law and equity, for centuries, that an agent cannot appropriate to his own use any portion of the profits arising from the business of the agency. The custom proposed to be established overrides this rule of law, and authorizes the agent, not to appropriate to himself a part only, but the whole of the profits arising from the business of his principal. Such a custom needs only to be stated to be repudiated. If tolerated, it would lead to the grossest abuses."

2. In *Allen v. St. Louis Bank*, 120 U. S. 20, it was held that a pledge of cotton by a factor to a bank as security for advances made by the bank to the factor in his individual capacity, if not otherwise binding on the owner and consignor of the cotton, is not made so by a general usage of trade between the banks and cotton factors in St. Louis, where they do business not shown to be known to the consignors or other owners of cotton. "Factors having no power, by the law of *Missouri*, to make a pledge of the goods of their principals by a transfer, without indorsement in writing, of the bills of lading, the fact that the transactions between the factors and the plaintiff were all according to the general usage of trade between banks and cotton factors



at St. Louis, cannot aid the plaintiff; because the usage attempted to be set up was not shown to have been known to the defendants or to other owners of cotton; and because it was contrary to law, in that it undertook to alter the nature of the contract between the factors and their principals, which authorizes them to sell, but not to pledge, and in that it would sustain a pledge by a factor of the goods of several principals to secure the payment of his own general balance of account to a third person."

In *Bliss v. Ropes*, 9 Allen (Mass.) 339, the court rejected a usage that a master of a vessel in a particular foreign port had no authority to bind his owners for necessities furnished to the vessel. "Such a usage would contradict and control a settled rule of maritime law of universal application, and would have been clearly illegal and inoperative to deprive the master of the authority vested in him by law."

In *Higgins v. Moore*, 34 N. Y. 417, it was held that a local usage in a particular trade is inadmissible to control the rules of law in respect thereto. Authority given to a broker to sell property does not include authority to receive payment for the same, especially when the principal is known to the vendee. The duty of a broker, in general, is ended when he has found a purchaser, and has brought the parties together. Hence, a local usage in *New York*, allowing brokers to receive payment for grain sold by them, when the seller resides out of the city, is not admissible in evidence for the purpose of establishing authority in the broker to receive such payment. "The duties and rights of the broker to contract for the sale of the grain were clear and well defined in this case. The law defined them. It was no part of his duty to receive payment when the principal was known, and he never had possession of the grain. No usage is admissible to control the rules of law. In *Wheeler v. Newbould*, 16 N. Y. 392, this court held that proof of usage of brokers in New York City to sell choses in action, pledged to them, in a mode unauthorized by law, was inadmissible. And so it has been held of stock pledged to brokers. In this case, the law defined the rights and duties of this broker and they could not be controlled by usage."

In *Lucke v. Yoakum*, 25 Neb. 427, the court said: "We know of no rule

of law which would authorize a real-estate agent, in violation of the directions of his principals, or in the absence of any directions, to sell property on credit, even though such might be the custom."

In *Ninis v. Nelson*, 43 Fed. Rep. 777, the court charged the jury that a custom that an agency to act for a ship in distress is irrevocable, is invalid. If it would prevent a ship-owner from revoking the agency, it is in violation of the general principles of the law of agency. The power of an agent may be revoked at any time by the principal, without notice.

In *Evans v. Waln*, 71 Pa. St. 69, Waln employed M., a broker in Philadelphia, to sell stock; E., a broker in New York, sold the stock by order of Wister, another Philadelphia broker under M., with assent of Waln, without naming the owner; before the proceeds were remitted by E., Wister failed, in debt to E. It was held that E. could not retain the debt from the proceeds. Evidence that it was the custom of brokers, in their dealings with brokers of other cities, to put all transactions between them into one account and settle for the general balance, was inadmissible. Such a custom, if proved, would have constituted no defense to the plaintiff's action. Admitting its existence, the defendants had no right to credit Wister's account with the proceeds of the stock. He was not the owner of it, and he had no title or claim to its proceeds.

In *Farmers', etc., Bank v. Sprague*, 52 N. Y. 605, it was held that a usage adopted by a certain class of factors, as to the disposition of the funds of their principals, would not relieve such a factor from a duty or a liability which the law would otherwise impose upon him, unless he shows that his principal had knowledge of such usage, or that he assented to that method of doing his business. The usage that those engaged in the same business did not keep the sums collected upon different consignments separate, but that it was all mingled and deposited to the credit of such consignees, and that it was impracticable to transact the great amount of this business in any other way, affords no protection to the defendants.

In *Merchants' Ins. Co. v. Prince*, 50 Minn. 53, it was held that a local custom that insurance agents, after

**7. Usages Between Vendor and Purchaser—*a.* DELIVERY.**—What constitutes a delivery of chattels as between vendor and purchaser is a question of law; and the legal rules cannot be changed by a usage. Hence it is held that when the facts of a particular case establish a delivery under the rules of law, no usage can be received to show that there was no delivery; nor, conversely, can a usage be allowed to establish a delivery where, upon the facts, the law declares that there is no delivery. It is not within the legitimate province of usages to control questions of this kind.<sup>1</sup>

the termination of their agency, may cancel any of the policies issued through them, is unreasonable, subversive of the principles upon which the rules of law governing the relation of principal and agent are based, and is void. "The proposition that any part of the business done by an agent for his principal, and for doing which the principal pays him, belongs to the agent, rather upsets our notions of the rights growing out of the relation of principal and agent."

In *Com. v. Cooper*, 130 Mass. 285, it was similarly held that a usage of brokers that one, on receipt of an order to buy stocks on a margin, assumes the contract himself, instead of making it with a third person, is illegal. "When a man gives an order to a broker to buy stocks on margin, he employs the broker to act for him and in his interest; the broker has no right to put himself in a position antagonistic to the interests of his employer; he cannot make himself both buyer and seller, and any custom to this effect, unknown to the employer, is against public policy and illegal."

In *Day v. Holmes*, 103 Mass. 306, it was held that the order of a customer to a broker to buy stock, deliverable at any time, at the buyer's option, in sixty days, would not authorize the broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission, though a general usage among stock brokers to act in this manner was proved. "There are many forcible objections to its validity, but a conclusive one is that it is against sound policy and good morals. It authorizes the broker, in his discretion, to disregard his instructions, and instead of acting solely in the interest of his principal, to speculate upon the transaction for his own benefit. It creates in the agent an interest adverse to his

principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into a contract of agency." See *Pickering v. Demeritt*, 100 Mass. 416, to the same effect.

In *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125, the court said: "The order is given to a stock broker to purchase certain shares of a particular stock, by parties not shown to have actual knowledge of any peculiar usage or custom of his business; and whilst the law will allow custom and usage to regulate its execution in the reasonable mode we have indicated, it will not permit the defendants, by the force of any such custom or usage, to be bound by a merely fictitious purchase, such, for instance, as one not *bona fide* and actually made, but pretended to be effected by mere entries upon books and accounts between the plaintiff and his New York agents."

In *Wolff v. Campbell*, 110 Mo. 114, it was held that where a broker represents that he has certain stock in his possession, when in fact he has no such stock, and a sale is closed on the faith of this representation, in an action to recover the price paid, evidence of a custom among brokers to sell stock in their own name, and to become personally liable to perform the contract, is inadmissible.

1. See IMPLIED WARRANTY, vol. 10, p. 116.

In *Haskins v. Warren*, 115 Mass. 514, the court considered the rule of law that in a sale of chattels, when the specific articles are set apart, and there is no stipulation for credit, the sale, as between the parties, takes effect at once to pass the title to the purchaser. Here there was a transfer of possession to the purchasers, such as to constitute a delivery. To overcome the effect of such a delivery of possession, the plaintiffs relied mainly upon evidence of an alleged usage of trade, that in

*b. WARRANTY.*—In a leading case the Supreme Court of the *United States* rejected as invalid a usage which would add to a contract of sale, a warranty not implied by the principles of the common law from the facts of the case. The effect of the usage, by adding the warranty to the contract of the parties, would have been to abrogate the common-law doctrine of *caveat emptor*, and thus to change the established law in regard to the sale of chattels. The usage was declared void upon the distinct ground that

cash sales, the goods were delivered or put into the possession of the buyer without prepayment, with the understanding that it was not to pass title or be a waiver of the condition to pay cash. But the court held that usage could not control the interpretation and effect which result from an established rule of law applicable to the facts; nor could it engraft on a contract of sale a stipulation or obligation different from, or inconsistent with the rules of the common law on the subject. It was therefore held that the title passed to the purchasers, in spite of a usage to the contrary.

In *Southwestern Freight, etc., Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255, the sellers of flour gave the purchasers an order upon certain flour mills, to deliver to the purchasers two hundred barrels of flour; this order was not a negotiable instrument, nor was any particular flour designated or set apart so as to vest the title by law in the purchasers; but there was a custom among the merchants that the effect of the order was to vest the title to the flour in the purchasers without delivery, and that from the time the order was handed over to them they became the absolute owners, and that the transference of the same by the purchasers to third parties, divested the seller of all interest in the flour. "But evidence of custom is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law. What constituted a delivery of the flour was a question of law, and the rights and liabilities of the vendor or vendee must be ascertained and fixed by the same standard." See also *Ober v. Carson*, 62 Mo. 209.

In *Strong v. Bliss*, 6 Met. (Mass.) 393, the defendant offered to prove that it was a custom among merchants, going or sending to purchase goods, to pay for the article purchased, without taking a delivery or seeing it, and that

it is considered a purchase, when paid for; but the trial court rejected the testimony. On appeal it was held that the proof of usage was properly rejected "It was not the usage of any particular place, or trade, or class of dealing, or course of dealing; it was of a general usage, to control the rules of law." And see *Suydam v. Clark*, 2 Sandf. (N. Y.) 133; *Furniss v. Hone*, 8 Wend. (N. Y.) 247.

In *Smith v. Lynes*, 3 Sandf. (N. Y.) 203, the court rejected as contrary to law a usage that on a sale of goods for cash they are delivered to the buyer without payment or demand of payment, and after a few days a bill for the goods is sent to the buyer, and in the meantime the seller retains a lien on the goods for the price, and that such a delivery is conditional and invalid.

See also *Morse v. Brackett*, 98 Mass. 205, in which the court held that the sale of the eight bags of wool in controversy was one entire contract, and that the right of rescission for breach of warranty could not be exercised as to a single bag. The defendant's counsel offered to prove a custom in the wool trade by which, in such a sale, the purchaser may return a bale of wool which proves to be of a different kind from the article intended to be purchased, retaining the residue. "To support the admissibility of such evidence of usage he relied upon *Clark v. Baker*, 11 Met. (Mass.) 186; 45 Am. Dec. 199. But, upon the facts disclosed by the evidence, the court is of the opinion that proof of such usage would have been unavailing and was properly rejected."

In *Beckwith v. Farnum*, 5 R. I. 230, the court said, in reference to a usage giving a seller the right to rescind a certain kind of contract: "We cannot receive evidence of the custom and understanding of the merchants in a particular trade, to vary well-established rules of law applicable to their transactions in it."

no usage could prevail when in conflict with a rule of law.<sup>1</sup> Similarly in other cases, it has been held that whenever, upon a given state of facts, the common law does not establish a warranty, no usage can be admitted to raise one in opposition to the legal rule. Such a usage is characterized as the mere adoption of a doctrine as to the legal rights of parties, such doctrine being contrary to the rules of the common law.<sup>2</sup> Conversely, when, by the estab-

1. In *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, Mr. Justice Davis, delivering the opinion of the court, said: "No principle of the common law has been better established than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. The court below having found that, by the custom of dealers in wool in New York and Boston there is a warranty by the seller, implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry arises whether such custom can be admitted to control the general rules of law in relation to the sale of personal property." After reviewing the authorities, the opinion continues: "The parties negotiated on the basis of *caveat emptor* and contracted accordingly. This they had the right to do; and by the terms of the contract, the law placed on the buyer the risk of the purchase and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose a burden on the seller which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties and their rights and liabilities under the law essentially altered. This cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade in the manner proposed by the dealers of wool in Boston, it is easy to see that it can be changed in other particulars, and in this way the whole doctrine frittered away. Usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given

state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom. In this case the common law did not imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one."

2. In *Thompson v. Ashton*, 14 Johns. (N. Y.) 316, the plaintiff purchased certain crates of crockery, according to the printed catalogue of the auctioneers selling the goods. After the sale the plaintiff found that some of the ware was of inferior quality. The plaintiff brought an action for fraud, and offered to prove that it was the custom and usage in the trade that the ware was bought and sold on the invoices without opening the crates, and that the exhibition of the invoices amounted to an understanding on the part of the seller that the ware was good and merchantable. This evidence was rejected, as in conflict with the legal principles governing the sale. "The evidence offered of a usage or custom in relation to the sale of crockery ware was properly rejected. No custom in the sale of any particular description of goods, can be admitted to control the general rules of law. Such a principle would be extremely pernicious in its consequences and render vague and uncertain all the rules of law on the subject of chattels."

In *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321, the court said that, "No custom in the sale of any particular description of goods can be admitted to control the general rules of law." And hence it was held that evidence of a custom that in the sale of blankets in bales, the seller was held to warrant them when the law implied no warranty, should be rejected.

In *Dodd v. Farlow*, 11 Allen (Mass.) 426; 87 Am. Dec. 726, it was held that a usage that in a sale of a certain kind of goods there is an implied warranty that they are merchantable, when the law does not imply such a warranty, was void. The court said: "The deci-

sive objection to its recognition is, that it embraces an element directly contrary to the ancient and well-established rule of the common law, that a vendor cannot be held responsible for the quality of goods sold, if he make no warranty or representation concerning their nature, condition, or merchantable value. In other words, it abrogates, to a certain extent, the maxim, *caveat emptor*, and puts on the vendor the burden of warranty, although he may be ignorant of the quality of the articles, or may have had no means of ascertaining their condition or value, and may have had no intention of selling the article with warranty. Such a usage is very like the one relied upon in the leading case of *Thompson v. Ashton*, 14 Johns. (N. Y.) 316, which was held invalid."

Similarly in *Dickinson v. Gay*, 7 Allen (Mass.) 29; 83 Am. Dec. 29, in which the court said: "In the present case, the usage proved, is the adoption of a mere doctrine as to the rights and obligations of the parties under a contract of sale, which doctrine is contrary to the rule of the common law on the subject. It holds that a warranty is implied, when by law it is not implied. It is, therefore, the converse of the case of *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.) 52, where the law implied a warranty by the manufacturer, and by the usage he was held not to warrant."

In *Wetherill v. Neilson*, 20 Pa. St. 448; 59 Am. Dec. 741, where the offer was to prove a usage to imply a warranty in the sale of soda, the court considered its previous decisions, and said: "As to the offer to prove a special custom in Philadelphia as to the special article of soda, if it means anything at all, it means that, when people in Philadelphia are selling soda, common English words of representation become words of warranty. It must be conceded that such evidence has been admitted, *Snowden v. Warder*, 3 Rawle (Pa.) 101, but never without serious doubts, and we have found ourselves unable to follow the example. See *Coxe v. Heisley*, 19 Pa. St. 243. The courts must be allowed to understand common English without the aid of witnesses. The law is that mere representation does not constitute a warranty. If we admit evidence of this special custom, we allow the law to be changed by the testimony of witnesses, or by the soda dealers of Philadelphia. If parties mean to war-

rant, it is very easy for them to say so. If we imply a warranty from such special customs, it is very easy to see that, theoretically, all contracts are *prima facie* undefined; for we cannot know what special customs will be needed to aid in their interpretation." See also *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196. There are, however, several cases of minor importance to the contrary.

In *Jones v. Bowden*, 4 Taunt. 848, the English court of common pleas held that a warranty may be implied from the custom of a particular trade. In auction sales of certain drugs it was the custom to state in the catalogue whether they were sea-damaged or not; if nothing was said as to the quality they were supposed to be sound. It was held that the freedom from sea-damage was impliedly warranted, although the purchasers, but for the custom, could not claim a warranty. Heatt, J., mentioned a trial before himself in an action on the sale of some sheep sold as stock; by the custom of the trade, stock was understood to be sound sheep, and the judge directed that there was an implied warranty to that effect. The case referred to was *Weall v. King*, 12 East 452. The case of *Jones v. Bowden*, 4 Taunt. 848, was followed in the superior court of Cincinnati in *Fatman v. Thompson*, 2 Disney (Ohio) 482, in which it was held that a usage among tobacco dealers in Cincinnati to warrant certain tobacco sold by them to remain sound and merchantable for four months after the sale, was valid, although no such warranty would be implied by law.

In *Clark v. Baker*, 11 Met. (Mass.) 186; 45 Am. Dec. 199, the *Massachusetts* court admitted evidence of a usage going to establish a rule directly in contravention of the rules of the common law, in relation to rescinding a contract in a case of sale of an unsound article, accompanied by a warranty, or induced by false representation; but this case has not been followed in the later cases, being distinguished in *Morse v. Brackett*, 98 Mass. 205; *Dickinson v. Gay*, 7 Allen (Mass.) 29; 83 Am. Dec. 29, and practically overruled by the cases cited above.

In *Sumner v. Tyson*, 20 N. H. 384, the vendor, who was the manufacturer, sold to the plaintiffs a quantity of iron castings. "To such a transaction the law annexes no implied stipulation on

lished rules of law, a warranty is implied from the contract of the parties, the warranty cannot be avoided by proof of a usage not to consider a warranty as being made.<sup>1</sup> Usage, therefore, can neither change the rules of law by raising a warranty when the law does not imply it, nor by denying a warranty when the law does imply it.

**8. Miscellaneous Cases.**—In numerous other cases the courts have rejected usages the effect of which would be to establish a legal liability, or to afford a legal defense contrary to the established rules of law. The instances are given in the note. In general, it may be said that no usage in direct opposition to the rules of law can be sustained. The cases embrace questions of morals and public policy, as well as technical doctrines of law.<sup>2</sup>

the part of the vendor and manufacturer, that the articles shall be good and merchantable, but devolves upon the purchaser the burden of ascertaining their quality from inspection, or insuring it by an express contract. No express contract of warranty is shown. It was clearly proper for the plaintiff to prove a warranty, by showing that, by the custom of the country, such a contract attached to the sale of articles of this nature. Such a custom cannot be deemed contrary to law, and is the more reasonable as taking the place of the only protection which the purchaser can have against the fraud or unskillfulness of the manufacturers of commodities whose qualities are not open to any inspection." This case is contrary to the well-settled rule of law as to implied warranty by manufacturers, and to the authorities cited as to allowing a custom to impose a liability different from that imposed by the rules of law.

1. In *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.) 52, a usage of founders not to warrant their castings against latent defects, or in case of patent defects, to be entitled to have the castings returned in a reasonable time and to have the option of replacing them with new ones, was rejected.

In *Miller v. Moore*, 83 Ga. 684; 20 Am. St. Rep. 329, the court held that it was not competent to vary the general law of the state, which raised a warranty in favor of the purchaser, by showing a local usage in Augusta operating upon the corn trade, to the effect that the acceptance of corn in bulk, and paying for it after inspection, were considered as waiving or releasing all claim upon the seller to answer for any defects of quality. "Doubtless the custom is binding upon

those who have recognized it in their own transactions, and thus adopted it for their own dealings; but persons who have not done so are entitled to stand upon the general law."

**2. Miscellaneous Instances.**—In *Jones v. Allen*, 5 Ired. (N. Car.) 473, the court held that the hirer of a slave, and not the owner, is liable in an action for medicine and medical services rendered the slave, while the term of hiring continues, the services and medicine not being rendered at the request of the owner, but at the request of the hirer. A particular custom in a county, that the general owner shall pay these expenses, does not vary the law. Without some stipulation on that point, the general rule of law must operate, and cannot be controlled by any understanding to the contrary in particular neighborhoods. A mere local usage, in a small part of the country, cannot change the law, and give the plaintiffs an action against one man, when they were employed by another.

In *Bauer v. Samson Lodge*, 102 Ind. 262, the court held that the right to sue is one given by law, and no custom can be good which is contrary to law. Hence, a custom that a party having a claim for money due upon a contract may not pursue the usual remedies provided by law, is not valid. *Manson v. Grand Lodge*, etc., 30 Minn. 509; *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549; 32 Am. Rep. 78; *Spears v. Ward*, 48 Ind. 541; *Wallace v. Morgan*, 23 Ind. 399.

In *Stoeber v. Whitman*, 6 Binn. (Pa.) 416, it was held that evidence of a custom in a particular place to enter for breach of a condition in a ground-rent deed, in a manner different from that

authorized by the rules of the common law, or the terms of the deed, is inadmissible.

In *Antomarchi v. Russell*, 63 Ala. 356; 35 Am. Rep. 40, it was held that the custom and practice of lot owners in the city of Mobile, as to contribution or compensation between the owners of adjacent lots for the cost of a party-wall between them, cannot be received to affect their legal rights.

In *Harrington v. Edwards*, 17 Wis. 586; 84 Am. Dec. 768, it was held that raftsmen on navigable streams have no right to moor their rafts in such a manner as to deprive wharf owners of access to their wharfs. Hence, evidence of a custom of raftsmen to anchor their rafts regardless of the wishes or convenience of the proprietors of adjoining lands, was not admissible. Raftsmen cannot establish a custom among themselves which will override the common-law rights of riparian owners.

In *Fisher v. Steward*, Smith (N. H.) 60, it was held that one who finds a swarm of bees in a tree on another's land, marks the tree, and notifies the landowner, cannot maintain trover against the landowner for taking the honey. "It has been said, that, by the usage in this part of the state, the person who finds bees acquires a property in them wherever found. We recognize no such usage. We have no local customs or usages which are binding in one part of the state and not in another. If this be the law here, it must be so in every other part of the state."

In *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268, which was an action for labor upon a vessel, built by several owners, against one of them, proof of the usage of the place, "that the owners were not jointly responsible for materials and labor for the vessel, and that no one was authorized to make contracts for materials and labor for the vessel so as to bind the owners generally," is inadmissible. The rights of parties are to be determined by law.

In *Bolton v. Colder*, 1 Watts (Pa.) 360, the court held that a traveler may use the middle or either side of a public road at his pleasure, without being bound to turn aside for another traveling in the same direction, provided there be convenient room to pass on the one hand or on the other. "The defendants gave evidence of its being a custom, for the leading carriage to

incline to the right, and the other making the transit at the same time by the left; whence it was attempted to be shown, that the injury suffered by the plaintiff, had been occasioned by his own neglect of this custom, which was said to have acquired the consistence of a law, but which was very properly exploded by the court."

In *Evans v. Hesler*, 1 Bibb (Ky.) 561, which was an action for wounding and killing the plaintiff's mare, the defendants offered to prove that it was the custom of the neighborhood to set dogs on horses which broke into fences or inclosures. But the court held that the evidence of the neighborhood custom was clearly improper and inadmissible, because whether the act was lawful or otherwise, did not depend upon the custom of the neighborhood, but upon the general laws of the land. The law furnishes the rule by which the propriety of every action is to be tested, and it will allow no other to be resorted to.

In *Lawrence v. State*, 20 Tex. App. 536, it was held that the law would not recognize a local custom authorizing anyone to kill unmarked hogs over a year old found on a range. "To fraudulently take such property when unmarked is as much theft as if it had been marked. This is the rule of law and cannot be controlled by any usage to the contrary."

In *Com. v. Perry*, 139 Mass. 198, on the trial of an indictment for maintaining a common nuisance, by keeping a large number of swine in the neighborhood of certain dwellings and highways, the court held that evidence was inadmissible that it was a custom in this commonwealth to tolerate the location of such establishments in populous localities; referring to *Cutter v. Howe*, 122 Mass. 549.

In *De Saussure v. Zeigler*, 6 S. Car. 12, it was held that the law gives priority of lien to the first judgment entered in the clerk's office, and a usage of the bar that all judgments lodged with the clerk for entry within a certain time after the rising of the court shall be entered as of the same date, cannot override the law of the case.

In *West v. Ball*, 12 Ala. 340, it was held that a usage of the attorneys at any particular place, to collect money of their clients in bank bills of the state bank, though selling at a depreciation, being contrary to law, cannot be supported.

In *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; 43 Am. Rep. 655, the court said: "The action before us is to recover money to which in conscience and good morals the defendant has no title, and it seeks to retain it upon the ground that by the custom of its kind within a certain city, its payor must at its peril ascertain whether a defect in title existed. In *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 619, it was thought to be well settled that a usage could never be set up to contradict a rule of law, or to vary an express agreement. The same rule applies where usage is offered to oppose or alter a general principle or rule of law, and upon a given state of facts, make the legal rights or liabilities of the parties other than they are by the common law. In *Frith v. Barker*, 2 Johns. (N. Y.) 327, Kent, Ch. J., says usage 'never is, nor ought to be, received to contradict a settled rule of commercial law.' In the case before us the common law did not on the admitted facts impose the duty of examination of the check on the paying bank, and we think no custom can be admitted to imply one. Whatever tends to unsettle the law and make it different in different portions of the state, would lead to mischievous consequences, and be against public policy."

In *Hathesing v. Laing*, L. R., 17 Eq. 92, it appeared that it was the general practice in Bombay of such of the European firms there as employ brokers to buy goods in the name of their brokers, but to ship the same in the firm's name, the brokers meanwhile retaining the mate's receipts as their security and by way of lien on the goods so shipped by them. The court rejected the custom and held that it could not override the plain, well-established law, which is that to assert a lien you must be entitled to possession.

In *Paine v. Howells*, 90 N. Y. 660, it was held that under a contract by which a salesman is to receive for his services a share of the net profits of the business, the interest on capital invested by the principal in the business is not an expense to be deducted in ascertaining the net profits. Hence, in an action upon such a contract, it is not competent for the defendant to prove a custom among merchants to charge interest on capital.

If a farm hand be injured in his employment, under circumstances which prevent a recovery in damages, he can-

not recover his wages for the period during which he was incapacitated; nor can such liability on the part of the master be established by evidence of local custom. *Shaw v. Deal*, 7 Pa. Co. Ct. Rep. 379; 25 W. N. C. (Pa.) 39; *Brightly's Digest*, vol. 4 (1889-91), col. 5888.

In *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 180, it was said that in *Chandler v. Grieves*, 2 H. Bl. 606, note, it was certified to the common bench to be the admiralty usage, that if a seaman be disabled in the course of the voyage, he was entitled to wages for the whole voyage, though he had not performed the whole. In *Sims v. Jackson*, 1 Pet. Adm. 157, it was decided, in the circuit court of the *United States for Pennsylvania*, that full wages for the entire voyage were due to the representative of a seaman, hired for the whole voyage, at \$30 per month, and who died when it was only half performed. The decision was grounded on what was understood to be the usage of the English admiralty.

In *Spotswood v. The Dora Matthews*, 31 Fed. Rep. 619, the court referred to the rule of law that a person owning improved wharves, which he maintains at his own cost, may charge and collect from parties using his wharves such reasonable fees as will fairly remunerate him for the use of his property. *Packet Co. v. St. Louis*, 100 U. S. 423. But it was said that there was a usage and custom among the wharf-owners in Mobile not to charge certain vessels any wharfage fee, and that said wharf was used under such usage. "It seems to me that the usage or custom invoked by the respondent in this case contravenes the well-established principles of law to which I have alluded, and, if allowed to prevail, would displace those principles, and allow respondent to make use of the libellant's wharf without incurring liability to pay for it, and would destroy the lien on the vessel given by law as security for the wharfage dues. Evidence of usage or custom in such case will not be admitted."

In *Swift v. Gifford*, 2 Low. (U. S.) 110, Judge Lowell said, in reference to a custom in the whaling trade which was alleged to be contrary to the general law: "The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used, and if a



**VIII. USAGES MUST NOT BE CONTRARY TO STATUTORY LAW—1. In General.**—A usage contrary to the terms of a statute is void. The act of the law-making power cannot be controlled by any usage. Statutes are often enacted for the express purpose of abolishing usages deemed to be unwise; and to uphold a usage contrary to the statute would be to allow the supreme law to be set aside by the custom of a limited number of individuals. But whatever the reason for its enactment, no statutory provision can be in any manner controlled by a contrary usage.<sup>1</sup>

**2. Usages of Carriers.**—The usages of carriers held to be void, or in conflict with the provisions of local statutes, embrace cases in which efforts were made by the carrier to limit, or by the customer to extend, the liability imposed by statute. And when a statute limits the liability, by relieving the carrier from the operation of the ordinary rules of law, usage cannot be received to extend it.<sup>2</sup>

**3. Usages of Officers.**—Usages frequently grow up in the offices of public officials regarding methods of procedure and transaction of business. But neither the usage of a particular office nor the

usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception."

Other cases stating or illustrating the rule that a usage must not be contrary to established law are *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Sullivan v. Jernigan*, 21 Fla. 264; *Gilbert v. McGinnis*, 114 Ill. 28; *Wilson v. Bauman*, 80 Ill. 493; *Van Camp Packing Co. v. Hartman*, 126 Ind. 177; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200; *Appleman v. Fisher*, 34 Md. 553; *Chesapeake Bank v. Swain*, 29 Md. 483; *First Nat. Bank v. Taliaferro*, 72 Md. 170; *Strong v. Bliss*, 6 Met. (Mass.) 393; *Page v. Cole*, 120 Mass. 37; *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196; *Van Hoesen v. Cameron*, 54 Mich. 609; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153; *Rogers v. Allen*, 47 N. H. 529; *Foye v. Leighton*, 22 N. H. 71; 53 Am. Dec. 231; *Swampscot Mach. Co. v. Partridge*, 25 N. H. 369; *George v. Bartlett*, 22 N. H. 496; *Piscataqua Exch. Bank v. Carter*, 20 N. H. 246; 51 Am. Dec. 217; *Barton v. McKelway*, 22 N. J. 165; *Fisher v. Brig Norval*, 8 Martin N. S. (La.) 120; *Cole v. Goodwin*, 10 Wend. (N. Y.) 252; 32 Am. Dec. 470; *Hinton v. Locke*, 5 Hill (N. Y.) 437; *Bowen v. Newell*, 8 N. Y. 190; *People's Bank v. Bogart*, 16 Hun (N. Y.)

270; *Commercial Bank v. Varnum*, 3 Lans. (N. Y.) 90; *Wheeler v. Newbould*, 16 N. Y. 392; *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321; *Higgins v. Moore*, 34 N. Y. 417; *Lawrence v. Maxwell*, 53 N. Y. 19; *Frith v. Barker*, 2 Johns. (N. Y.) 327; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 149; *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 619; *Hinton v. Locke*, 5 Hill (N. Y.) 437; *Bargett v. Oriental Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Brown v. Jackson*, 2 Wash. (U. S.) 24; *Rapp v. Palmer*, 3 Watts (Pa.) 178; *First Nat. Bank v. Fiske*, 133 Pa. St. 241; 19 Am. St. Rep. 635; *Lowry v. Read*, 3 Brews (Pa.) 452; *Coxe v. Heisley*, 19 Pa. St. 243; *Sterling Organ Co. v. House*, 25 W. Va. 64; *Wright v. Boller*, 42 Hun (N. Y.) 77; *U. S. v. Buchanan*, 8 How. (U. S.) 83; *National Bank v. Burkhardt*, 100 U. S. 686; *Magee v. Atkinson*, 2 M. & W. 440; *Trueman v. Loder*, 11 Ad. & El. 589; 39 E. C. L. 178; *Edis v. East India Co.*, 2 Burr. 1216.

1. See subdivisions of this section, *infra*, and cases cited.

2. In *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, the court said: "The effect of the statute prohibiting the delivery by a common carrier of property covered by a bill of lading, except upon surrender and cancellation of the bill, and authorizing the transfer of the property by indorsement of the bill, is to incorporate into every such instrument the statutory condition and make it an

practice of other officers can authorize the performance of acts or justify the non-performance of duties required by statute. In matters of taxation of costs and fees in courts of law or by public officers, no usage in conflict with a statute can be allowed to prevail.<sup>1</sup>

element of the contract. Proof of a custom to deliver property to the consignee without production of the bill of lading was immaterial; the custom could not repeal the statute, or protect from a violation thereof."

In *The La Fayette* Lamb, 20 Fed. Rep. 319, it appeared that there was a rule of the superintending inspectors, having the force of law, that barges should display permanent lights at night. It was proved that it was not the custom on the Mississippi river to have a permanent light upon barges. "But those whose duty it is to provide such lights for the benefit and safety of navigation cannot set up a custom in defiance of the plain requirements of the law, and if they do so they invite the law upon their own heads. It is evident the law in this case is much more reasonable than the proved custom of disregarding it."

In *Walker v. Western Transp. Co.*, 3 Wall. (U. S.) 150, the Act of Congress of March 3d, 1851, was under consideration. That act limited the liability of owners of vessels in certain cases, but permitted parties to make contracts extending the liability. It was alleged that the statutory liability had been extended by custom; but the court held that usage could not take a case out of the statute, and said: "Can usage add to words which do not express it a liability from which the act of Congress declares the ship-owner to be free? It was the common law, or immemorial usage, which made him liable before the statute. The statute then relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract which have no such meaning of themselves."

*Illinois, etc., R. Co. v. People*, 19 Ill. App. 141, was a case under the *Illinois* statute requiring every railroad corporation in the state to furnish and run cars for the transportation of such property as shall within a reasonable time previous thereto be offered for transportation. It was argued that the customary mode of transporting coal being for the carrier to furnish cars on

switches at the request of the shipper, there to remain until the coal is mined and dumped into cars, and the appellant, having been notified that a certain number of cars were required daily, and having failed to furnish them, it became liable for the penalty provided in the statute. "The statute imposing a liability for treble damages is highly penal, and must be strictly construed. The language, 'as shall within a reasonable time previous thereto be offered for transportation,' cannot be extended so as to include coal in the earth, to be dug and raised from the mine after cars are furnished. The custom or usage in the shipment of certain classes of freight may fix the liability of a carrier for a refusal to transport that kind of freight in conformity to the custom, but custom and usage cannot be held to extend the terms of a penal statute."

*Osborne v. C. N. Nelson Lumber Co.*, 33 Minn. 285, was an action under the *Minnesota* statute authorizing the recovery of reasonable compensation for driving the logs of another so intermingled with one's own as not to be conveniently separable. The court held that the existence of a custom to treat as voluntary and gratuitous services authorized by statute, and upon the performance of which, even without the consent of the defendant, a right of compensation is given, cannot affect the statutory right of compensation, and is no defense to an action to recover the same.

In *McCune v. Burlington, etc., R. Co.*, 52 Iowa 600, the railroad company attempted to set up a custom not to be liable for damages for the loss of blooded stock at any higher rate than for common stock. The statutes of *Iowa* provided that no contract or regulation should exempt any railroad from any liability, as a common carrier, which would exist had no contract or regulation been made or adopted. The custom was held void, being in conflict with the statute. See also *Chicago, etc., R. Co. v. People*, 56 Ill. 365; 8 Am. Rep. 690.

1. *Usages of Officers.*—In *Shattuck v. Woods*, 1 Pick. (Mass.) 170, an action of debt was brought to recover certain

**4. Usages Allowing Usury.**—The courts are always alert to set aside evasions of the statutes respecting the rate of interest ; and

penalties incurred by the defendant as a deputy sheriff, for demanding and receiving illegal fees. He offered to prove that it had long been the usual practice in the commonwealth, for officers to charge and receive such compensation. The judge instructed the jury that the defendant had no right to demand or receive anything more as a compensation for his services and travel, than the fees mentioned in the statute. "As to the practice of other officers on like subjects, we cannot think it is legal evidence to protect the defendant against the charge in the declaration. An unlawful act cannot become lawful by usage; and it cannot be known whether the defendant may not himself have contributed to establish the practice under which he would defend himself. *Lincoln v. Shaw*, 17 Mass. 410."

In *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457, an inspector of flour, who, under the *Virginia* statute, was allowed a certain money compensation, endeavored to prove a usage of flour inspectors to take, in addition to their legal fees, the flour drawn from the barrel in the course of inspection, called the draft flour. The court held that the statute meant that the compensation to the officer should be restricted to the fees expressly provided; that such fees should be fixed and certain; and that "perquisites of office" had no place in the legislation of the state. The usage set up was therefore rejected. A statute introducing a new principle, with a negative, either express or necessarily implied, must be strictly proved, and no custom can be set up against it. *Dwar. on Stats.* 475, 477; *Lord Lovelace's Case*, *W. Jones* 270; *Jones v. Smith*, 2 Bulst. 36; *King v. Bishop of London*, *Show.* 420.

In *Cutter v. Howe*, 122 Mass. 541, the court held that certain charges by an officer could not legally be included in the taxable costs of an action; and evidence of a practice long continued, "to tax the same fees for like services," is immaterial. "In the case of *Shattuck v. Woods*, 1 Pick. (Mass.) 177, Chief Justice Parker said that the practice of other officers on like subjects was not legal evidence to support a charge not allowed by law; and that an unlawful act would not become lawful by usage."

In *Pierce v. U. S.*, 1 Ct. of Cl. 290, also called the "*Floyd Acceptances Case*," the facts were that *Floyd*, as secretary of war, accepted bills drawn on him by army contractors. As between the contractors and the government, the acceptances were fraudulent and unlawful. The claimant bought the acceptances before maturity for a valuable consideration. "He has notice that the secretary of war is prohibited 'by express law' from making direct advance payment to the contractors, and that the only authority for giving them these acceptances is 'the custom of the department.' The illegality of the transaction goes to the very foundation of the secretary's authority. He cannot be the agent of the *United States* to do that which the laws of the *United States* expressly forbid. Usage cannot aid the transaction. An illegal practice prevailing among officers of the government, no matter how long continued or extensive, can never ripen into a binding usage."

In *Currie v. Page*, 2 Leigh (Va.) 617, it was held that under the statute the aldermen of the city of *Richmond*, not being justices of the peace of *Henrico*, had no authority to take privy examinations and acknowledgments to conveyances of land of *femes covert* residing in *Richmond*. It was argued, that though the actual legislation may not have given this power to the corporate magistrates of *Richmond*, the general opinion and practice of the town has given it to them, and that this makes the law. But the court held that the statute existing at the time of the deed in question provided that it must be by two justices of the peace of the county in which the *feme* dwelleth. The usage could control this law, if such had been proved; no usage of the city could make an alderman of the corporation a justice of the peace for *Henrico*.

In *Delaplane v. Haxall*, 15 Gratt. (Va.) 459, it was held that the terms of a statute requiring inspectors of flour to use an auger not exceeding half an inch in diameter, could not be controlled, either by the fact that the inspection could not be satisfactorily made with an auger of that size, or by a usage to disregard the statute.

usages to disregard the statutory limit have been unavailing as a means of obtaining usurious rates. The expressions of the courts are very vigorous to the effect that no usage can be allowed to control the provisions of the statute.<sup>1</sup>

**5. Usages as to Weights and Measures.**—Usages respecting weights and measures have been offered to show that contracts were to be construed with reference to the usage rather than with

In *Hicks v. Duncan*, 4 Martin N. S. (La.) 497, the court said, in reference to the local statute, that where the plaintiff in an attachment is cast in the suit, the attorney for the defendant is only entitled to have a fee of \$11 taxed in the costs. A custom to tax other costs relied on cannot prevail against the law, which limits the tax fee to \$11.

In *Scribner v. Hollis*, 48 N. H. 35, it appeared that it had been the usage of highway surveyors to engage labor without express authority, contrary to the terms of the statute. The usage was held void, and the court said: "If such usage has been tolerated, it is enough for us to say that it cannot be now so construed as to repeal or violate the positive rules of statute law."

In *Dwight v. Boston*, 12 Allen (Mass.) 316, a usage of tax assessors to make certain deductions in taxing the stock of corporations was rejected, because the statute provided that the full value should be taxed.

In *Otsego County Bank v. Warren*, 18 Barb. (N. Y.) 290, it was held that a custom among notaries to make a demand of acceptance or payment of a bill of exchange in a manner different from that required by the statute, was invalid; and the same ruling was made in *Commercial Bank v. Varnum*, 3 Lans. (N. Y.) 90.

Other instances are found in *The Forrester*, Newb. Adm. 81, in which the custom of purchasers of vessels to renew their licenses at the close of navigation, instead of at the time required by the statutes of the *United States*, was rejected; and in *Crocker v. Schureman*, 7 Mo. App. 358, in which the custom was contrary to a municipal ordinance.

**1. Usages Allowing Usury.**—In *Dunham v. Gould*, 16 Johns. (N. Y.) 367; 8 Am. Dec. 323, the Chancellor said: "It is perfectly idle to talk of a custom among merchants to take a commission above the legal rate of interest or the exchange of notes. Custom of merchants is not applicable to such a case. It is not a matter of trade or

commerce within the law merchant, and if there were such a local usage in New York, it would be null and void, and could not be set up as a pretext or cover to trample down the law of the land. The money lenders throughout the country might as well set up a practice of their own, and then plead it in bar of the statute."

In *New York Firemen's Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678, it was held that a usage among banks to cast interest at a year for 360 days; one-half of a year, for 180 days; one-quarter 90 days; one-sixth 60 days; and the three days of grace at one-tenth of a month, would not prevent its being usurious, though such usage were universal. The legal year is 365 days; the legal half-year 182 days; and the legal quarter 91 days, the law paying no regard to the odd hours. A statute cannot be abrogated or controlled by the custom or usage of a particular trade. The custom or usage of banks or individuals cannot shorten a year to 360 days. "I cannot, therefore, resist the conclusion, that the note in this case was usurious in consequence of interest having been calculated and taken upon the principle that 90 days were the fourth of a year."

In *Dunham v. Dey*, 13 Johns. (N. Y.) 40, it was held that where A receives B's note, on giving B his note at ten days, for the purpose of raising money on B's note, and pays B two and a half per cent. commission, this is a loan within the statute of usury, and A's note is usurious and void, and evidence that it was the usage of trade to take two and a half per cent. commission on the exchange of paper, is inadmissible; for usage is of no avail, if the transaction comes within the meaning of the statute.

In *Daquin v. Coiron*, 3 La. 387, the court said: "Does it follow, that any man, or set of men, can create a custom for their own benefit, or even for the mutual benefit of borrower or lender, and give to that custom a force, not merely of law, but to control

reference to statutory provisions. Parties, of course, are at liberty to contract with reference to the usage if they desire; but in the absence of proof that the parties did adopt the usage as a part of the contract, to the exclusion of the statute, the law holds that the statute alone entered into their agreement. Hence, when the statute prescribes that a "ton" shall mean a certain number of pounds, the provision cannot be overcome by a usage to consider either a greater or a less number as constituting a ton. But in the absence of a statutory provision, the meaning of words denoting weights, measures, etc., may be determined by local usage known to the parties.<sup>1</sup>

**6. Miscellaneous Usages.**—Various other cases in which usages have been rejected as in conflict with statutory provisions are mentioned in the note. Certain usages have been disallowed as

law? Surely not. Neither combinations nor usages, of the few or of the many, can control the will of the people, constitutionally expressed through their representatives." And in *Harrod v. Lafarge*, 12 Martin (La.) 26, the same court said that any alleged usage of the merchants to pay and demand ten per cent. interest, could not be regarded.

And in *Niagara County Bank v. Baker*, 15 Ohio St. 68, it was said that, "Evidence of a usage with other banks organized under the same law, to discount more than the legal rate of interest upon the acquisition of business paper, is not admissible. The courts of *New York* have settled this question. These cases are also substantially in accordance with the ruling of this court, in *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. Rep. 452."

Other cases to the same effect are *Greene v. Tyler*, 39 Pa. St. 361; *Jones v. McLean*, 18 Ark. 456; *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712; *Cooper v. Sandford*, 4 Yerg. (Tenn.) 452; 26 Am. Dec. 239; *Gore v. Lewis*, 109 N. Car. 539; *Floyer v. Edwards*, Cowp. 112.

But in *Crump v. Trylitle*, 5 Leigh (Va.) 251, a bank discounted a note payable on its face sixty days after date; it was understood that this accommodation would be continued indefinitely, till discontinued. The bank, in discounting the first note, deducted the interest for sixty-four days, *i. e.*, for the time the note had to run including the days of grace, and in discounting the second note, made on the last day of grace of the first, deducted the interest for sixty-four days, counting from the day of the date of the

second note and the last day of grace of the first note, to the last day of grace of the second note, both inclusive; and so on, upon each renewed note, successively, to the end of the transaction; so that the bank, in fact, received double interest for every sixty-fourth day; and this was in conformity with the known usage of the bank, and of all the banks in *Virginia*. It was held that this transaction was in no wise usurious. *Brockenbrough, J.*, dissented, and said: "What is to protect the bank in this case, from the operation of the statute against usury? Its own usage, and that of the other banks of *Virginia*. I do not think that the usage ought to control a statute. 'It would be strange, indeed,' says Chief Justice Savage, 'if any set of men, or companies of men, should become paramount to the authority of the legislature.' *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712. To which I will add that the banks ought not to be allowed to make the law; they should obey it."

**1. Usages as to Weights and Measures.**—*Noble v. Durell*, 3 T. R. 271, is the leading English case upon this subject. The Statute 13 & 14 Car. II., ch. 26, directed that every pound of butter should contain sixteen ounces. The question, as stated by Lord Kenyon, was, whether a custom in Southampton that a pound should contain eighteen ounces, could be supported in law; "to say that it can, would be to violate all the rules of language, as long as the acts of Parliament are to regulate this subject. This has engaged the attention of the legislature for five centuries, and they have thought it of the utmost importance that there should be one stand-

ard of weights and measures throughout the kingdom. . . . If this custom can be established, it may also be extended to hops in Kent, or to any other community in any other part of the kingdom, and thus the greatest confusion will be introduced on a subject that ought to be particularly plain.

. . . It might as well be contended that a custom could prevail in a particular place, that a less number of days than seven should constitute a week; or that a less space of ground than an acre should be called an acre."

In *Godcharles v. Wigeman*, 113 Pa. St. 431, it was held that the statute of *Pennsylvania* enacting that "Twenty hundreds make one ton," cannot be controlled by a custom in a particular business making twenty-two hundred and forty pounds a ton. The offer, with its variations, was to prove a custom making the ton 2,240 pounds. But the court below held that the custom, if proved, was not good, because opposed to the statute which fixes the legal ton at 2,000 pounds, and that the former could not be imposed upon the plaintiff except by proof of a special contract, or, of such knowledge by him of the rules of the establishment as would raise the presumption that he was working under them; hence the proposed evidence was rejected. On appeal, the court said: "It requires no argument to establish the correctness of this ruling, hence we attempt none."

In *Evans v. Myers*, 25 Pa. St. 114, where a contract was made for a given number of tons of iron, the court held that it must be taken to have been made in reference to the statute above mentioned, and it was error to admit evidence of a local custom to control the statute. "If every section of the country may have its own weights and measures, to be established by its own customs, strangers would be entrapped into liabilities which they never intended to incur, and no one could know with precision the extent of his obligations. The act of Assembly entered into the contract and formed an essential part of it. A custom may be abolished by an act of Assembly, and it was the purpose of the act to produce that result in this case. The sound policy which dictated it cannot be doubted. It is a statute which ought to be enforced, and the local customs up the Allegheny river are certainly insufficient to repeal it. It was an er-

ror to admit the evidence of custom to control the statute, and to permit the jury on such evidence to find the contract to be different from its legal import." A similar ruling was made in *Weaver v. Fegeley*, 29 Pa. St. 27; 70 Am. Dec. 151.

In *Green v. Moffett*, 22 Mo. 529, the court said: "In 1841 the legislature declared, by express statute, that 'Hereafter, when sales of hemp shall be made, the delivery of one hundred pounds avoirdupois weight, shall be considered as the delivery of one hundred weight, any custom or usage to the contrary notwithstanding.' In 1845, the legislature again say: 'The hundredweight shall consist of one hundred pounds avoirdupois, and twenty such hundreds shall constitute a "ton." Here is the statute law of the land since 1841, and shall it be proved away by custom? The lawmakers struck at this custom, this usage, and by law abolished it. Now, when parties make contracts about hemp, they can easily agree to pay or to take so much money for so many pounds of hemp; but if the bargain be only by the 'ton,' then the law says what the 'ton' is, and no proof will be admitted about custom or usage or understanding."

*Paul v. Lewis*, 4 Watts (Pa.) 402, was a somewhat analogous case, in which witnesses were called to establish a usage by which a sale by the acre, without restrictive words, passes an allowance of six per cent. of course. "What foundation is there for such a rule, either in general usage or anything else? In the progress of the cause I have heard the statute acre of *Pennsylvania* mentioned as something peculiar, though we have no statute on the subject but the 33 Ed. 1, Stat. 6, and it certainly says nothing about an allowance. . . . Here the attempt was to show that by the word 'acre,' the parties did not mean an acre, but something more."

In a *New Hampshire* case, a custom of measuring lumber by what was known as the Blodgett measure, was rejected, because it adopted a mode of measurement different from that prescribed by the statute. *Rogers v. Allen*, 47 N. H. 529.

In *Hockin v. Cooke*, 4 T. R. 314, "bushels" was construed to mean only statute bushels.

In *St. Cross v. Howard De Walden*, 6 T. R. 338, "quarters of corn" were held to mean the statutory quarters. But if

contrary to the constitutional provisions of a state or of the *United States*;<sup>1</sup> and others as in conflict with city charters or ordinances.<sup>2</sup>

any particular weight or measure, etc., is not covered by the statute, the custom will not of course be held void as contrary to the statute. Instances are *Hughes v. Humphreys*, 3 El. & Bl. 954; 77 E. C. L. 954; *Giles v. Jones*, 11 Exch. 393.

1. *Miscellaneous Usages.*—In *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302; 39 Am. Rep. 785, a coal company pumped from its mines water which polluted a stream of the plaintiff. The company alleged a custom to do this, and that mining would be impossible in any other manner. The court held that a custom authorizing the destruction of the rights of the riparian owners would be void. It would violate the constitutional provision that corporations taking private property for their use, shall make compensation therefor. "Not only thus would we have a custom superior to the express law of the land, but one reaching even beyond the possible sovereignty of the state, in that it would empower private persons for private purposes to injure or destroy private property, and that without compensation."

In *Woodruff v. North Bloomfield Gravel, etc., Co.*, 18 Fed. Rep. 753, a custom or usage was attempted to be established, whereby mining debris might be sent down to the valleys, devastating the lands of private owners, without first acquiring the right to do so, by purchase or other lawful means, upon compensation paid; this was held to be in direct violation, both of the laws and constitution of the state and of the Constitution of the *United States*, and therefore void. In *Jupiter Min. Co. v. Bodie Consolidated Min. Co.*, 11 Fed. Rep. 666, a similar principle was declared.

In *Hawkins v. State*, 17 Tex. App. 593; 50 Am. Rep. 129, in which the appellant was on trial for assault, evidence was offered of a usage of the appellant and his associates, when controversies arose between them, to curse, abuse, and denounce each other in violent language, and to flourish knives and pistols as a mere matter of jest. The evidence was rejected, the court saying: "We are aware of no principle of law which would tolerate a usage, custom, or prescription that would confer upon a citizen the right to act the rowdy to

the disturbance of the peace, and carry a six-shooter in violation of the general statutes."

The legal-tender statutes cannot be controlled by the usages of banking houses. *Marine Bank v. Birney*, 28 Ill. 90; *Marine Bank v. Rushmore*, 78 Ill. 463; *Marine Bank v. Ogden*, 29 Ill. 249.

2. In *Butler v. Charleston*, 7 Gray (Mass.) 12, it was held that a city, whose charter and ordinances provide that no contract shall be binding on the city, unless made by some authorized agent, and within some appropriation, is not liable for legal services, beneficial to the city, performed by counsel retained by a majority of the members of the board of aldermen, without any official action of the city council; although the usage of the city has been to pay such bills approved by a committee. "In cities where the corporation acts only through officers whose powers are limited and defined by law, the court would be slow to sanction any usage enlarging those powers. The usage here attempted to be established is in violation of the general law, and the charter and ordinances of the city."

In *McCrary v. McFarland*, 93 Ind. 466, it was held that the power of trustees of a church to contract is given by statute, and the custom of a particular church cannot abridge this power. Hence, in a suit against the church as a corporation upon a contract made by the trustees, evidence that by the custom of the church the trustees could not make the contract is immaterial.

In *Ocean Beach Assoc. v. Brinley*, 34 N. J. Eq. 438, it was contended that, by a long established and universally recognized custom, the widow of a proprietor is not entitled to dower in lands held by him in severalty under the council of proprietors. The court said: "It is not debatable that the custom avouched by the complainants stands in direct conflict with our statute. That enacts that a widow shall be endowed of the third part of all lands whereof her husband, or any other to his use, was seised of an estate of inheritance, at any time during coverture, to which she has not released her right." The custom was therefore rejected.

In *Perkins v. Franklin Bank*, 21

The substance of the decisions may well be expressed in a quotation from a *Louisiana* case: "Where the law is express, no man or set of men can create a custom for their own benefit or convenience, and give to that custom a force paramount to that of the law."<sup>1</sup>

**7. Usages Contrary to the Policy of Statutory Law.**—Furthermore, it is held that a usage contrary to the general policy of the

Pick. (Mass.) 483, a usage was alleged not to allow days of grace on promissory notes, although the statute provided that grace should be allowed. The usage was rejected and the court said: "If this custom existed before the statute was passed, the statute did away with the effect of it. If it has grown up since, it was bad in the first instance and cannot be made good by time."

In *Lehman v. Marshall*, 47 Ala. 362, a usage to transfer warehouse receipts by delivery was rejected, because the statute required them to be indorsed.

In *Mansfield v. Stoneham*, 15 Gray (Mass.) 149, a custom to sell spirituous liquors on credit, in the face of a statute requiring them to be sold for cash only, was held void.

In *Bankus v. State*, 4 Ind. 114, it was held that the criminal statutes in reference to riotous conduct could not be evaded by the fact that the accused were only following the custom of the country.

In *Phillips v. Innes*, 4 Cl. & F. 234, a usage of barbers to work on Sunday was rejected, as in conflict with a statute prohibiting such work.

1. *Ledoux v. Armor*, 4 Rob. (La.) 381, in which case it appeared that there existed a commercial usage in New Orleans, which authorized the purchaser of a large quantity of rope to return the whole parcel to the seller and receive back his money, if he discovered that a part of it was defective. But the civil code established a different rule in such cases, and the usage was therefore held to be void. "In the absence of any expression of legislative will on the subject, such a usage would have been entitled to some weight. But where the law is express, no man or set of men can create a custom for their own benefit or convenience, and give to that custom a force paramount to that of the law. And see *Glasgow v. Stevenson*, 6 Mart. N. S. (La.) 567." *Smyth v. Walton* (Tex. Civ. App. 1894), 24 S. W. Rep. 1084.

In *Patapsco Guano Co. v. Magee*,

86 N. Car. 350, it was decided that an agricultural lien could only be acquired by virtue of the statute, and in strict compliance with its requirements. The agreement must be executed before the advancements are made or supplies furnished. In such case, evidence as to the custom of the plaintiff to have agreements signed after the delivery of supplies to customers, was rejected.

In *Trull v. Wheeler*, 19 Pick. (Mass.) 240, it was held that a usage to allow prisoners to go beyond certain limits prescribed by statute was bad. The evidence was inadmissible to control the operation of the statute.

In *Blizzard v. Walker*, 32 Ind. 437; the statute provided that partition fences should be such as good husbandmen usually keep. It was attempted to prove that, although the inclosure was not such as "good husbandmen generally keep," yet it was such as was kept in that locality. "Our statute, unfortunately," says the court, "is general, and not, perhaps, adapted to this custom."

In *Grisling v. Wood*, Cro. Eliz. 85, the quaint record of the case is as follows: "Error, for that in an action in an inferior court, the declaration was in English, whereas by the 36 Edw. 3, ch. 15, all entries are to be in Latin; and although it was said the custom there was so used, yet this cannot be good against a statute, and the judgment was reversed."

Other cases stating or illustrating the rule that a usage must not be contrary to a statute are *Blackett v. Royal Exch. Assur. Co.*, 2 C. & J. 244; *The Reeside*, 2 Sumn. (U. S.) 567; *Mosier v. Harmon*, 20 Ohio St. 220; *Brown v. Farran*, 3 Ohio 155; *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Hall v. Reed*, 2 Barb. Ch. (N. Y.) 500; *Many v. Beekman Ins. Co.*, 9 Paige (N. Y.) 188; *Love v. Hinkley*, Abb. Adm. 436; *The Lucy Anne*, 13 Law Rep. N. S. 545; *Winter v. U. S.*, Hempst. (U. S.) 344.



statutory law, as distinguished from its express terms, cannot be sustained.<sup>1</sup>

**8. Usages in the Construction of Statutes.**—When a statutory provision is ambiguous, evidence of usage may be admissible to interpret the real meaning of the provision.<sup>2</sup> This is especially the case with ancient statutes.<sup>3</sup> Where the statute is modern, the court will consider how far it was intended to modify a usage

**1. Usages Contrary to Policy of Statutes.**—In *Daun v. London Brewery Co.*, L. R., 8 Eq. 155, it was said: "This is a custom which tends to alter the character of the interests in land belonging, respectively, to the plaintiffs and defendants, there being express legislation that every interest in land shall be created by writing. No doubt this court has in several cases found means to avoid or evade that rule of the legislature. I apprehend, however, that that is not a thing to be extended. It appears to me to be the duty of every court, whether a court of equity or a court of law, to give effect to the plain meaning of the legislature, whatever may be the views entertained of its policy or applicability in particular cases. I, therefore, should be very slow to extend anything by which interests in land can be created, affected, or altered by parol, or by any supposed convention existing by the understanding of the parties."

In *Tremble v. Crowell*, 17 Mich. 493, it was held that a local custom which is opposed to the general policy of the state on the subject to which it refers, is not valid in law. A custom that if fish caught within the state and sold in barrels to a dealer without express warranty, prove to be unsound, the seller shall refund the price, tends to defeat the purpose of the inspection laws of the state, and is therefore opposed to the general state policy on that subject, and cannot be supported. The effect of the usage must be to cause dealers to dispense with inspection, and pave the way for those consequences which the law was designed to avert; and, at the same time to defeat the desirable objects which the legislature intended to promote. Without attempting to contrast the usage with specific provisions, there can be no doubt but that it would introduce a practice altogether at variance with the spirit and plain policy of the inspection laws.

**2. But a usage from which it may be inferred that Congress intended to use**

particular words in a particular sense in a tariff act, must be definite, uniform, and general; and such designation is to be determined as of the date of the act. *Berbecker v. Robertson*, 152 U. S. 373; *Maddock v. Mayone*, 152 U. S. 368.

**3. Ancient Statutes.**—In *Sage v. Wilcox*, 6 Conn. 81, it was held that if the language in ancient charters has become obscure from antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument, may be resorted to, for the purpose of explanation; and in the case of an act of Parliament, universal usage is a proper expositor, where the language is, in any respect, ambiguous. *Rex v. Varlo*, Cowp. 248; *Sheppard v. Gosnold*, Vaugh. 169; *Rex v. Scott*, 3 T. R. 604.

In *Dublin's Case*, 38 N. H. 512, it was held that when a question arises as to the contemporaneous meaning of the terms used in an ancient instrument, early and long-continued usage has a controlling weight.

In *Cole v. Skrainka*, 37 Mo. App. 427, one of the judges writes: "The instances where unbroken usage has been allowed to establish the interpretation of a statute have been where the practical interpretation has stood for five hundred years, *Mansell v. Reg.*, 8 El. & Bl. 54; 92 E. C. L. 52; two hundred years, *Gorham v. Exeter*, 15 Q. B. 69; 69 E. C. L. 68; one hundred years, *Packard v. Richardson*, 17 Mass. 131, 143; 9 Am. Dec. 123; fifty years, *Lord Fermoy's Case*, 5 H. L. C. 729, 785; forty years, *Reg. v. Cutbush*, L. R., 2 Q. B. 379; or even thirty years, *Pease v. Peck*, 18 How. (U. S.) 595; *U. S. v. The Recorder*, 1 Blatchf. (U. S.) 223; *Clark v. Dotter*, 54 Pa. St. 215. A recent author of a work of great learning and excellence, to whom I am indebted for these citations, adds: 'It may, in general, be said, that the force of contemporaneous exposition, or the exposition involved in professional usage, is most properly confined to old statutes; whereas a re-

existing at the time of its passage. But when a statute is free from ambiguity, neither contemporaneous construction nor established usage can be received in its interpretation.<sup>1</sup>

**IX. USAGES TO EXPLAIN CONTRACTS**—1. **The Key to the Contract—The Reason Why.**—Usage is said to be “the key to the contract,” without reference to which the intent of the parties could not be ascertained. It is for the purpose of ascertaining this intent of the parties that usage is received to explain contracts. If the parties make a complete contract which is not susceptible of explanation, there is no need of usage; and hence follows the rule that usage is inadmissible to vary the terms of a contract. But whenever a contract is brought into court in which there is any ambiguity, or in which the rights of the parties are not fully expressed, usage is admissible to explain its intent. The experience of the courts proves that men of affairs are not in general careful, in making contracts, to express themselves with that completeness which a lawyer would probably desire. Merchants, whose daily transactions are of almost the same character from one year to another, get into the habit of doing certain things in certain ways;

cent statute, when brought into controversy, is to be construed according to its terms, not according to the views taken of it by the parties in interest.’ Endlich on Statutes, § 359, *citing* Clyde Nav. Trustees v. Laird, L. R., 8 App. Cas. 673.”

In *Bailey v. Rolfe*, 16 N. H. 247, it was said that, “It is only where the words of the statute are doubtful, that usage may be called in to explain them, and not when the act cannot admit of different interpretation. Buller, J., in *Rex v. Hogg*, 1 T. R. 726. And in this case, the usage of the selectmen in their perambulations has been one way, and that of the assessors has been another. Neither can have any force against the true meaning of the act, if it contain words sufficient to satisfy the court as to what that meaning is.”

1. In *Robertson v. Downing*, 127 U. S. 607, it was said that the regulation of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons. *U. S. v. Hill*, 120 U. S. 182; *U. S. v. Philbrick*, 120 U. S. 59; *Brown v. U. S.*, 113 U. S. 571.

In *Swift, etc., Co. v. U. S.*, 105 U. S. 691, it appears that the Act of July 14th,

1870, ch. 255, allowed the proprietor of friction matches, who furnished his own dies, a commission of ten per cent. upon the amount of stamps purchased. The provisions of the statute being clear to that effect, he was entitled to recover pursuant thereto, although a different contemporaneous construction of them was given by the bureau, it not appearing that he acquiesced therein. The rule which gives determining weight to contemporaneous construction put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt. *Edwards v. Darby*, 12 Wheat. (U. S.) 206; *Smythe v. Fiske*, 23 Wall. (U. S.) 374; *U. S. v. Moore*, 95 U. S. 760; *U. S. v. Pugh*, 99 U. S. 265.

In *Frazier v. Warfield*, 13 Md. 279, it appeared that an immemorial usage had existed in Baltimore, by which the weight of a lot of wheat, as between buyer and seller, had always been ascertained by weighing one bushel in sixty. The legislature passed an act to regulate the sale of grain and provided that inspectors should weigh all wheat offered for sale. The question was whether the statute abrogated the usage. The court said: “If the meaning of the words of the act be uncertain, the law authorizes us to resort to the usage for their interpretation. Doubtful words, in a general statute, may be expounded with reference to a general usage, and when a statute is

and as everyone in the particular business is familiar with the method, or usages, which thus become established, contracts are made in silent reliance upon them. To those engaged in the trade, it seems unnecessary to state at length what every one acts upon as a matter of course. Their contracts are thus made as brief as possible, and naturally do not mention the usages which every one takes as understood. But when such contracts are brought into court for construction they are examined more carefully. The effort of one of the parties will be to construe the contract with reference to the usage; the other litigant will deny that the usage is admissible. The duty of the court is to interpret the contract so as to enforce it, in accordance with the intention of the parties at the time it was made. The question then arises whether the usage offered to explain the contract does, in fact, explain it, or whether its effect would be to vary the plain meaning of the terms employed.<sup>1</sup>

applicable to a particular place only, such words may be construed by usage at that place. *Love v. Hinckley*, Abb. Adm. 436. This rule is founded in reason and common sense, and is peculiarly applicable to the case before us. The legislature must be presumed to have acted with a knowledge of the usage existing in Baltimore, and if it had been their purpose to inaugurate a new mode of weighing, they would have declared their intention in plain and unequivocal terms."

In *Devlin v. Creditors*, 2 La. 361, the court said: "Something was said of the custom of merchants. That custom is entitled to attention, when it is not opposed to positive law. But the opinions of that portion of the community can neither inform the court, nor in any respect influence its judgment, in construing a recent statute."

1. *German Savings Bank v. Renshaw* (Md. 1894), 28 Atl. Rep. 281.

In *Stewart v. Scudder*, 2 Am. L. Reg. 80, usage is said to be the key to the contract, without reference to which the intent of the parties could not be ascertained.

In *Williams v. Woods*, 16 Md. 220, it is said that in a mercantile transaction, where the terms of a written instrument are technical or equivocal on its face, or are made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade, is admissible to explain their meaning.

In *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, it was held that usage may always be referred to for

the purpose of showing the intention of the parties in all those particulars concerning which they have not expressed themselves with clearness and certainty in the contract; or where words have been used which have acquired a broader or different signification than that commonly attributed to them, the fact may be proved. *Lyon v. Lenon*, 106 Ind. 567; *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211; *Reissner v. Oxley*, 80 Ind. 580.

In *Nordaa v. Hubbard*, 48 Fed. Rep. 921, it was said that while evidence of usage is inadmissible to contradict, it is admissible to explain, a contract, where otherwise the intention of the parties cannot be ascertained.

In *Starkie on Ev.* (10th ed.) 710, it is said: "The principle upon which such evidence is admissible, seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom and usage to similar dealings. It is evident that in commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known ordinary practice and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage to be derived from the known course of dealing, or be placed under the necessity of laboriously specifying

**2. Classifications of the Cases.**—Usages to explain contracts may be said to be of two kinds:

**a. USAGES TO EXPLAIN AMBIGUITIES OR TECHNICALITIES IN CONTRACTS.**—In the first class are usages which explain ambiguous or technical words or phrases in contracts. Thus, if a stock-broker's contract states that certain stock is to be sold "short,"

in their contracts by what particular usages they meant to be bound."

"Experience and observation," says Storrs, J., in *Kilgore v. Bulkley*, 14 Conn. 390, "prove that the engagements of individuals are in fact entered into with reference to the customs and usages which prevail in the community where they are made; they, therefore, tacitly agree to conform to them, and so far from doing injustice, by regarding such customs and usages, it is the only mode by which justice can be attained. The presumption is, indeed, that those who enter into contracts intend to be governed by the general principles of law. It is, however, competent for them to renounce these principles when public policy does not forbid, and to adopt another rule of action; and the prevalence of a particular local usage on the subject, variant from those general rules, in the absence of evidence to resist it, affords a rational ground of inference that they intended to do so."

In *Humfrey v. Dale*, 7 El. & Bl. 266; 90 E. C. L. 265, Lord Campbell, C. J., said: "The minds of lawyers are under a different influence from that which, in spite of them, will always influence the practice of traders; which practice creates the usages of trade. The former desire certainty, and would have a written contract express all its terms, and desire that no parol evidence beyond it should be receivable; but merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of judges, they will continue to do so; and in a vast majority of cases, of which courts of law hear nothing, they do so without loss or inconvenience, and, upon the whole, they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of

mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them."

Mr. Schouler, in his work on Bailments, § 448, says: "Custom antedates judicial sanction in most instances; and not to recognize its just force as shaping the social and business intercourse of mankind would be to set the courts, whose machinery was contrived for bending individuals to the public will, into hopeless encounter with the public will itself and the irresistible forces of human society."

Other cases expressing similar views are *Chapman v. Devereux*, 32 Vt. 616; *Ellis v. Ohio L. Ins., etc., Co.*, 4 Ohio St. 662; *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264.

In *Brown v. Byrne*, 3 El. & Bl. 703; 77 E. C. L. 702, Coleridge, J., said: "In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract in truth is partly expressed and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less; neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are, in their ordinary meaning, unambiguous, for the

it would be necessary upon a trial to explain the meaning of the technical term "short;" or if a contract uses an ambiguous word, it would be necessary to explain the ambiguity. In these cases evidence of usage is admitted under the general rules of evidence respecting ambiguities.<sup>1</sup>

**b. USAGES TO EXPLAIN OMISSIONS IN CONTRACTS.**—The second class comprises cases in which usages are admitted to determine the rights and obligations of parties in respect to matters about which the contract is silent. Thus, if a contract omits to specify whether certain goods contracted for are to be delivered in bulk or in sacks, evidence of usage is received to determine the proper method.<sup>2</sup>

The consideration of the first class of cases in which the meaning of words or phrases are explained, consists largely of a list of instances in which explanations have been made. The second class is more interesting and important.<sup>3</sup>

**3. Usages to Explain Ambiguities or Technicalities.**—*a. THE GENERAL PRINCIPLES.*—The cases in the notes define the principles upon which proof of usage is admitted to explain the meaning of technical or ambiguous words and phrases. In general it may be said that usage is admitted in such cases as a matter of necessity, in order to inform the court of the meaning of the parties. So, also, when words or expressions are used by parties in a special or limited sense, usage is admitted to explain their exact meaning. Words and phrases frequently acquire a peculiar or secondary signification in particular trades; and parties engaged in such trades are presumed to use them in their acquired sense.<sup>4</sup>

principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language."

1. See 1 Greenl. Ev. (14th ed.), §§ 292-295. And see *infra*, this title, *Usages to Explain Ambiguities or Technicalities*.

2. See 1 Greenl. Ev. (14th ed.), §§ 292-295.

3. See *infra*, this title, *Usages Annexing Incidents to Contracts*.

4. In *Long v. Armsby Co.*, 43 Mo. App. 253, the court said: "Numberless terms are used in the various branches of commerce and trade, which have a distinct and well-defined and known

meaning, but which to the uninitiated and general public are not more intelligible than if Sanskrit. The admissibility of evidence of this kind is necessary to enable the court to understand the contract made, and that the elements of a general and uniform usage need not be proved in such a case, and that the evidence is competent, whether the definition be sanctioned by usage, local or general, limited or universal. If it is shown that a special sense is attached by known usage of trade to words of a contract, it is presumed that the words bear their special meaning. The meaning of terms at the place where the parties use them, or to which they look as the seat of the contract may also control their interpretation. In the hurry of trade and the multitude of contracts, brevity and condensations are absolutely essential. The decisions of the courts in the various jurisdictions seem to be quite uniform and to result in this: that when words have acquired an exact and technical meaning in any

b. PARTICULAR INSTANCES.—The decided cases in which usage has been admitted to explain the meaning of words are very

trade or business, and are used in a contract relating to such trade or business, *prima facie*, they are to be construed in the meaning or sense which they have acquired in that business." In this case the words used were "strictly choice" evaporated apples. Evidence was admitted to show the meaning of those words as acquired by trade usage.

In *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349, the court said: "Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time would permit, of reducing their agreements to writing beyond a mere memorandum, the courts are compelled to look to the usages of trade or business to learn the real intention of the parties. If proof of such usages was not allowed, it is believed that in a large number, if not the greater portion of commercial transactions, the intention of the parties would be defeated instead of being enforced, when differences should occur between them. The number, magnitude and complexity of the transactions carried on by dealers on the Board of Trade, have necessitated the adoption of various customs, rules and usages for the regulation and government of the business of the board. Indeed, few of these transactions can be adequately understood from the words, either oral or written, actually employed by the contracting parties, without reference to the usages and rules of the trade. The language of the parties, standing alone, is often meaningless and incapable of interpretation, but when viewed in the light of these customs, rules and usages, it becomes plain, sensible, and easily understood. In point of fact, the main body of these contracts is made up from the rules and usages of the board. Evidence, then, of these rules and usages must ordinarily, at least, form an indispensable element in the interpretation of these transactions."

In *Myers v. Sarl*, 30 L. J. Q. B. 9; 7 Jur. N. S. 97, Blackburn, J., said: "The words of a written contract are to be understood in that sense which the phrase has acquired in the trade with regard to which it is used. It is the *prima facie* presumption that it was

the intention of the parties to use it in that sense; and, having expressed themselves in a written contract making use of the phrase, it is *prima facie*, as a matter of construction of the contract, to be taken that they used the phrase in the particular limited sense which it has acquired in the trade. That peculiar and limited sense, if such a one had been acquired, must be shown by parol evidence; and this having been shown, then the presumption is that that was the sense in which the parties making the contract used it. In order to introduce this extrinsic evidence, it is not necessary that the phrase should be at all, on the face of it, ambiguous."

In *Eaton v. Smith*, 20 Pick. (Mass.) 150, it was said that when a new word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any branch of business, or to any particular class of people, evidence of usage is admissible to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court then is, to instruct the jury what will be the legal effect of the contract, as they shall find the meaning of the word modified or explained by the usage.

In *Smith v. Clews*, 114 N. Y. 190; 11 Am. St. Rep. 627, it was held that, "Evidence of usage is always admissible to explain the meaning of terms used in any particular trade, when their meaning is material to construe the contract; this rule extends to forms of expression as well as to single words. Evidence of usage is also admissible to apply a written contract to the subject-matter of the action; to explain expressions used in a particular sense by particular persons as to particular subjects, and to give effect to language in a contract as it was understood by those who made it."

In *Dwyer v. Brenham*, 70 Tex. 30, it was said: "When there is nothing in a contract to negative the inference that the parties contracted with reference to the usage or custom which prevails in the particular trade or business to which the contract relates, then the usage may be shown in evidence for the purpose of ascertaining with greater certainty what was intended by the words or terms used in the contract;

numerous and are incapable of satisfactory classification. In the note a few interesting examples are given at some length, and in

and this, though a meaning may be thereby given to words contradicting that which would attach to them generally. This rule, even when there is no ambiguity in the contract, is especially applicable in a case where the literal and usual construction of the words used would render the contract so unconscionable that no sane man would have entered into it."

In 2 Parsons on Contracts (7th ed.), p. 541, it is said: "The degree in which these characteristics must belong to the custom, will depend in each case upon its peculiar circumstances. Suppose a contract to be entered into for the making of an article which has not been made until within a dozen years, and only by a dozen persons. Words are used in this contract, and their meaning is uncertain; but it is proved that these words have been used and understood, in reference to this article, always, by all who have ever made it, in one way, and that both parties to the contract knew this; then this custom will be permitted to explain and interpret the words of the parties. But if the article had been made a hundred years, in many countries, and by multitudes of persons, the same evidence of this use of words, by a dozen persons, for a dozen years, might not be sufficient to give to this practice all the force of custom."

In *Lowe v. Lehman*, 15 Ohio St. 179, it was said: "It is as true now as it was in the time of Horace, that custom is at once the arbiter and standard of languages; *usus, quem pene et jus et norma loquendi*. It belongs to the imperfection of language, that while much the larger part of its words become, by usage, fixed and universal in their meaning, yet some of them must always be left subject to the changes and variations necessarily occasioned by local usages, and the custom of trades."

In *Carver on Carriage of Goods by Sea*, § 169, it is said: "A word or phrase used may have a peculiar, or a specially limited sense in the trade, although it may be an ordinary, well-known expression, and free from any apparent ambiguity. If so, evidence of its meaning may be given. The object is to get at the real effect to the parties of the terms used; and if they

have acquired secondary meanings in connection with particular kinds of transactions, it is as important to have them translated, as if the contract were in a foreign language." And in § 170 it is said: "Where a word is understood in a special sense in the trade in which the parties are engaged, the presumption is that they have used it in that way. 'Where it is shown that the term or phrase has acquired a peculiar meaning in the trade, it is *prima facie* to be taken as used with that meaning, unless upon construing the whole contract you can see that, either in express terms or by necessary implication, the parties intended to use it in a different sense.' *Per Blackburn, J., Myers v. Sarl*, 30 L. J. Q. B. 16; *Holt v. Collyer*, 16 Ch. Div. 718."

In *Long v. Davidson*, 101 N. Car. 170, the court said: "If the terms are only used in a particular trade or science or calling, the meaning must be gathered from the testimony of persons acquainted with the trade or science or calling in which the terms are employed, and it is for the jury to ascertain the meaning of the terms used; but when the terms of the contract are ascertained, the construction of the contract is a matter for the court." *Silverthorn v. Fowle*, 4 Jones (N. Car.) 362.

In *Susquehanna Fertilizer Co. v. White*, 66 Md. 444; 59 Am. Rep. 186, it was said that proof of usage for the purpose of explaining the meaning of terms used in the formation of a contract, should be admitted with extreme caution, and never until the party offering it has distinctly stated to the court what he intends to prove. "If a word has acquired a peculiar meaning in a certain trade or business, either local or general, that meaning will be applied to it in the construction of written instruments affecting the transactions growing out of that trade or business; but the fact that the word has acquired such meaning must be distinctly proved by the adduction of satisfactory evidence. *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; 20 Am. Dec. 424; *Taylor v. Briggs*, 2 C. & P. 525; 12 E. C. L. 245; *Murray v. Hatch*, 6 Mass. 477; *Coit v. Commercial Ins. Co.*, 7 Johns. (N. Y.) 385; 5 Am. Dec. 282."

the succeeding section an alphabetical list of the various words and phrases that have been passed upon by the courts.<sup>1</sup>

1. In *Smith v. Wilson*, 3 B. & Ad. 728, a leading case, the facts were that in a lease of a rabbit-warren, the lessee covenanted that at the expiration of the term he would leave on the warren ten thousand rabbits, the lessor paying for them £60 per thousand. In an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, it was held, that parol evidence was admissible to show that by the custom of the country where the lease was made, the word "thousand," as applied to rabbits, denoted twelve hundred. It was agreed that to say that a thousand means twelve hundred was not to explain, but to contradict, the lease. The judgments in the king's bench were as follows:

Lord Tenterden, C. J.: I am of opinion that the evidence was properly received. Where there is used in any written instrument a word denoting quantity, to which an act of Parliament has given a definite meaning, I agree it must be considered to have been used in that sense. But there is no act of Parliament which says one thousand rabbits shall denote ten hundred, each hundred consisting of five score; and that being so, we must suppose the term "thousand" to have been used by the parties in the sense in which it is usually understood in the place where the contract was made, when applied to the subject of rabbits, and parol evidence was admissible to show what that sense was.

Littledale, J.: I am of the same opinion. Words denoting quantity are undoubtedly to be understood in their ordinary sense, where no specific meaning is given to them by statute or custom. But here the ordinary meaning of the word "thousand," as applied to rabbits in the place where the contract was made, was one hundred dozen. The word "hundred" does not necessarily denote that number of units, for one hundred and twelve pounds is called a "hundred weight," so, where that term is used with reference to ling or cod, it denotes six score; and there being, therefore, no precise meaning affixed by the legislature to the word "thousand," as applied to rabbits, I think that parol evidence was admissible to show that in the country where the contract was made the word "thousand" meant one hundred dozen.

Parke, J.: The only question is whether the evidence has been properly received. Assuming that it has, the jury have found that, according to the custom of the country, there was an understanding between the parties to this contract that the defendant should pay for the rabbits, computing them at the rate of one hundred dozen to the thousand. Although the principle has been more frequently applied to mercantile instruments than to others, it is not confined to them; and if the word "thousand," as applied to the particular subject-matter of rabbits, had, in the place where this contract was made, a peculiar sense, I think that parol evidence was admissible to show it. In an action upon a contract for the sale of one thousand deals, it would, I think, be competent to show that the word "thousand" meant more than it would in its ordinary sense. I agree that where a word is defined by act of Parliament to mean a precise quantity, the parties using that word in a contract must be presumed to use it in the sense given to it by the legislature, unless it appear from other parts of the contract that they use it differently. But that is not the present case. No specific meaning has been given by the legislature to the word "thousand," as applied to rabbits, and therefore it must be understood according to the custom of the country, and evidence is admissible to show what that was.

In *Soutier v. Kellerman*, 18 Mo. 509, the plaintiff, alleging that he bought of the defendant 4,000 shingles, and that he received eight bundles, which contained only 2,500, and that he had paid for 4,000, brought suit to recover the value of the 1,500 not delivered. The defense was that by the custom of the lumber trade two packs of a certain size are regarded as 1,000 shingles, and are always bought and sold as such without any count of the number, and that the eight bundles delivered to the plaintiff were, according to the custom, properly reckoned as 4,000 shingles. The court declared that, "If the contract was at so much per thousand, and not so much per bundle, and no express agreement was entered into that two bundles should represent a thousand, then the defendant must deliver the four thousand, or else account



to the plaintiff for their value." On appeal to the supreme court, this ruling was declared to be erroneous and the judgment reversed. "In the present case, there was evidence that a general custom prevailed in the lumber trade of estimating two packs of shingles of certain dimensions as a thousand shingles, without reference to the number of pieces in the pack. If such was the usage of the trade, so general and well established that those buying and selling might be presumed to deal in reference to it, there does not appear to have been any such contract shown in this case as would prevent the usage from applying. The law commissioner seems to have thought that the defendant could notes-cape from liability, if the contract was at so much per thousand, unless there was an express agreement that two bundles should represent a thousand. This was an incorrect statement of the law in a case where evidence was given of a general usage that a thousand shingles meant two packs of certain dimensions."

In *Merrick v. McNally*, 26 Mich. 374, where a contract called for "sixty thousand cubic feet square white oak lumber," a custom in the market to reject fractions of a foot in its measurement was allowed.

In *Bragg v. Bletz*, 7 D. C. 105, the defendant ordered from the plaintiff, Bragg, of *Maine*, the shingles in controversy. It appeared that the quantity of shingles constituting a thousand was regulated by a uniform and well-settled custom of trade in *Maine*, and that that custom established a package twenty inches in width and twenty-three and twenty-four courses in thickness as the equivalent of a quarter of a thousand. The court said that, "The dealings between the parties settled the question whether the custom of reckoning a thousand shingles by measurement, instead of by actual count, was binding upon the defendant. It appeared that cedar and spruce shingles were thus reckoned by mercantile usage everywhere, and that the defendant contracted with a distinct knowledge of its existence."

In *Heald v. Cooper*, 8 Me. 32, where mill logs were sold for a price per thousand, according to the quantity of lumber they should afterward be estimated to make, and there was a table or scale of estimation then in such general use that the parties were found by

the jury to have referred to it as the rule for computing the quantity, it was held that they were bound by this scale, though proved to be in some respects erroneous. "This usage explains the intent of the parties, and not being in opposition to established principles of law, or in contradiction to the express terms of the written instrument, is deemed to form a part of the contract, as much as though actually incorporated into it, or expressly referred to."

In *Smith v. Clayton*, 29 N. J. L. 357, it was said that it is the duty of the court to interpret written instruments, the meaning of words and their grammatical construction, according to the general rules and usages of the language, as matters of law; but if a local or provincial usage, or a usage as applied to a particular branch of business, is meant to be established, as in regard to the meaning of the word "grain," evidence of common usage is competent.

In *Featherston v. Rounsaville*, 73 Ga. 617, it was said that where, in the particular trade of selling and buying bacon and pork sides, the words "fully cured" were used as descriptive of the classification of articles sold, in a contest in regard thereto, such words are to have the meaning attached to them by experts—that is, persons in the trade.

In *Parks v. O'Connor*, 70 Tex. 377, it was said that in a contract for the delivery of cattle, when the word "yearlings" is used, it is competent to prove the local custom among stock men as to the age of cattle coming within the meaning of the word.

In *Whitney v. Boardman*, 118 Mass. 242, it was held that if goods are sold with "all faults," parol evidence is admissible to show that these words have a well established meaning in the trade in such goods, and what that meaning is. "The expression was one of such a character, that, if in common use and having a well-established meaning in the trade in such articles, such meaning might properly be shown. It is not necessary that terms should be technical, scientific, or ambiguous in themselves, in order to entitle a party to show by parol evidence the meaning attached to them by the parties to the contract. *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.) 359; 77 Am. Dec. 414; *Miller v. Stevens*, 100 Mass. 518; 97 Am. Dec. 123; 1 Am. Rep. 139; *Swett v. Shumway*, 102 Mass. 365."

In *Williams v. Stevens Point Lum-*

c. EXPLANATION OF PARTICULAR WORDS AND PHRASES.—The reports contain many instances of the application of usage to particular words and phrases used in contracts, mercantile or other.<sup>1</sup>

ber Co., 72 Wis. 487, it was queried whether the purchaser of specific piles of lumber, who had received the identical property purchased, could show by parol that, by local usage, the word "lumber" in the bill of sale meant pine lumber only.

In *Cook Mfg. Co. v. Randall*, 62 Iowa 244, the contract and order for the buggies specified "top buggies with poles." A witness engaged in the trade was permitted to testify against the plaintiff's objection that these words in the order would be understood to mean a common grade of buggies. The evidence was held competent. The language had a meaning understood by the trade, and that meaning must be adopted in enforcing the contract.

In *Bullock v. Finley*, 28 Fed. Rep. 514, which was an action for "three car-loads of brewers' rice," it did not appear that the contracting parties agreed as to the quantity to make a car-load. It was held that the custom of the trade would fix the quantity. "Where it does not appear that the parties to a contract agreed upon the meaning of a particular word in it, the custom of the trade will determine it."

In *Lane v. Union Nat. Bank*, 3 Ind. App. 299, it was held in an action on a note executed by the defendants, and payable at the "First Nat., La Fayette, Ind.," and assigned to the plaintiff before maturity, it was admissible to show by extrinsic evidence that the words "First Nat., La Fayette, Ind.," had a definite and settled meaning in the neighborhood where the notes were payable, and meant the First National Bank of La Fayette, Ind., and the proof of such usage or custom, whereby the words were so used, need not to be co-extensive with the state.

In *Scott v. Hartley*, 126 Ind. 239, it was held that where words or phrases peculiar to a trade or business are found in a written contract, they are open to explanation by parol evidence, and the same may be said of abbreviations.

In *Bonham v. Charlotte, etc., R. Co.*, 13 S. Car. 267, it was said that it was clear that the terms "heavy articles" and "articles of measurement" could not be defined, in their applica-

tion to goods of different kinds, by mere legal authority; but assuming them to be intelligible to those concerned in the business of transportation by rail or by more general means, their sense must be made apparent by testimony of such a custom or habit of business as tends to define their import.

In *Dodge v. Hedden*, 42 Fed. Rep. 446, it was held that the trade usage which is to determine the meaning of a word or words in the tariff must be a well-known and general one.

In *McCulskey v. Klosterman*, 20 Oregon 108, it appeared that in a contract to ascertain the net profits of a firm, it was provided, among other things, that "from the outstanding accounts 5 per cent. be deducted to cover losses and bad accounts;" usage was admitted to show in such case that "outstanding accounts" meant those from which the bad accounts had been segregated and charged to profit and loss.

In *Bissel v. Baird*, 28 L. T. N. S. 740, the judge received evidence that in the iron trade a usage or custom prevails whereby the entire months of July and August would be included in the terms "during the next two months." It was held that the evidence was properly admissible.

In *Myers v. Walker*, 24 Ill. 133, the meaning of the word season was explained by reference to a local usage, regarding the time in which grain could be shipped. "The court could see that the term as employed was, without proof of a local usage, without meaning, and that it must have been employed with a local signification."

1. See generally the various definitions, words, and phrases throughout the *ENCYCLOPEDIA OF LAW* generally and throughout this article. In *Lawson on Usages and Customs* and in *Clarke's Brown on Usages and Customs* many of these words and phrases are collated. See also the following cases: *Broadwell v. Broadwell*, 6 Ill. 599; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Williams v. Woods*, 16 Md. 220; *Moran v. Prather*, 23 Wall. (U. S.) 492; *Seymour v. Osborne*, 11 Wall. (U. S.) 516; *Hartwell v. Camman*, 10 N. J. Eq. 128; *Smith v. Clayton*, 29 N. J. L. 357; *Barlow v.*

4. **Usages of Banks.**—In the note are several instances of usages admitted to explain transactions of banks with their customers.<sup>1</sup>

5. **Usages of Carriers.**—In contracts between carriers and their customers, usages have frequently been received to interpret the terms of bills of lading, and to explain the intent of the parties as to matters not specifically embraced in them. Thus, questions as to the manner of transportation, the right of steamboat carriers to alter the course without causing a deviation, methods of delivery, and various other matters, have been determined by means of usage as explanatory of the contract between the parties.<sup>2</sup>

Lambert, 28 Ala. 704; 65 Am. Dec. 374; Grant v. Maddox, 15 M. & W. 737; Hill v. Evans, 31 L. J. Ch. 457.

1. **Instances of Usage in Bank Transactions.**—In Keavy v. Thuett, 47 Minn. 266, the defendants, dealers in live stock, wired the plaintiffs, who were in the banking business: "Will honor W. Jones' \$500 draft carload steers, bill lading attached." Three days later Jones presented to the plaintiffs a draft, with bill of lading attached, and received the amount of money specified. In an action on the said draft, it was held that as against the plaintiffs, who were not dealers in, or shippers, or carriers of live stock, the defendants could not show what would be understood among such persons by the use of the term "carload," as found in the telegram, and that the animals shipped to the defendants did not in weight constitute a "carload," according to such custom.

In First Nat. Bank v. Fiske, 133 Pa. St. 241; 19 Am. St. Rep. 635, the defendants, commission merchants dealing in wool, wrote the plaintiff bank as follows: "We expect to have some business with Reid, when the wool season opens, in which case we will honor his drafts with bill of lading attached." The plaintiff bank, discounting drafts upon the defendants by Reid, with knowledge of a usage of trade in the sale of wool on commission limiting the amount of drafts to a certain rate upon the value of the shipment, was affected by that knowledge in such transactions. And, such usage not being unreasonable or in conflict with positive law, the plaintiff bank, discounting drafts in excess of the amount authorized thereby, had no right of action against the defendants upon their refusal to honor them. "The usage does not contradict the terms of the instrument on which the plaintiff relies, but it explains them, and gives effect to the intention of the parties.

The letter of the defendants must be read in the light of the usage known to the parties, and applicable to the transaction between them. When so read, it is fatal to the plaintiff's claim for the overdraft."

In Chesapeake Bank v. Swain, 29 Md. 483, it appeared that A sent to the Chesapeake Bank \$3,000, in gold coin of the *United States*, which, in accordance with a previous agreement, was received as a special deposit, and entered on the bank book of A, as follows: "1861, Dec. 30th, Cash (coin) \$3,000." In an action by the depositor, A, against the bank, the court held that the plaintiff could properly introduce evidence to show that, according to the general and well-known usage of the banks in the city of Baltimore, existing before and at the time of the deposit, and ever since, the entry in his bank book imported an agreement on the part of the defendant to return the deposit in kind—such evidence being offered for the purpose of explaining a latent or patent ambiguity in the entry itself; and that, according to this usage, the striking of balances subsequent to such entry, did not work any change in the character of the particular deposit, the balance to the credit of the plaintiff having always exceeded the amount of the deposit. "It is because of the absence of expressed stipulations in the contract under consideration, that proof of existing usage, in reference to which the contract is supposed to have been made, is admissible, in order to ascertain the real meaning of the parties." Compare Thompson v. Riggs, 5 Wall. (U. S.) 663.

2. **Usages of Carriers.**—In East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596; 51 Am. Rep. 489, it was held that when a special contract is entered into between a railroad com-

**6. Usages Between Employer and Employee.**—In contracts between employer and employee, usages have been received to explain the meaning of the agreement in various particulars.<sup>1</sup> The instances

pany and the owner of cattle, for the transportation of the cattle, and it is silent as to the kind of car to be furnished, and as to any special preparation of the car, evidence of a usage, by which the owner is to bed the car, known to him, and upon which he had acted in making previous shipments, is admissible for the purpose of interpreting and explaining the intention of the parties in making the special contract.

In *Pittsburgh, etc., R. Co. v. Nash*, 43 Ind. 423, it was held that where it had been the custom of the railroad company to deliver cars loaded with lumber for the plaintiff, at or near the plaintiff's place of business, it is to be presumed that the contract of shipment was made with reference to such custom or usage, and that the railroad company was bound to deliver the cars at the usual place.

In *Fisher v. Geddes*, 15 La. Ann. 14, it was held that where it is the custom of common carriers to allow the baggage of passengers to be taken in charge by servants in their employ, to be delivered by them at a certain place and in a certain manner, they will be liable for the loss of the baggage arising from the neglect of their employees to make the delivery according to custom.

In *Andrews v. Roach*, 3 Ala. 590; 37 Am. Dec. 718, it was held that although a bill of lading of cotton, to be carried by river, states the price at which it is to be transported, the carrier is not precluded from showing the existence of a custom on the river to charge lighterage in addition to the freight, whenever the tide is so low throughout the season as to prevent cotton boats from passing shoals.

In *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81; 9 Am. Rep. 437, it was held that where a bill of lading recited that certain cotton was shipped on a specified steamboat, it was ruled admissible to show that, by the custom of the river, when the river was low, barges were carried in tow, and freight stored, at the option of the carrier, on either the boat or the barge.

In *McClure v. Cox*, 32 Ala. 617, it was held that where a railroad company received goods addressed to a point beyond its terminus, and gave a bill of lading for the transportation of the

goods to its terminus, it was held that parol evidence was admissible to prove that there was a custom in such cases to deliver to a connecting carrier, such evidence not tending to vary or contradict the bill of lading.

In several cases usage has been received to explain the meaning of the word "days" in bills of lading, as referring to working days. *Cochran v. Retberg*, 3 Esp. 121; *Higgins v. U. S. Mail Steamship Co.*, 3 Blatchf. (U. S.) 282; *Balfour v. Wilkins*, 9 Cent. L. J. 56; *Commercial Steamship Co. v. Boulton, L. R.*, 10 Q. B. 346. For other cases, see *Peek v. North Staffordshire, etc., R. Co.*, 10 H. L. Cas. 473; *Bissel v. Campbell*, 54 N. Y. 353; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 184.

In *Walsh v. Homer*, 10 Mo. 6; 45 Am. Dec. 342, it was held that evidence that it was the usage of the carrying trade for one boat on a voyage to stop and aid another boat in distress, is competent to show that such is not a deviation so as to make the owners liable for a loss.

In *Lowry v. Russell*, 8 Pick. (Mass.) 360, it was held that by a bill of lading expressing that goods are to be carried from one port to another, a direct voyage is *prima facie* intended; but this presumption may be controlled by a usage to stop at intermediate ports. "The bill of lading, like other contracts, is to be construed according to the intention of the parties. Usage of trade is always presumed to be within the knowledge of the parties, and these contracts are supposed to be made with reference to it. There is nothing in the evidence in the present case, contradicting the express terms of the bill of lading, which are that the goods shall be carried from New York to Georgetown. A direct voyage is *prima facie* intended, but this may be controlled by usage."

**1. Usages Between Employer and Employee.**—In *Grant v. Maddox*, 15 M. & W. 737, by a written contract, the plaintiff, an actress, agreed to perform at the defendant's theater, and the defendant agreed to engage her for three years, and pay her a salary per week. The court allowed the uniform usage of the theatrical profession to be shown, by

include usages to show that in a contract at a yearly salary, the employer may dismiss the employee at a month's notice ;<sup>1</sup> that in an agreement for a year, the employee is not expected to work continuously, but is entitled to certain intervals for rest and holi-

which the plaintiff was to be paid only during the theatrical season, *i. e.* during the time while the theater was open for performance, in each of those years. "You have no right to qualify or alter the effect of a written contract, but it is perfectly competent to qualify or alter the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to show what the contract is. Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shown by parol evidence. The evidence was admitted only for the purpose of explaining the meaning of the words used in the contract. It is clear that this may be done with respect to foreign words or scientific expressions; and I think the same is true of a case where the words of the contract have reference to a particular profession."

In *Gleason v. Walsh*, 43 Me. 397, it was held that when men are hired, and no special agreement made as to the time they are to work, evidence of what usage in that particular employment is, as to time, is proper for the consideration of the jury.

In *Vaughn v. Gardner*, 7 B. Mon. (Ky.) 326, it was held that proof of the customary duty of those employed in the performance of any particular service at any particular place, which is reasonable, is legitimate evidence in questions involving the rightful discharge of such duty.

1. In *Parker v. Ibbetson*, 4 C. B. N. S. 346; 93 E. C. L. 345, the plaintiff agreed to serve the defendants as agent, under a written agreement as follows: "P. engages to serve the said I. & Co. as agent or representative, at the salary of £150 per annum in consideration thereof. Also provided, that at the end of the year, if I. & Co. find the said P. has done sufficient business to justify them in recompensing him by making up his salary to £180, to do so, being a donation of £30 to his present stipulated amount of £150." Under this agreement, the plaintiff continued in the service of the defendants, receiving his salary monthly, when the defendants,

before the end of the year, gave him a month's notice to quit. For this dismissal, he brought an action. On the trial, the defendants called several witnesses to prove a custom in the trade to dismiss at a month's notice, though the engagement was at a yearly salary. Crowder, J., said: "It seems to have been established that there was a general custom in the trade that a yearly hiring might be put an end to by either party upon a month's notice. It is insisted on the part of the plaintiff that, assuming such a custom to exist, the special terms of this agreement exclude the application of it to this case. It seems to me that there is no foundation for that argument. The first part of the contract amounts simply to an engagement on the part of the plaintiff to serve the defendants as agent, at the salary of £150 per annum; then follows a proviso that if 'at the end of the year the said I. & Co. (the defendants) find the said P. (the plaintiff) has done sufficient business to justify them in recompensing by making up his salary to £180, to do so, being a donation of £30 to his present stipulated amount of £150.' Reading this agreement and its construction is for the court, and not for the jury. It seems to me to be simply an agreement for a yearly hiring at a yearly salary, and that there is nothing in the proviso to alter the nature and character of the agreement. The simple question is whether, looking at the custom proved, which is general, there is anything in the written agreement to exclude it. I see nothing in it that can have that effect. The proviso cannot exclude it; that has no reference to dismissal. Then, if there is nothing in the contract that is inconsistent with the application of the general custom, it is the same as if the custom had formed part of the written agreement. This case must follow the ordinary rule, that wherever a contract is made in a particular trade, all customs which regulate that trade are tacitly incorporated into the contract, unless by express terms excluded." Willes, J., said: "The fact of the plaintiff having been engaged at a yearly salary, under an agreement which has been reduced into writing, is clearly not

days;<sup>1</sup> that a day's work consists of a certain number of hours;<sup>2</sup> and that the employee is or is not entitled to retain gratuities given him by customers outside of his wages.<sup>3</sup>

enough to exclude the custom, which was proved to be general, to determine a yearly hiring by giving a month's notice, just as in the case of domestic servants, where, though a general hiring is presumed to be a hiring for a year, the service may nevertheless be put an end to at any time by a month's notice. The question is, whether the application of that general custom to the particular case, is excluded by the concluding words of the agreement, which provide that, at the end of the year, if the employer is satisfied with the amount of business done, he will make an addition of £30 to the stipulated salary. Would that proviso be inconsistent with the agreement going on to say that the master should be still at liberty, if so minded, to dismiss the servant at any time during the year, upon giving him a month's notice? Clearly not. The custom, being proved, becomes part and parcel of the contract." Byles, J., said: "In cases of this nature two questions generally arise—the one, a question of law: Whether the terms of the agreement may admit, or must necessarily exclude the custom; the other, one of fact: Whether, if the agreement may admit the custom, the custom extends to the particular agreement."

1. In *Reg. v. Inhabitants of Stoke-upon-Trent*, 5 Q. B. 303; 48 E. C. L. 301, the court held that when, by written contract, a workman engages to work at a particular trade for a year, parol evidence may be given that, by the custom of the trade, the workman is entitled to certain holidays in the course of the year; "as the contract is in general terms and does not specify the particular times of service, such evidence explains and does not contradict the written contract. If the contract had been to serve day by day, the evidence of custom with respect to holidays would have contradicted the contract. But it was in general terms, specifying merely the commencement and the determination of the term of service. The evidence was therefore not inconsistent with the contract."

2. In *Hinton v. Locke*, 5 Hill (N. Y.) 437, an action to recover for work and labor done for the defendant, it appeared that he had promised to pay the

plaintiff, a carpenter, twelve shillings per day for every man employed by him about the work. The plaintiff insisted that ten hours' labor constituted a day's work, and that he was entitled to charge one day and a quarter for each natural day during which the men worked twelve hours and a half; and he offered evidence of a custom among carpenters to that effect which the court admitted. "The usage or custom did not go to vary the contract. It went to explain and ascertain the intention of the parties in relation to a matter upon which the contract was silent. Evidence often serves to explain or give the true meaning of some word or phrase of doubtful import, or which may be understood in more than one sense, according to the subject-matter to which it is applied. Now here, the plaintiff was to be paid for his workmen at the rate of twelve shillings per day; but the parties have not told us by their contract what they meant by a day's work. It has not been pretended that it necessarily means the labor of twenty-four hours. How much then does it mean? Evidence of the usage or custom was let in to answer that question. And when we find a universal usage in this business to call ten hours' labor a day's work, we have arrived at the true meaning of the word day, as used in this contract."

3. In *Jonsson v. Thompson*, 97 N. Y. 642, which was an action against a hotel keeper to recover an alleged agreed compensation for services as hostler, the defendant claimed to set off moneys received by the plaintiff as gratuities or "scale moneys," and offered to show that it was the universal custom at hotels to consider scale money as part of the compensation of the hostlers. The testimony offered tended to prove a general usage to that effect, and if such a usage existed, the parties may be presumed to have contracted with reference to it. The court said: "Even if the referee was justified in finding from the evidence that the amount of the plaintiff's wages was fixed by agreement at \$20 per month, this would not be inconsistent with a usage, if such a general usage existed, that the scale money received by him was to be considered a part of his wages."

Usages are frequently admitted to explain what are the proper duties of the employee's position, and to show whether or not he is bound to do various items of work. By this means the duties of salesmen, mechanics, and others have been judicially ascertained.<sup>1</sup>

7. **Usages in Contracts for Services or Labor.**—Contracts for services and labor have been prolific of controversies requiring proof of usage for their determination. Especially has this been the case in building contracts, into which mechanics and others have sought to incorporate the usages of their trades. Thus, contracts providing for the building of house walls may be at so much per square yard, and when a dispute arises between the parties, the question is, how are the square yards to be computed in respect to windows, doors, cornices, rounded surfaces, and the like. In such cases the courts generally have held that the usages of the trade are admissible to determine the proper method of measurement. Other cases relate to the manner of ascertaining the amount of materials used in erecting a house, such as the number of bricks in a wall; the ownership of refuse or old material; the compensation to be paid, etc.<sup>2</sup>

1. In *Brown v. Baldwin* (C. Pl.), 13 N. Y. Supp. 893, it was held that evidence to show that an agreement in writing "to serve as traveling salesman" imposes upon the salesman, according to the usages and customs of trade, the duty of making up samples necessary for his business, is admissible in an action for breach of such contract. The court said that by the contract the respondent was to serve as traveling salesman, "but what were his duties as such was not defined, nor does the law determine them. Parol evidence of trade usage ascertaining those duties was, therefore, in no sense contradictory of or inconsistent with the terms of the written instrument, but tended only to show the full meaning and effect of the words 'traveling salesman.'" Other cases of similar character are *Hagan v. Domestic Sewing Mach. Co.* 9 Hun (N. Y.) 73; *Hosley v. Black*, 28 N. Y. 438; *Sweet v. Lea*, 3 M. & G. 452; *Price v. Mouat*, 11 C. B. N. S. 509; 103 E. C. L. 508; *Mumford v. Gething*, 7 C. B. N. S. 305; 97 E. C. L. 303; *Collyer v. Collins*, 17 Abb. Pr. (N. Y. Supreme Ct.) 467; *Baron v. Placide*, 7 La. Ann. 229.

2. In *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407, the plaintiffs contracted, in writing, to furnish the materials to do certain plastering for the defendant, at so much per square foot. They charged him for the full surface

of the wall, without deducting for cornices, baseboards, or doors and windows. Proof that this was the customary method among plasterers in measuring work was allowed. "The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got at by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house, calling it solid, with no allowance for the openings by windows or doors? . . . How shall the number of the square yards of the work done be ascertained, is not so determinately reached by the language of the contract as that the law can say there was but one method in the minds of the parties, and this is it. . . . The usage is not designed to obtain payment for material never furnished. It is a method devised for more conveniently and readily ascertaining the quantum of compensation for what work has been done in fact, and what material has been in fact furnished. It is agreeable with common sense that it is more difficult, asking

more skill and care, requiring more time, to plaster about the frames of doors and windows and along the edges of baseboards and cornices than over the plain, uninterrupted surface of wall and ceiling. The more, then, of such openings or obstacles, the more, in proportion to the space of plaster actually laid on, should be the compensation. And it matters not, in law or in reason, how the amount of that greater compensation is arrived at; whether by a minute and precise calculation of part plain and of part broken space, at a greater price for the square yard of space actually covered, or by an assumption that the whole surface worked upon is plain, and then payment be made for it at a less price per square yard thereof. The aim which the usage takes is at a compensation which shall be just to employer and employed. The mode of reaching it proposed by the usage does not infringe upon any principle of law, for it is but a mode."

In *Ford v. Tirrell*, 9 Gray (Mass.) 401; 69 Am. Dec. 297, which was an action on an agreement to build an octagonal cellar wall at a certain price by the foot, evidence of the usage of measuring the angles of such walls, and of the proper mode of measuring the angles of rectangular walls, was held admissible. "The meaning of the language used by the parties in their agreement being, in reference to the compensation to be paid for the work which was to be done, equivocal and obscure, it was certainly competent for the plaintiff to introduce proof of usage, in order to interpret the meaning of the language and ascertain the extent of the contract. 'The true office of usages of trade,' says Mr. Greenleaf, 'is to interpret the otherwise indeterminate intention of the parties; and to fix and explain the meaning of words and expressions of doubtful or various senses.' The evidence in relation to a general usage to make an allowance to the extent claimed by the plaintiff in the admeasurement of octagonal walls beyond the mere inner surface of them, on account of necessary additional work at the angles, was, we think, very properly admitted."

In *Long v. Davidson*, 101 N. Car. 170, however, the court held that the terms used were terms of art, and meant amongst contractors, builders and others, that the count was to be made by ascertaining the number of

cubic feet in the wall, and then multiplying that number by eighteen, as the number of bricks of average size needed to make a cubic foot, "The contract was that the building was to be erected of brick at \$2.40 per thousand, 'wall count, solid measure,' and it must be that something was meant by the term used. The defendant says that no such contract as is alleged by the plaintiff was made, and that he knew nothing of any such rule for counting bricks as was alleged; but if the terms of the contract were as alleged by the plaintiff, it was the misfortune of the defendant to have agreed to pay \$2.40 per thousand, 'wall count, solid measure,' in ignorance of the meaning, and the only meaning, as appears from the testimony, conveyed by the terms used in making the contract, and without informing himself of the fact that they had at least, one meaning."

In *Graham v. Trimmer*, 6 Kan. 231, where the subject of controversy in a suit was, among other things, the amount, in yards, of a certain job of plastering, it was held that it was not error for the court to permit evidence to be given as tending to show the proper and customary method of measuring and ascertaining the amount of such work.

In *Fitzsimmons v. Academy of Christian Brothers*, 81 Mo. 37, contractors undertook to do the masonry of a building according to plans and specifications for the same, for the sum of \$2, in addition to the price of rock, per perch, the evidence showed a custom prevailing, in ascertaining how much masonry had been completed so as to pay the demand of a mason for laying rock in a wall, to count corners twice, each corner constituting a part of two intersecting walls, also all openings for doors and windows as if they were solid matter. It was held that the contractors were entitled, under their contract, to a measurement in accordance with the said custom.

In *Johnson v. DePeyster*, 50 N. Y. 666, which was an action upon a building contract, evidence of usage, as to measurements in the locality where the building was built, was held competent, and the usage became part of the contract.

In *Smythe v. Parsons*, 37 Kan. 79, it was held that parties to a contract are presumed to contract with reference to a uniform and well-settled custom or usage pertaining to the matters concern-



ing which they make the contract, where such custom or usage is not in opposition to well-settled principles of law nor unreasonable; and therefore it was held, in an action upon a building contract, that the trial court did not err in permitting testimony to be introduced tending to prove a general custom at Wichita, with reference to the method of ascertaining the number of bricks in a wall, the contract having been made at Wichita, and not prescribing how the number of the brick in the wall should be ascertained.

In *Hugg v. Shank* (Supreme Ct.), 4 N. Y. Supp. 929, it was held, in an action for the foreclosure of a mechanic's lien, that where the point in controversy is as to whether the ceilings were as high as required by the specifications, the question asked a witness, "In measuring for a nine-foot ceiling from what points do you measure?" does not call for a matter of opinion, but for a custom or rule of the trade.

In *Bradbury v. Butler*, 1 Colo. App. 430, it was held that where, in an action to foreclose a mechanic's lien on an irrigating ditch, the contract for the construction of the ditch was silent as to the basis of estimates of work and labor, testimony of custom was admissible.

In *Lowe v. Lehman*, 15 Ohio St. 179, the contract was to furnish and lay bricks at a certain price per thousand. "The question was as to the proper mode of counting the bricks, and evidence of a usage among builders to estimate by measurement of the walls on a uniform rule based on the average size of brick, making slight additions for extra work and wastage, deducting openings in walls, but not for openings in chimneys, nor jambs, was held admissible. The workman was to furnish the brick and materials, and lay them up by the thousand. The contract contains no specifications of the dimensions, shape, angles, openings or arches of the wall, or of the size of the brick. It does not require a mason to know that the value of the work and materials depends much upon these, and such like conditions, if they are to be paid for by the numerical thousand. Again, the brick are to be furnished as well as laid up. Where and how will you count them numerically? Will you count them at the kiln, on the ground, or in the wall? And who will lose the breakage in transportation and in handling, and the

waste of filling them into the wall? Some fair measurement of the wall would seem to be a more reasonable method. And we cannot say that this method was not a fair one. It slightly increased the estimated number of bricks in the wall, it is true, by making small additions for extra work, and extra waste of bricks at the angles and openings; and the rule of measurement adopted fixes upon an arbitrary and uniform dimension for the average size of the brick, which may vary slightly, but cannot vary very much, from their true average size. All this seems to be reasonable."

In *Hewett v. John Week Lumber Co.*, 77 Wis. 548, it was held that a usage by saw-mill owners to retain the slabs of logs which they have contracted to saw, in addition to the compensation fixed in the contract, may be proved in an action by the mill-owners for the breach of such a contract. "The custom was, we think, a proper and lawful custom, and one which would be likely to be adopted by parties dealing in the furnishing of logs by one party, and the manufacture of them by another party, for the reason that the slabs would be of considerable value to the mill-owner, and of little or no value to the man furnishing the logs, if required to remove them from the mill. The object of proving the usage is not to contradict or change the contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made."

In *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, which was an action to recover boomage charges, the defendant counter-claimed for the failure to deliver some of his logs at his mill. The plaintiff alleged that the logs in question became misplaced and were passed below the defendant's mill without fault of the plaintiff, and that, in accordance with the established custom in such cases, the logs were delivered to other mills, which gave credit to the defendant therefor. It was held that evidence of such custom was admissible. "Such evidence, in such a case, manifestly tends to explain and make evident the understanding and intent of the parties upon matters as to which their contract is silent. Of course, such usage, customs, and course of dealing should, in the absence of actual knowledge, be so long continued, and so well known and established, and so

**8. Usages in Contracts of Insurance.**—Usages to explain contracts of insurance are chiefly directed toward defining the meaning of words used in policies, either by way of limiting or extending their scope. So, also, usages have been received to explain the established method of conducting business in insured buildings, or on board ship, and in other cases.<sup>1</sup>

**9. Usages Between Landlord and Tenant.**—In contracts between landlord and tenant all the usages prevailing in the particular locality are supposed to be in the minds of the parties. It is said that every demise is open to explanation by the usage of the

uniformly acted upon, as to raise a presumption that it was known to both contracting parties, and that their contract was made with reference to it."

In *Cooper v. Kane*, 19 Wend. (N. Y.) 386; 32 Am. Dec. 512, a contract for the excavation of lots in a city, so as to make them conform to a certain plan, was silent as to whom should belong the sand or other material taken therefrom. A usage existed, long established and notorious, that it went to the excavator, and not to the owner of the lots. It was held that evidence of the usage was admissible to explain the contract of the parties. The court, by Nelson, J., said: "I am inclined to the opinion that the evidence of the custom in respect to contracts like the one out of which this action has arisen, by way of explaining it, and which was offered by the defendant for that purpose, was admissible. It did not go to vary any express or necessarily implied stipulations between the parties therein contained, but rather to establish what amounted to a complete performance agreeably to the presumed understanding of the parties. . . . Now, in this case, there is simply an agreement to excavate the earth in a certain street, and to make the necessary embankment, according to a map of the corporation, for a given compensation. Nothing is said about the surplus earth; where it is to be laid, or what is to be done with it. Would it be a workmanlike execution of the contract to pile it upon the adjacent bank or may the contractor dispose of it as he sees fit, and as most convenient and profitable to himself? It appears to me the solution of these questions may very well be referred to common usage in such cases, if any exist."

Other cases upon this subject are *Jordan v. Meredith*, 3 Yeates (Pa.) 318; 2 Am. Dec. 373; *Pittsburg v. O'Neill*, 1 Pa. St. 343; *Martin v. Thrasher*, 40

Vt. 460; *Myers v. Sarl*, 30 L. J. Q. B. 9; 7 Jur. N. S. 97; *Reynolds v. Jourdan*, 6 Cal. 108; *Symonds v. Lloyd*, 6 C. B. N. S. 691; 95 E. C. L. 689.

**1. Usages in Insurance Contracts.**—In *Allegre v. Maryland Ins. Co.*, 6 Har. & J. (Md.) 408; 29 Am. Dec. 536, it was held that policies of insurance, charter-parties, or instruments of like nature, may be explained by parol evidence of the usages of the trade to which they relate, whether such usages regard the course of the voyage or not. Parol evidence of usage is admissible to prove the meaning of the words in a policy that in case of loss, the same was to be paid in ninety days after proof and adjustment thereof.

In *Crocker v. People's Mut. F. Ins. Co.*, 8 Cush. (Mass.) 79, it was held that a policy of insurance on a "machine shop, a watchman kept on the premises," does not require a watchman to be kept there constantly, but only at such times as men of ordinary care and skill, in like business, keep a watchman on their premises; and in an action on such a policy, evidence of the usage, in this respect, of similar establishments, is admissible to explain the meaning of the terms.

In *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277, which was an action upon a policy of insurance against loss by fire on a junk-dealer's stock of "rags" and "old metals," it was held that evidence was admissible to show that, by a usage of the trade, the terms quoted had acquired a broader signification than belonged to those words as commonly used. The plaintiff was permitted to prove a custom in the junk trade to include under the term "rags" all articles used in the manufacture of paper, and under the term "old metals" various articles, such as old rubber and old glass. The court said:

place where the land lies, and that it would be very inconvenient if it were otherwise. The cases relate to the removal of fixtures, the cultivation of the soil, the apportionment of expenses, the hours for quitting the premises, and other matters.<sup>1</sup>

**10. Usages in Maritime Contracts.**—In maritime contracts usages have explained questions in relation to the departure which will

"Knowledge by an insurer of a usage in a certain trade, extending the meaning of terms used in a policy of insurance upon articles designated by those terms, may be inferred from the universality and long existence of the usage."

In *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; 20 Am. Dec. 424, it was said that the word "cargo," in an order for insurance, does not, ordinarily, cover live stock; but if live stock constitutes the only article of exportation from the port from which the vessel carrying the insured property is to sail, to the port to which she is destined; or if, according to the mercantile usage of the place of effecting the insurance, the word "cargo" is understood to cover live stock, then an insurance under that general denomination, will cover live stock.

In *Boice v. Thames, etc., Marine Ins. Co.*, 38 Hun (N. Y.) 246, evidence was received, against the objection and exception of the defendant, tending to show that the plaintiff was accustomed to load on deck; that this was the customary mode of loading, and that the defendant's agents knew this to be so. It was held that, as the evidence was not intended to explain or modify any terms actually written in a policy, but only to show what must have been the understanding of the plaintiff and the agents when the verbal agreement was made, it was admissible.

In *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1, it was held that a general usage for the same species of vessels, in various kinds of navigation and in different seasons of the year, to carry deck loads, was competent evidence, in connection with the opinions of nautical witnesses, to show that in fact the risk was not increased by carrying the cotton on deck. "The usage was not admitted in evidence for the purpose of giving a construction to the contract. In that view it would have been competent, if the contract had been in reference to it. But it was introduced merely as to the question, whether, in point of fact, the risk was or was not

increased by taking the cotton on deck. It does not seem to have been very material, but we cannot perceive that it was altogether irrelevant."

Other cases in which usages have been admitted to explain policies of insurance are *Franklin F. Ins. Co. v. Brock*, 57 Pa. St. 74; *New York Belting, etc., Co. v. Washington Fire Ins. Co.*, 10 Bosw. (N. Y.) 428; *White v. Mutual F. Ins. Co.*, 8 Gray (Mass.) 566; *Houghton v. Manufacturers' F. Ins. Co.*, 8 Met. (Mass.) 114; *Percival v. Maine Mut., etc., Ins. Co.*, 33 Me. 242; *Webb v. National F. Ins. Co.*, 2 Sandf. (N. Y.) 497; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Fowler v. Ætna F. Ins. Co.*, 7 Wend. (N. Y.) 270; *Babcock v. Montgomery County Mut. Ins. Co.*, 6 Barb. (N. Y.) 637; 4 N. Y. 326; *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.) 359; 77 Am. Dec. 414; *Sims v. State Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 311; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416; 59 Am. Dec. 192; *Steyer v. Dwyer*, 31 Iowa 20; *Mobile Marine, etc., Ins. Co. v. McMillan*, 27 Ala. 77; *Fay v. Alliance Ins. Co.*, 16 Gray (Mass.) 455; *Mallan v. May*, 13 M. & W. 511; *Robertson v. Clarke*, 1 Bing. 445; 8 E. C. L. 587; *Robertson v. Money, R. & M.* 75; *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.) 75; *Cobb v. Lime Rock F., etc., Ins. Co.*, 58 Me. 326; *Uhde v. Walters*, 3 Camp. 15; *Moxon v. Atkins*, 3 Camp. 200.

This subject is considered at some length in *MARINE INSURANCE*, vol. 14, pp. 329 *et seq.*, rendering unnecessary anything further in this article.

**1. Usages Between Landlord and Tenant.**—In *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, the question was as to the validity of a custom in the city of Washington, authorizing a tenant to remove any building, which he might erect upon rented premises, provided he did it before the expiration of the term. The court, by Story, J., said: "Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and cus-

tom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conusant of the custom, and to contract with a tacit reference to it."

In *Hutton v. Warren*, 1 M. & W. 474, Parke, B., said: "The relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should have been favorably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties." And see *LANDLORD AND TENANT*, vol. 12, p. 713.

In *Amory v. Melvin*, 112 Mass. 83, the lessees in certain leases of property in Boston covenanted that they would pay "all taxes and assessments whatsoever, which may be payable or assessed in respect of the premises, or any part thereof, during said term." The leased premises were parts of a large building which was leased to several tenants. At the trial the judge admitted evidence of a usage in Boston, in such cases, to apportion the whole tax assessed upon the building among the different tenants, according to their respective rents. "The covenant of each tenant to pay taxes cannot be construed to mean the taxes upon the whole estate. From the nature of the case some mode of apportioning the whole tax must be contemplated by the parties. The usage to apportion it in proportion to the rents paid by the tenants is a convenient and reasonable usage, and, in the absence of any express stipulation upon the subject, the parties must be deemed to have contracted in reference to it."

In *Wilcox v. Wood*, 9 Wend. (N. Y.) 346, the court said that it seems that a lease of premises from the first day of May in one year to the first day of May in the succeeding year, excludes the first day. But proof of a local custom that a lease in those terms expires at noon of

the last day is admissible; and the court suggested that such custom would be highly convenient. "I do not mean to be understood that, in general, customs can be valid which give a construction to written instruments; that is the business of the courts; but if under leases in the usual form, from the first of May, to the first of May, it has been the immemorial usage to interchange possession at twelve o'clock at noon, it seems to me unobjectionable—not as a construction of the instrument, but as a practical exercise of rights under it. The time in the lease either includes or excludes the first of May; but as the courts would not settle the point, the people have taken the medium and that which is the most convenient, and, therefore, that which was no doubt the true intention of the parties. A strict compliance with the letter of the lease, whether it includes or excludes the day, would compel those who change tenements to move in the night, or remain one night in the street. Such an absurdity was never intended."

In *Mangum v. Farrington*, 1 Daly (N. Y.) 236, it was held that a written contract may be interpreted by the local customs in reference to which it was made, and it is error to exclude evidence of such customs. As between the lessor of a bulkhead and the lessor of the adjoining pier, evidence of the custom of the port is admissible to show how far wharfage is collectible for the use of the bulkhead, and to what extent for the use of the pier.

In *Hutton v. Warren*, 1 M. & W. 466, a custom by which the tenant, cultivating according to the course of good husbandry, was entitled, on quitting, to receive a reasonable allowance in respect to seed and labor bestowed on the arable land in the last year of his tenancy, and was bound to leave the manure for the landlord, if he would purchase it, was held not to be excluded by a stipulation in the lease that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land, on receiving a reasonable price for it.

In *Muncey v. Dennis*, 1 H. & N. 216, a custom of the country binding the incoming tenant to pay the outgoing tenant for straw left on the farm, was held not to be excluded by a provision in the lease to the outgoing tenant that all

constitute a deviation, the payment of freight and towage, the measurement of goods shipped, etc.<sup>1</sup>

straw should, during the term, be consumed, and the manure used on the premises.

In *Holding v. Pigott*, 7 Bing. 465; 20 E. C. L. 201, a lease contained stipulations limiting the quantity of grain that should be grown on the farm, and directing that the land should be summer-fallowed, and that the tenant should spend all the fodder, hay, straw, turnips, etc., on the premises; and held that the custom of the country, which would give the tenant a right to the away going crop of wheat after a crop of turnips, was not excluded, though such crop had been grown in violation of the covenant to leave the land summer-fallowed. The court said these were stipulations as to the terms of holding, not as to the terms of quitting. In reference to this case it is said, in *Clarke's Brown on Usages and Customs*, section 51; "The agreement under which the tenant held was silent altogether as to any terms on which the tenant should quit, and the clause of the agreement which was inconsistent with the custom of the country was a stipulation confined expressly to the period of holding by the tenant. It adverted to nothing that was to take place at the end of the tenancy, and spoke only of terms of holding during its continuance. There was, therefore, nothing in such an agreement at variance with the application of a custom between the landlord and tenant which did not come into force until the expiration of the term. In that case, the rights of the landlord and tenant were governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards. It is clear that, as the agreement only referred to the continuance of the tenancy, both the landlord and tenant must have anticipated, not only an end to the holding, but must have looked forward to a time when their mutual relations must be regulated by some other rule than that contained in the agreement. As there is nothing said as to the end, there is the ambiguity of silence which the custom of the country can be called upon to explain."

In *Muncey v. Dennis*, 1 H. & N. 216, where, by the terms of a farm lease for seven years, expiring at Michaelmas, the tenant agreed to cultivate the land according to the custom of the country,

and "during the term to consume with stock on the farm all the hay, straw, and clover grown thereon, which manure shall be used on the farm," and the landlord agreed to let the tenant occupy part of the homestead until midsummer after the expiration of the term, if necessary, "to end the cropping of the tenant grown on the premises," it was held that the lease did not exclude the custom of the country, by which the tenant having paid for straw on his incoming, was entitled to be paid for straw on his quitting.

1. *Usages in Maritime Contracts.*—In *Brown v. Byrne*, 3 El. & Bl. 703; 77 E. C. L. 702; 18 Jur. 700, the action was for freight claimed by a shipowner against the indorsee of a bill of lading who had accepted goods, the bill of lading stating "he (the indorsee), paying freight for them five-eighths of a penny sterling per pound, with five-pound per cent. prime and average accustomed." The court held that evidence was admissible that by the custom of Liverpool the shipowner was entitled to a deduction of three months' discount from the freight, though such custom applied only to goods coming from ports in the southern states of *America*. "Here," said Coleridge, J., "the contract is to pay freight on delivery, at a certain rate per pound. Is it inconsistent with this to allege that, by the custom, the shipowner, on payment, is bound to allow three months' discount? We think not. The written contract expressly settles the rate of payment. The custom does not set this aside; indeed, it adopts it as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the shipowner undertakes to allow three months' discount on freight paid after that rate. The latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed—or if from the language of it, the intention of the parties could have been collected—that the freight, at the specified rates, should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom, and the case would have been brought within the restriction mentioned above. . . . But the contract

**11. Usages Between Vendor and Purchaser.**—The cases arising in the relation of vendor and purchaser are numerous and interesting. In these cases it is competent to offer evidence of usage, not contradictory to the contract, to show what the parties must have intended by their contracts of sale.<sup>1</sup> The cases disclose a

settles the rate of freight; whether or not discount is to be allowed on the payment, it leaves open, and to that the custom applies."

In *Hostetter v. Park*, 137 U. S. 30, a deviation was defined to be "a voluntary departure, without necessity or reasonable cause, from the regular and usual course" of a voyage, in reference to the terms of a policy of marine insurance; "but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade. The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage. It is well settled that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary. *Robinson v. U. S.*, 13 Wall. (U. S.) 366. The contract in the bill of lading, that the goods are to be delivered at New Orleans 'without delay,' is qualified by the exception of 'the dangers of navigation' and 'unavoidable accidents;' and if the navigation was in its course according to the usage of the trade, as is found to be the fact, the loss in question occurred through a danger of navigation. *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 129; *The Favorite*, 2 Biss. (U. S.) 502; *Williams v. Grant*, 1 Conn. 487; 7 Am. Dec. 235." And see *Walsh v. Homer*, 10 Mo. 6; 45 Am. Dec. 342.

In *Buckle v. Knoop*, L. R., 2 Exch. 125, and *Bottomley v. Forbes*, 6 Scott 816; 5 Bing. N. Cas. 121; 35 E. C. L. 50, the actions were for freight; usages were admitted to explain that the measurement of the goods, which determined the amount of the freight, was to be calculated at the port of shipment rather than the port of delivery.

In *The Queen of the East*, 12 Fed. Rep. 165, it was held that payment for towage from and to sea, under a contract in which the time for payment for the same is not specified, is due in

the port of New Orleans, under the custom thereof, prior to the ship's being towed back to sea. And further, it is well settled that, in all maritime contracts, usage or custom is always applicable and binding on the parties to explain doubtful and supplement incomplete agreements and stipulations.

In *Brown v. Hicks*, 8 Fed. Rep. 155, it was held that in the light of the usages of the port of New Bedford, the common contract to perform a whaling voyage can be terminated by either party for good cause; and information justifying a party to such a contract in concluding that the voyage had failed, and could no longer be prosecuted with success, constitutes a good cause. "The contract should be construed in the light of the usages of the port of New Bedford, and, being so construed, it provided for a whaling voyage to continue for the term of three years, or until an earlier accomplishment of its purpose; and in the meantime neither party had the right, at his own pleasure and against the will of the other, to put an end to the voyage, except for good cause."

For other cases upon this subject see *Roberston v. Jackson*, 2 C. B. 412; 52 E. C. L. 411; *Leidemann v. Schultz*, 14 C. B. 38; 78 E. C. L. 38; *Cuthbert v. Cumming*, 10 Exch. 809; 11 Exch. 405; *Russian Steam Nav., etc., Co. v. Silva*, 13 C. B. N. S. 610; 106 E. C. L. 609; *Birch v. Depeyster*, 1 Stark. 210; *Barcker v. Borzone*, 48 Md. 474; *Philadelphia, etc., R. Co. v. Northam*, 2 Ben. (U. S.) 1; *Ogden v. Parsons*, 23 How. (U. S.) 167; *Norden Steamship Co. v. Dempsey*, 1 C. P. Div. 654; *Phillips v. Briard*, 1 H. & N. 21; *Robertson v. Wait*, 8 Exch. 299; *Peisch v. Dickson*, 1 Mason (U. S.) 11; *Gibbon v. Young*, 2 J. B. Moo. 224; *Hudson v. Clementson*, 18 C. B. 213; 86 E. C. L. 213.

**1. Usages Between Buyer and Seller.**—In *Haas v. Hudmon*, 83 Ala. 174, the contract required the sellers to deliver the meat at O. The court held that it necessarily followed, if there was nothing to vary the rule, that the damage for non-delivery was governed by the price at O. It was contended,

however, that there was a general custom of trade varying the rule; and that the custom was so general, and had prevailed so long, that the parties must be presumed to have contracted in reference to it. Under this custom it was claimed that, in cases like the present, the price at the point of shipment was the measure of damages for non-delivery. "To avail, it must, among other things, have been established and acted on generally, and sufficiently long to raise a presumption of its knowledge. There is no rule of mere law which forbids the making of the defense, offered as it was in this case."

In *Belrne v. Dord*, 2 Sandf. (N. Y.) 89, it was held that a general and uniform usage in a particular trade, in goods so packed or situated that examination of the bulk is inconvenient and difficult, or calculated to expose the goods to injury, to the effect that the goods in that trade are sold by the production and examination of samples, is competent, in connection with other evidence, to prove in respect of a sale of such goods, that a personal examination of the bulk was not contemplated by either party, and that both intended to contract upon the sample only.

In *Page v. Cole*, 120 Mass. 37, the defendant by a written instrument conveyed to the plaintiff for a certain sum, "a certain milk route, situated in the southerly part of Boston, with all the rights, privileges thereto belonging;" "also the right and good will of supplying twenty-six full eight-quart cans of custom situated as above." In an action upon the agreement, the plaintiff offered in evidence the testimony of experts that milk trade is bought and sold by the can; that the right and good will of supplying customers has a known and recognized value in the market; that there was a uniform usage in the trade for the person selling the right and good will of supplying custom to furnish to the purchaser customers whose average daily purchases amount to the number of cans sold; that in the milk trade the terms "right and good will of supplying custom" mean, when applied to sales of the trade, the right of supplying milk to the customers furnished and pointed out by the vendor from those accustomed to buy milk of him. The court held that this evidence of usage of the milk trade was admissible, and the defendant's contract was hardly

intelligible without it, and said "the usage which the plaintiff offered to prove was not offered for the purpose of contradicting the terms of the written contract, or applying to it any system of interpretation different from the standing rules applicable to written contracts generally. It was merely as to the mode of doing business in that particular trade, and to show that certain terms, hardly intelligible in themselves, have a recognized and well-known meaning in that special trade."

In *Atkinson v. Truesdell*, 127 N. Y. 230, it was held that a written contract for the sale and purchase of glassware "to be made after September 1st, and to be taken by January 1st, 1883, terms, sixty days, net on dock," is not varied, but only explained, by parol evidence showing that in the glass business the words "to be taken" between fixed dates give the buyer a right of ordering the goods to be shipped as he wishes, between the dates; that the seller must ship as ordered, and may not deliver the goods without such order.

In *Field v. Lelean*, 6 H. & N. 627; 30 L. J. Exch. 68, evidence of a usage amongst brokers that on the sales of mining shares the seller is not bound to deliver without contemporaneous payment, was held admissible to show that the defendant was not entitled to have the shares which he had bought from the plaintiff delivered to him before payment, although by the bought and sold notes payment of the price was to be made, half in two, half in four months, and nothing was there said as to the time of delivery.

In *Loneragan v. Stewart*, 55 Ill. 44, it was held that where the owner of grain deposited the same in a warehouse, taking an ordinary warehouse receipt therefor, which did not explicitly state the character of the transaction—whether as a sale or a mere bailment—it is competent, in an action by the depositor against a purchaser from the warehouseman, for the latter to show that, according to the usage in such cases, warehousemen do not keep the identical grain deposited, but ship and sell it without regard to the identity of the grain deposited by any particular person, and that depositors at a warehouse do not expect to take their grain away, but to get their money at the market price on the day they demand it—and this, as tending to give character to the transaction as a sale rather than a bailment.

So in *Lyon v. Lenon*, 106 Ind. 567, it was held that where a receipt for personal property delivered does not disclose whether the transaction is a sale or a bailment, extrinsic evidence may be resorted to. "Where a contract concerning a particular business is ambiguous, it will be presumed that it was made with reference to the ordinary course of such business, and evidence showing such course is admissible."

In *Gunther v. Atwell*, 19 Md. 157, it was held that where samples of tobacco are prepared by a state tobacco inspector, his agency in performing that duty is as much in behalf of the buyer as the seller, and neither the buyer nor seller has cause of complaint, or right of redress, either against the other, for any mistake as to condition or quality of the goods sold, if with mutual knowledge and good faith they buy and sell upon the credit of the samples so obtained. Hence, in an action for damages alleged to have resulted from the non-correspondence of two hogsheads of tobacco sold by sample, with the samples by which it was sold, the defendant offered to prove "that according to the usage and understanding of merchants in the tobacco trade in the city of Baltimore, the purchaser does not look to the seller to insure a correspondence between the quality of the tobacco in the sample and that in the hogsheads, but relies exclusively upon the sample, and the fidelity of the inspector in its preparation." The court, in holding that such evidence was admissible, said: "The testimony would only have proved a usage among tobacco dealers, in strict conformity with what we understand to be the law in buying and selling tobacco by samples prepared by the state inspectors."

So in *Mida v. Geissmann*, 17 Ill. App. 207, it was held competent to show a custom or usage of the whisky trade in Chicago, well known to all dealing in whisky warehouse receipts, that in purchasing whisky warehouse receipts, the seller of such receipts was never looked to as the responsible party; that the sole reliance was upon the warehouse which issued the receipts. It was entirely competent to prove such usage where, as in this case, it contravened no provision of an express contract.

In *Florence Mach. Co. v. Daggett*, 135 Mass. 582, B agreed to make for

A a certain number of castings of a new stove, in a specified time, the patterns for which were to be furnished by A. In an action by A against B, for breach of this contract, one ground of defense was, that delays were occasioned by the failure of A to furnish patterns in time, because of alterations made by him in the patterns. It was held that A was entitled to put in evidence that there was a well-known, universal usage in the business to make changes in new patterns, arising from the fact that the first set of patterns, however good, would never produce castings that could be put together without alteration. The court said: "In mercantile, manufacturing and other business transactions, evidence of established usage is admissible, not merely to explain the words or terms employed in a contract, but to annex to it those ordinary and customary incidents which must have been intended to form a part of it. If it be impossible to add any material incident to the written contract without altering its effect more or less, an incident so established is deemed to have been contemplated by and embraced in it. The usage which the plaintiff attempted to show was not in violation of any rule of law, was not unreasonable and was neither expressly nor impliedly excluded by the tenor of the written instrument."

In *Johnson v. Raylton*, 7 Q. B. Div. 438, the defendants tendered evidence to show that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates, if tendered, though of the quality contracted for. The learned judge at the trial rejected this evidence, and gave judgment for the plaintiffs. On appeal it was held that such evidence was improperly rejected. "The contract contains no express stipulation on the question in dispute, and as this is the fact, the principle of the cases is that if there is a custom or practice of the trade, the parties must be taken, as regards matters on which the contract is silent, to have dealt with reference to the practice or custom of the trade, and to have expressed in their written contract those matters for which the custom of the trade did not



variety of instances of this character. Thus, where goods are to be delivered under a contract, and the measure of quantity is of doubtful meaning, usage is received to show what meaning should be given to the measure mentioned;<sup>1</sup> and where there is nothing to show how certain goods are to be delivered, whether in sacks or in bulk, usage may decide the uncertainty.<sup>2</sup> So various questions of weight, measurement, quality, etc., in the sale of goods are determined by the usage of the trade in respect to said sales, as the best means of ascertaining the intention of the parties where it is not declared by the contract.<sup>3</sup> Similarly, in the

provide, or in which in the particular case they decided to depart from or vary the custom."

Other cases upon this point are *Spicer v. Cooper*, 1 Q. B. 424; 41 E. C. L. 608; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Shepherd v. Kain*, 5 B. & Ald. 240; *Schneider v. Heath*, 3 Camp. 506; *Taylor v. Briggs*, 2 C. & P. 525; 12 E. C. L. 245; *Cooper v. Smith*, 15 East 103; *Busch v. Pollock*, 41 Mich. 64; *Hopkins v. Sanford*, 41 Mich. 243; *Sager v. Tupper*, 38 Mich. 258; *Spartali v. Benecke*, 10 C. B. 212; 70 E. C. L. 212; *Cockburn v. Alexander*, 6 C. B. 791; 60 E. C. L. 790; *Godts v. Rose*, 17 C. B. 229; 84 E. C. L. 229; *Field v. Lelean*, 6 H. & N. 627; *Holding v. Elliott*, 5 H. & N. 117; *Clark v. Smallfield*, 4 L. T. N. S. 405; *Schrieber v. Horsley*, 11 Jur. N. S. 675; *Bowman v. Horsey*, 2 M. & R. 85; *Syers v. Jones*, 2 Exch. 111; *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 44; *Ryder v. Worley*, 10 W. R. 294; *Lucas v. Bristow*, El. Bl. & El. 907; *Dana v. Fielder*, 1 E. D. Smith (N. Y.) 463; 12 N. Y. 41; 62 Am. Dec. 130; *Pollen v. LeRoy*, 10 Bosw. (N. Y.) 38; 30 N. Y. 549; *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230; *Cole v. Wendell*, 8 Johns. (N. Y.) 116; *Taylor v. Beavers*, 4 E. D. Smith (N. Y.) 215; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; 27 Am. Dec. 158; *Linsley v. Lovely*, 26 Vt. 123.

1. In *Miller v. Stevens*, 100 Mass. 518; 97 Am. Dec. 123; 1 Am. Rep. 139, the court, in holding oral evidence admissible to show that in a written contract for the purchase of a certain number of "barrels" of petroleum oil at so much a gallon, the word "barrel" means a vessel of a certain capacity, and not the statute measure of quantity, said: "The written contract between the parties does not show whether the word 'barrels' is used as describing a quantity merely, or a ves-

sel of a certain kind and capacity; for 'barrels' might mean either a quantity or a vessel; and if the vessels intended were of a uniform size, the fixing of the price by the gallon would be equally adapted to either. Parol evidence was therefore admissible to show in which sense the parties intended to use the word; and the presiding judge rightly admitted testimony that refined petroleum was often sold in barrels, and that the usual size of such barrels was forty-two gallons."

2. In *Robinson v. U. S.*, 13 Wall. (U. S.) 363, a party agreed to deliver so many bushels of "first quality clear barley," the contract not stating whether the barley was to be delivered in sacks or in bulk, *i. e.*, loose. It was held that evidence was properly received to show a usage of trade to deliver in sacks; such evidence tending, not to contradict the agreement, but only to give it precision on an important point where by its terms it had been left undefined. If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

3. In *Barton v. McKelway*, 22 N. J. L. 165, the contract was for the delivery of a number of trees, "not to be less than one foot high." A usage was shown that such trees should be measured only to the top of the ripe wood, rejecting the green, immature top. "It

is no answer to say that 'tree' is a word of precise and definite signification, or that a 'tree' is a 'tree,' and can be nothing else, and that everybody knows what a tree is. It is the qualification contained in the contract that we are to consider in this case. The trees were to be at least a foot high. This involves the question of measurement, and how were they to be measured—while standing and growing in the ground, or after they had been dug from it? Were they to be measured from the extreme root to the extreme branch (both of which are parts of the tree), or in what other mode were they to be measured, in order to determine their height? The jury were called upon to decide whether the plaintiff's or the defendant's rule of measurement was the true rule, and they could do that satisfactorily only by being informed of the usage that appertained to the subject matter of the contract."

In *Swett v. Shumway*, 102 Mass. 365, the plaintiffs contracted with the defendants for certain goods described as "all the horn chains they manufacture." The defendants contended that these words implied a warranty that the chains should be made wholly of horn, and that there was a failure to comply therewith if part of the links were made of hoof; but the plaintiffs were allowed to show that chains of the latter kind were known as horn chains in the market. "There are many articles which are named from one of several different materials of which they are made. A contract, for example, to furnish gold watches or mahogany furniture would not be construed to require the whole watch to be of gold, or the whole piece of furniture to be mahogany. In the admission of the evidence offered by the plaintiffs on this point, the true rule was applied by the court."

In *Jones v. Hoey*, 128 Mass. 585, it was held that if goods in cases are sold by weight, without more specific agreement, evidence of a general usage is admissible to show that the weight is to be computed as previously ascertained at the time of packing and marked on the cases, and not by the actual weight at the time of the sale.

In *Ragland v. Butler*, 18 Gratt. (Va.) 323, it was held that a contract to sell the merchantable pine timber upon a certain tract of land, to be sawed into lumber by the vendor according to the directions of the purchaser, and to be delivered at Richmond, was a contract

that the lumber should be merchantable; and the usage at Richmond as to what constitutes a compliance with the directions of the purchaser, is to be the rule in determining that question. "If it should appear that there was an established usage, showing what should be deemed a substantial and sufficient compliance with such orders, it might be proved to ascertain the sense in which the orders were understood by the parties."

In *Humphreysville Copper Co. v. Vermont Copper Min. Co.*, 33 Vt. 92, A agreed, in writing, to deliver to B five hundred tons of copper ore, to be paid for at certain specified prices per ton, according to the quality of the ore, to be ascertained by an assay thereof, "the moisture to be deducted, as usual, from the weight of the ore." B claimed that under the contract A was bound to deliver a quantity of ore weighing five hundred tons after deducting for the moisture, while A insisted that he was only bound to deliver five hundred tons of ore, gross weight, without any deduction for the moisture, and that the proviso in regard to such deduction related only to the mode of ascertaining the weight of ore to be paid for. It was held that either party might show a custom in the sale of copper ore corresponding with their respective claims as to the construction of the contract.

In *Baker v. Squier*, 1 Hun (N. Y.) 448; 3 *Thomp. & C.* (N. Y.) 465, the action was upon a bought-and-sold note describing the goods as 225 tons "Kurtz, 48 to 50 per cent. carbonated soda-ash." The court admitted evidence of a custom as to determining the quality of the goods. On appeal it was said: "We think the custom was properly admitted in evidence. A person engaged in a particular trade is presumed to be acquainted with the usages of that trade, and to contract with reference to them, and the usage of the trade in which the contract is made, may be shown to explain the meaning of a particular contract, but not to contradict its plain terms. The figures 48 to 50 per cent. convey no meaning to a person ignorant of the subject-matter of the contract, and of the usages of the trade in which it was made, and the evidence of the custom was to explain the meaning of those terms or figures when used in such a contract, and did not tend to vary the import of the contract so far as its terms were expressed."

absence of an express provision, usage may determine whether the vendor or purchaser should pay the duties upon goods imported, or the freight upon goods sent by a carrier, or storage.<sup>1</sup>

**12. Miscellaneous Contracts.**—In the note are collected other cases in which proof of usage has been admitted as explanatory of contracts. Among them are usages in wagering contracts, usages in the mining regions of *California* and elsewhere, and other instances.<sup>2</sup>

1. In *Brown v. Browne*, 9 U. C. Q. B. 312 the plaintiffs bought from the defendant certain coal shipped to the defendant at Toronto from a foreign port, and then lying on board the vessel in the Welland canal. A sale note was given, stating only the quantity and price, and the time by which it was to be taken out of the vessel. It was held that the defendant was not obliged to pay the import duties and that evidence was rightly admitted to show the usage of the trade on sales made under such circumstances. "There was no writing produced that expressed anything on the subject of duties, and the defendant was therefore not seeking to contradict the terms of any writing by parol testimony when he gave evidence as to what was the usual course of trade when purchases of coal are made under such circumstances. That was strictly admissible evidence; because, when we know what the general usage of trade is in regard to any branch of business, we are to look on the parties as intending to contract with reference to it, unless we have proof that they meant to deviate from it."

In *Howe v. Hardy*, 106 Mass. 329, which was an action between a manufacturer of window frames and a dealer in them, on an issue whether the former should pay freight on frames sold and delivered by him to the latter, evidence of a usage between manufacturers and dealers, in the place where the goods were made and sold, that the manufacturers should pay the freight, was held admissible. The usage was competent, for it related to what the vendor was to do in respect to the delivery of the goods in the absence of an express stipulation. *Putnam v. Tillotson*, 13 Met. (Mass.) 517.

In *Fawkes v. Lamb*, 31 L. J. Exch. 168; 8 Jur. N. S. 385, a written contract for the sale of goods was silent as to the time for which warehouse-room rent was allowed by the seller to the purchaser, and it was held competent to show this fact by evidence of custom.

**2. Usages in Miscellaneous Contracts.**—In *Walker v. Armstrong*, 54 Tex. 609, the court interpreted a written contract for a horse race. It appeared that the word for starting was given in so loud a tone that one of the horses became frightened, and not entering the polls was not turned loose, while the other horse started and ran the distance required by the contract. "The contract being silent as to the consequences of a failure to start when the word is given for the start in a horse race, parol evidence of custom is admissible to explain its consequences. It will be presumed where the contract was silent, the parties had in view the rules of the turf. Evidence of these rules does not vary the contract, but explains the meaning of the parties to it."

In *Evans v. Pratt*, 3 M. & G. 759; 4 Scott N. R. 378, an agreement was made for a wager upon a horse race "across a country." Usage was admitted to show that by this expression the rider was not allowed to ride through an open gate.

In *Morgan v. Richards*, 1 Browne (Pa.) 173, usage was received to show that when either party to a wager relinquishes the deposit, the wager is at an end.

In *Brown Chemical Co. v. Atkinson*, 91 N. C. 389, it was held that parol evidence is admissible to show the custom or usage of a place where a contract is entered into; and this, upon the principle, that it is presumed the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to such usage. In this case the court allowed evidence of usage in a controversy as to whether fertilizer dealers in other states, or their local agents in *North Carolina*, should pay the license tax imposed in *North Carolina*.

In *Lamb v. Klaus*, 30 Wis. 94, it was held that where there is a written contract to manufacture and deliver

**X. USAGES ANNEXING INCIDENTS TO CONTRACTS**—1. **Nature of this Branch of the Subject.**—We have thus far considered the functions of usages in explaining contracts, by removing ambiguities, or by determining matters about which the contract was silent. But beside these functions an important branch of the law of usage relates to what is termed “annexing incidents” to contracts. An example will illustrate clearly what is meant by usage “annexing an incident” to a contract. A tenant holds under a lease running from April 1st to April 1st in each year. The lease contains nothing as to the tenant’s right to the crop sown before April 1st, but maturing after April 1st. There is nothing in the lease requiring explanation or construction. Here the usage steps in and adds a new clause to the contract of lease, to wit: that the away-going crop shall be the property of the tenant. This clause, thus added by the usage, is said to be an incident annexed to the contract. This branch of the law of usage is an outgrowth or extension of the principles governing the admissibility of usage to explain contracts. It was found that parties in

goods, and money is advanced thereon, a usage to pay interest on such advance at ten per cent. is not contrary to the terms of the written contract, although nothing is said of the interest therein. “A usage to pay ten per cent. interest on advances is like any other unwritten promise to pay that rate, and is good to enforce payment of interest at seven per cent.; the rate allowed by law where there is an obligation to pay interest and no written agreement for a higher rate.

In the following cases usages in the mining business were received: *Clayton v. Gregson*, 5 Ad. & El. 302; 31 E. C. L. 342; *Hicks v. Bell*, 3 Cal. 219; *Packer v. Heaton*, 9 Cal. 568; *Waring v. Crow*, 11 Cal. 366; 76 Am. Rep. 574; *Roach v. Gray*, 16 Cal. 383; *English v. Johnson*, 17 Cal. 107; *Gore v. McBrayer*, 18 Cal. 582; *Prosser v. Parks*, 18 Cal. 47; *St. John v. Kidd*, 26 Cal. 263; *Morton v. Solambo Co.*, 26 Cal. 527; *Colman v. Clements*, 23 Cal. 245; *Table Mountain, etc., Co. v. Stranahan*, 31 Cal. 387. There are also other *California* mining cases of merely local interest. See also *MINES AND MINING CLAIMS*, vol. 15, p. 559.

In *Newhall v. Appleton*, 114 N. Y. 140, it appeared that the defendants agreed to pay the plaintiff \$15 for each order that he obtained for the defendants’ encyclopedia. It was held that the defendants may show that the words “\$15 an order for each and every order obtained for the encyclopedia” meant, and were well understood in the sub-

scription-book business to mean, \$15 for each order obtained for the encyclopedia, under which five volumes have been taken and paid for. “By the usage or custom of the subscription-book business, the words used in the contract had a well-defined meaning which was understood by both parties to the contract, and what such meaning was. The evidence of custom was admissible, not to change or vary the contract made, but to ascertain with greater certainty what was the intention of the parties at the time of its making.

In *Miller v. Insurance Co. of N. A.*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 470, it was held, in an action on a promise to pay commissions to an insurance agent, that evidence of a usage or custom of the trade to pay commissions only on premiums actually collected was admissible. “The agreement designated no time for the payment of the commissions. Parol evidence for the purpose of supplying this omission was therefore admissible. The defendants proved a custom among brokers, that the commission is not due until the premium is paid, and by the plaintiff that the custom was to collect commissions after the premiums were paid. Evidence of a custom of that kind is admissible. It is not repugnant to, or inconsistent with, the contract, nor does it add any new terms thereto, but is merely explanatory thereof.”

See also, in general, *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611; *Crosby*

making contracts often omitted to state important parts of their agreements. It was, therefore, recognized by the courts that it was as necessary to add to the contract as it was to explain it, if the intent of the parties was to be followed.<sup>1</sup>

**2. Distinction Between Annexing Incident and Varying Contract.**—The chief difficulty in determining whether or not a given incident may be annexed to a particular contract, arises when it is considered in reference to the question whether it varies the terms of the contract.<sup>2</sup> An incident annexed, simply means a term added; and it is, therefore, clear that in every case in which an incident is annexed, the contract is to that extent changed and made different from what it previously was. If the change varies the contract by contradicting it, or adds inconsistent terms, it is

*v. Wyatt*, 23 Me. 156; *Fox v. Parker*, 44 Barb. (N. Y.) 541; *Erwin v. Clark*, 13 Mich. 10; *Chase v. Washburn*, 1 Ohio St. 252; 59 Am. Dec. 623; *Carlisle v. Wallace*, 12 Ind. 252; 74 Am. Dec. 207; *Hughes v. Stanley*, 45 Iowa 622; *Goodyear v. Ogden*, 4 Hill (N. Y.) 104; *McKinstry v. Pearsall*, 3 Johns. (N. Y.) 319; *Allan v. Sundius*, 1 H. & C. 123.

1. In *Hutton v. Warren*, 1 M. & W. 474. Parke, B., delivering judgment, said: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by authority."

In 1 Greenl. on Ev. (15th ed.), § 294, it is said that, "Parol evidence of usage or custom is admissible 'to annex incidents,' as it is termed; that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. This evidence is admitted on the principle, that the parties did not intend to express in writ-

ing the whole of the contract by which they were to be bound, but only to make their contract with reference to the known and established usages and customs relating to the subject-matter. But in all cases of this sort, the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict, that which is written."

In *Everingham v. Lord*, 19 Ill. App. 565, it was said that while usage or custom cannot contradict the stipulations in the contract, it may add new terms not expressed in or covered by the contract, and which are incidental and not repugnant to it. "Customs which do not contradict the agreement, but add to it a consequential right or duty, are binding on the parties without reference to the question whether the agreement is by deed or parol, or the undertakings are implied from certain acts of the parties."

But a usage to affect a contract must be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform. *Baltimore Base Ball, etc., Co. v. Pickett* (Md. 1894), 28 Atl. Rep. 279.

2. In *Humfrey v. Dale*, 7 El. & Bl. 266; 90 E. C. L. 265, Lord Campbell, C. J., said: "In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract without, you write the same contract with the added incident, the two would seem to import different obligations and be dif-

inadmissible; but if it has not such effect, it may be received. The line of distinction is difficult to draw closely, much depending upon the facts of particular cases, and the views of individual judges. The paragraph of this article relating to the rule that usages are inadmissible to vary the terms of a contract should be read in this connection.<sup>1</sup>

**3. Cases Between Landlord and Tenant.**—The cases in which usages have been received to annex incidents to contracts are principally those arising out of the relation of landlord and tenant, and vendor and purchaser's agent. As between landlord and tenant, the cases are chiefly upon the away-going crop. In a leading English case the question was decided in favor of admitting the usage. It was said that, "The custom does not alter or contradict the agreement in the lease; it only superadds a right."<sup>2</sup>

ferent contracts. To take a familiar instance by way of illustration: On the face of a bill of exchange at three months after date, the acceptor would be taken to bind himself to the payment, precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace, which vary, according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent. Thus, to warrant bacon to be 'prime singed,' adding, 'that is to say, slightly tainted,' or to insure all the boats of a ship, and add, 'that is to say, all not slung in the quarter,' and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and, therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also. Without repeating ourselves, it will be found that the same reasoning applies where

the evidence is used to explain a latent ambiguity of language."

1. See *infra*, this title, *Usage Not Admissible to Vary Contracts*.

2. *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith Lead. Cases \*594, was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, a tenant. The defendant Dallison, the landlord, pleaded *liberum tenementum*, and the other defendant justified as his servant. The plaintiff replied, that it was true that the *locus in quo* was the close, soil, and freehold of Dallison; but pleaded a custom in the following words, viz: "That within the parish there now is, and, from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of May in any year, hath been used and accustomed, and of right ought, to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and taken away, his way-going crop; that is to say, all the corn growing upon the said lands which hath before the expiration of such term, been sown by such tenant upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." He then stated that he sowed with corn part of the said close, being a reasonable part in proportion to the residue

This case and a contemporaneous decision in *Pennsylvania*<sup>1</sup> have been generally followed in the *United States*, and therefore a

thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The jury found the custom in the words of the replication. It was moved, in arrest of judgment, that such a custom was repugnant to the terms of the deed, and therefore, though it might be good in respect to parol leases, could not have a legal existence in the case of leases by deed. Lord Mansfield said: "We have thought of this case, and we are all of opinion that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease." Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought in the exchequer chamber, and the defendant assigned for errors, "that the custom contained and set forth, etc., is a custom void in law, and is contrary to and inconsistent with the said indenture of lease in the said replication mentioned." Lord Loughborough delivered the unanimous opinion of the court of exchequer chamber, that the custom was good, and the judgment was affirmed.

1. Before the judgment in *Wigglesworth v. Dallison*, 1 Doug. 201, was known in this country, a similar decision had been reached in *Pennsylvania*. The decision was based both upon the reasonableness of the thing, and the fact that it did not conflict with the terms of the lease. In *Stultz v. Dickey*, 5 Binn. (Pa.) 285; 6 Am. Dec. 411, Tilghman, C. J., said: "When the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted. Both parties are supposed to know it, and to be bound by it, unless provision to the contrary is made in the contract. It appears to me, therefore, that it was proper to admit evidence of the custom concerning the way-going crop. I understand that this custom had been recognized by a decision at *nisi prius* prior to this action, and that the law had been held as it is laid down in the case of *Wigglesworth v. Dallison*, 1 Doug. 201. There the custom was limited to a particular part of *England*. With us it is supposed to extend throughout the state. In the nature of the thing, it is reasonable that where a lease commences in the spring of one year and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of a winter crop. If the parties intend otherwise, it is easy to control the custom by an express provision in the lease." Yeates, J., said the question had been settled by the case of *Diffendorffer v. Jones*, decided in 1782, and in which he was counsel. "Though I was dissatisfied with the opinion then delivered," he added, "I have never heard the doctrine questioned since. I have adverted to this case in *Carson v. Blazer*, 2 Binn. (Pa.) 487; 4 Am. Dec. 463. Such custom is said in our books not to alter or contradict the agreement in the lease, but only to superadd a right which is consequential to the taking, although not mentioned therein. There can be no doubt, if the tenant was restricted by the terms of his lease from removing his grain after his time was expired, that he would be bound by his contract; and I apprehend the privilege of the tenant, in general, is confined to a rea-

lease not providing for the disposition of the away-going crop, is, by the addition of terms not inconsistent with the lease, made to contain a clause which was in the minds of the parties, but which was omitted from their contract.<sup>1</sup>

sonable quantity of the lands in proportion to the residue thereof, according to the course and usage of husbandry in the same parts of the country. The privilege is founded on the highest equity, and conduces to the extension of agriculture.

1. In *Foster v. Robinson*, 6 Ohio St. 90, it was held that in case of a lease of farming lands, whether by deed or in parol, from the first of April in one year, to the first of April in the next year, the contract of lease being silent in respect to an away-going crop, and containing nothing, either expressly or by fair implication, to negative a customary right of the tenant to such crop, a general custom, established in the place where the parties reside and the demised premises are situate, giving to the tenant the right to the away-going crop, annexes such right, by way of incident, to the contract of lease.

In *Howell v. Schenck*, 24 N. J. L. 89, the court defined it as "the custom which allows a tenant to enter after the expiration of his term and reap his way-going crop. It is a custom established for the benefit and encouragement of agriculture, and based upon the principle, that he who sows in peace shall reap in peace. The custom is recognized in *VanDoren v. Everitt*, 5 N. J. L. 460; 8 Am. Dec. 615, as the law of *New Jersey*. Its object is to give the tenant the full benefit of the crops of the year, of which he would otherwise be deprived, as they do not all ripen until after the expiration of his term." See also *Society, etc. v. Haight*, 1 N. J. Eq. 393.

In *Dorsey v. Eagle*, 7 Gill & J. (Md.) 321, it was said: "It is conceded that if the lease were silent upon the subject of the manor regulations, that then parol evidence would be admissible to prove that the tenants have a right, by the custom of the manor, to remove their away-going crops at any time within a reasonable period after the determination of their leases; because the law itself would admit evidence extrinsic of the written agreement of the custom of the manor for the purpose of annexing it incidentally to the terms of the written instrument concerning which it was silent." And in *Dircks*

*v. Brant*, 56 Md. 500, it was held that where the renting is for a term certain, the tenant is not entitled to the crops which at the time of sowing he knew could not mature during the continuance of his term, unless by express stipulation with his landlord, or by the custom of the country.

In *Harris v. Carson*, 7 Leigh (Va.) 632; 50 Am. Dec. 510, it was held that where land is leased for a fixed and determinate period, the off-going tenant is not entitled to the way-going crop; and that parol evidence of a usage for the off-going tenant to have the way-going crop, is not admissible to explain a written contract of lease for a fixed and certain period. "Here there is no ambiguity, no uncertainty, no doubt, whatever. It is nothing more nor less than a lease for a fixed period and certain, when the interest of the tenant is to cease and determine. To extend it beyond that period by parol testimony, is contrary to received principles, and utterly inadmissible."

In *Woodfall's Landlord & Tenant* (13th ed.), p. 752, it is said: "At common law a tenant who knows when his tenancy will end (whether he be a tenant for years, or a tenant from year to year, having received due notice to quit), has no rights on or out of the land at the end of his tenancy. But this rule (which may, of course, be modified by agreement) the common law allows to be modified by custom by what is called, in relation to agricultural holdings, the 'custom of the country.' The customs of the country vary in respect of place, and change in respect of time in a very remarkable degree. Nor are they always for the benefit of agriculture. In forward districts, they will be found to move with the times, or to be superseded by special agreements, but in backward districts this is often not the case. However this may be, the object of all customs of the country applicable to the end of the tenancy is to extend the doctrine of emblements, and to allow him who sows to reap. With this object, the outgoing tenant is allowed to occupy his farm for periods and under limitations infinitely varying in extent, after the expiration of his tenancy; to re-



**4. Cases Between Vendor and Purchaser's Agent.**—In the relation of vendor and purchaser's agent the illustrations of the principle are, perhaps, still more pointed. In some trades there is a usage that if a broker purchasing goods does not give the name of his principal in the contract of purchase, the broker is to be held personally liable for the purchase-money, although he contracted merely as a broker for a principal. By the terms of the contract, the broker is liable as an agent; by the usage, another liability is imposed upon him. The contract is thus changed by the addition of a distinct term to the written agreement of the parties.<sup>1</sup>

enter and carry away crops; and to receive compensation for unexhausted improvements. Every custom of the country must be proved as a fact by the party setting it up. It need not have existed from time immemorial; a common usage of the neighborhood is sufficient. The landlord and tenant are presumed to have contracted with reference to the custom, and the custom is incorporated into the contract, whether oral, in writing, or by deed, unless the custom and the terms of the contract are expressly or impliedly inconsistent with it."

In *Senior v. Armitage*, Holt's N. P. 197, which was an action by a tenant against his landlord for a compensation for seed and labor, under the denomination of tenant-right, Bayley, J., on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterward set aside that nonsuit, and held that though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative, "unless the agreement in express terms excluded it." It would appear that the court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it. On the second trial, the Lord Chief Baron Thompson held that the custom prevailed; although the written instrument contained an express stipulation that all manure made on the farm should be spent on it, or left at the end of the tenancy, without any compen-

sation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive compensation for seed and labor.

1. In the leading English case of *Humfrey v. Dale*, 7 El. & Bl. 266; 9 E. C. L. 265, it appeared that the defendants, brokers, employed by S. to purchase oil, signed a memorandum as follows: "Sold for Messrs. T. (the plaintiff's brokers) to our principals, ten tons of linseed oil," and delivered the memorandum to Messrs. T., without disclosing the name of their principals, who afterward became insolvent, and did not accept the oil. The plaintiffs then sued the defendants, alleging a custom in the trade that when a broker purchased without naming his principal, the broker was held liable as a purchaser. In reference to this custom, the court of queen's bench said: "The plaintiff does not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely: that this was a contract which the defendants made as brokers. The evidence, indeed, is based on this; the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal. But the plaintiff, by the evidence, seeks to show that, according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more, namely: that if the buying broker did not disclose the name of his principal, it might become a contract with him, if the seller pleased. Supposing this incident had been expressed on the face of the note, there would have been no objection to it as affecting the validity of the contract, for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker, unless he disclosed

the name of his principal; if he did that, it remained a sale to the principal. Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view it will be admissible, unless it labors under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument. And upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. If all that the plaintiff contends for had been expressed, the defendants would have contracted thus: 'We buy for our principal; but if we do not disclose his name within a reasonable time, we agree that you may treat us as the purchasers.' And it cannot be said that the latter branch is inconsistent with the former." This judgment was affirmed on appeal to the exchequer chamber. *El. Bl. & El.* 1004; 96 *E. C. L.* 1004.

In *Fleet v. Murton*, *L. R.*, 7 *Q. B.* 126, the same question arose. It was a custom of the London fruit market that if brokers did not give the names of their principals in the contract, the brokers were held personally liable, although they contracted as brokers for a principal. *Cockburn, C. J.*, said: "Although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself, chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another, and giving to another rights under the contract, he himself will incur the same liability as his principal. Now, although where a party professes to contract as broker, it might *prima facie* be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of that particular trade there is that qualification of the contract (which, if written into the contract *in extenso*, would undoubtedly bind him), that qualification may, I think, be imported into the contract by evidence of the custom. The defendants here undoubtedly call themselves 'brokers,' acting for their principal.

But if the custom attaches, the non-liability which would, under ordinary circumstances *prima facie* exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the custom of the trade, evidence of which, according to all principles, is admissible to qualify the terms of a contract where not inconsistent with it."

In *Hutchinson v. Tatham*, *L. R.*, 8 *C. P.* 482, the defendants chartered a ship, signing themselves "agents to merchants." Evidence of usage was admitted in an action by the ship-owners against the defendants upon the charter-party establishing a personal liability upon the defendants, the name of the principal not being disclosed.

In *Pike v. Ongley*, 18 *Q. B. Div.* 708, the court said: "In this case the defendants are clearly not liable upon the contract itself; they were selling as agents for an owner, and, in the absence of trade usage, no liability would attach to them. The evidence came to this, that if the name of the owner was not given in, or at the time of the making of the contract, the buyer had the right to treat the broker as principal; and on such a custom I should say that even if the owner's name were disclosed after the making of the contract, the buyer might sue either the principal or the broker. The meaning of this custom is that where the principal's name is not disclosed in or at the time the contract is made, the buyers reserve to themselves the right of suing the broker or factor. By the terms of the document itself the owner is liable; the custom says the broker shall be liable also; there is nothing in that which is inconsistent with the contract, though it would be inconsistent if the custom were to exclude the liability of the owner."

In *Imperial Bank v. London, etc., Docks Co.*, 5 *Ch. Div.* 195, a usage of the London dry-goods market was recognized, by which a broker who buys for an undisclosed principal is personally liable to the seller for the price of the goods.

In *Barrow v. Dyster*, 13 *Q. B. Div.* 635, a written contract made by brokers on behalf of undisclosed principals for the sale of hides, provided that, "If any difference or dispute shall arise under this contract it is hereby mutually

**XI. USAGE NOT ADMISSIBLE TO VARY CONTRACTS—1. The Rule Stated.**

—Usage is not admissible in evidence to vary the express terms of a verbal or written contract.<sup>1</sup> This rule, as also the rule admitting proof of usage to explain the terms of a contract, is merely an application of the general principle of the law of evidence, that parol evidence is not admissible to vary the terms of a written contract.

Parties by their contracts may disregard any usage or custom ordinarily prevailing in their transactions, and if they make the terms of their contracts contrary to the usage, they must have intended their contract to exclude the usage; in such a case, therefore, evidence of usage would give the contract a meaning different from the clear purport of its terms, and the intention of the parties.<sup>2</sup>

**2. Difficulty of the Subject.**—The difficulty in considering the subject is not with the general principle as above stated, but with the application of the principle to the facts of particular cases. In considering whether in a given case evidence of a usage would, or would not, vary the terms of a contract, a court may be influenced to some extent by its views as to what the policy of the law should be in regard to the admissibility of usages in general. If the court thinks that the admission of usages should be encouraged, it will be more likely to admit a usage to influence a contract in a doubtful case than if it were not favorable to the admission of usages as a variety of evidence. The views of different courts vary in respect to such matters, and the views of the same court often undergo a change. In admitting usages, the earlier authorities in *England* and *America* were more liberal than the later ones have been. The extracts in the notes contain the substance of useful cases in this connection.<sup>3</sup>

agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers." Under this contract the court held that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach, was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause.

In *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; 27 Am. Dec. 158, it was held that evidence of usage in a particular trade is admissible for the purpose of annexing incidents to a written instrument, concerning which the instrument is silent; thus, evidence may be given to show that, according to the

known usage of the trade, cotton is sold by sample; and then it may be shown by parol that a particular sale of cotton was a sale by sample, although the entry in the broker's book, the bought-and-sold note, and the bill of parcels are silent in that respect.

1. *Pickering v. Weld*, 159 Mass 522.

2. 1 Greenl. Ev. (14th ed.), § 292.

3. In *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, the court said: "It is to be regretted that the decisions of the courts defining what local usage may or may not do have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them; and on this account, mainly, the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle as in the application of the rules of law. The

proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this intrinsic evidence. It does not go beyond this; and is used as a mode of interpretation, on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' 'If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable. These rules,' says Chief Justice Wilde in *Spartali v. Benecke*, 10 C. B. 222; 70 E. C. L. 221, 'are well settled, and the difficulty that has arisen respecting them has been in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved.'

In *Kirkland v. Nisbet*, Scotch App. Rep. 876, the controversy was in regard to the construction of certain correspondence between the parties. A witness was asked what an employer "would be entitled to expect" from a certain letter in the correspondence. The court refused to allow the question. On appeal to the House of Lords, the following discussion occurred. The counsel of the appellants argued that the question was competent. "We wanted to prove that six hundred tons of the sugar had been actually sold to us by the respondents, and that this was the meaning of the word 'contracted,' in the letter of the 11th of December, 1850. We produced a witness to prove the mercantile usage, and asked him that question." Lord Chancellor Campbell: "If you had asked the witness about the mercantile usage, that might have been well; but how could you ask him such a question as this: 'What would the employer be entitled to expect from that letter?' That was asking the witness to explain or construe a written document." Counsel: "What we wanted was

merely to explain the technical meaning of the word 'contracted,'" Lord Chancellor Campbell: "But you must defend the question as put. The question was, in substance, 'What is the meaning or just construction of the whole letter?'" Lord Chelmsford: "What a witness in such cases is called on to do, is merely to explain some technical terms to assist the court, and the court then construes the document. You might have asked the witness what was the technical meaning of the word 'contracted,' if it had any peculiar meaning. But you ask him the meaning of the whole written contract. You are not to use the witness as an interpreter, but only as a guide." Lord Chancellor Campbell: "You are not to substitute the witness for the judge." Counsel: "We can carry the argument no further." Lord Chancellor Campbell: "My lords, I think that this question was very properly overruled by the learned judge, because, in effect, it sought to obtain the opinion of the witness on the construction of a written document. There is no doubt that evidence may be competently given of mercantile usage to explain the meaning of peculiar terms used in trade. But what is the meaning of a written document is not a question proper to put to a witness. The question here put was substantially this: What was the contract—what is the construction of the document? That was an improper question, and I have no difficulty in recommending your lordships to affirm the unanimous judgment of the learned judges in *Scotland*, which overruled it."

In *Lamb v. Henderson*, 63 Mich. 302, the court said: "The decisions in this state are uniform that custom cannot change a definite contract, and that no custom is binding which is not certain, definite, uniform, and notorious. *Harvey v. Cady*, 3 Mich. 431; *Erwin v. Clark*, 13 Mich. 10; *Hutchings v. Ladd*, 16 Mich. 493; *Advertisers, etc., Co. v. Detroit*, 43 Mich. 116; *Ledyard v. Hibbard*, 48 Mich. 421; 42 Am. Rep. 474; *Greenstine v. Borchard*, 50 Mich. 434; 45 Am. Rep. 51."

In *Lamb v. Klaus*, 30 Wis. 94, it was said that it is not in cases alone where the incidents to be annexed to the contract by usage are in conflict with the express language of the instrument, that the usage is excluded, but that it is also excluded where the provisions of the contract are such as reasonably

Bearing in mind the cardinal principles that the proper office of a usage is to ascertain the meaning and intention of the parties to a contract, and that usage may be admissible to explain what is doubtful, but never to contradict what is plain, we proceed to consider the cases decided in different contractual relations.

and fairly to imply some different agreement or intention as between the contracting parties.

In *Dixon v. Dunham*, 14 Ill. 324, the court said: "No usage or custom can be admitted to vary or control the express terms of a contract, but they may be admitted to determine that which by the contract is left undetermined. The parties by the contract may abrogate any custom, no matter how ancient or uniform, but such custom cannot abrogate the terms of a contract. Whenever there is a conflict, the contract must control. The reason why a custom is allowed to be proved for the purpose in interpreting a contract, is because both parties are supposed to have been acquainted with it, and to have contracted in reference to it. The custom does not become a part of the law of the place, but rather a part of the contracts which are to be performed at the place; and hence, if the usage is excluded by the contract, it cannot constitute a part of it."

In *Foye v. Leighton*, 22 N. H. 71; 53 Am. Dec. 231, it was said that a usage explains and ascertains the intent of the parties. "It cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties; for it incorporates itself into the terms of the agreement, and becomes a part of it."

In *Bigelow v. Legg*, 102 N. Y. 653, it was said that, "Custom or usage cannot control the legal rules applicable to the construction of a contract, and evidence that by a custom a contract means something different from what its terms clearly import, is inadmissible."

In *Willmering v. McGaughey*, 30 Iowa 205, it was said that while extrinsic testimony may be received to aid the court in construing a contract where it refers to principles of science or arts, or where it uses the technical phraseology of some profession or occupation, or common words used in a technical sense, or uses new and unusual words, such testimony is not admissible where it is not apparent that the

language is used in any such new, peculiar, or technical sense; and the contract will be construed according to the established usage of language as applied to the subject-matter.

In *Snelling v. Hall*, 107 Mass. 134, it was held that the evidence offered by the defendants as to the local usage of the coal trade was properly rejected. "It was an attempt, not to show a peculiar mode of doing business, but a local rule of law in the interpretation of written contracts, giving to them a meaning different from the obvious purport of the terms in which they are expressed. This, the law does not allow."

In *Partridge v. Phoenix Mut. L. Ins. Co.*, 15 Wall. (U. S.) 573, the court said: "When usage is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing, and are expressed in language neither technical nor ambiguous, and, therefore, needing no such aid in its construction, it amounts to establishing the principle that a custom may add to, or vary, or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts."

In *Randolph v. Halden*, 44 Iowa 327, it was held that a contract cannot be controlled by a custom which the parties have expressly excluded, or which they have excluded by necessary implication, as by providing that a thing which custom effects shall be done in a different way. Where the terms of a contract are plain, custom, even under that very contract, cannot be permitted to affect materially the construction to be placed upon it. The custom of miners to remove the pillars and supports in a mine cannot be permitted to control a contract, when the effect of allowing a custom to leave the mine in good working order, would be

3. **Usages of Banks and Regarding Commercial Paper, etc.**—The various usages of banking institutions have, in almost all cases, been sustained by the courts, as entering into the contracts of parties doing business with them. But banks are equally subject to the law with others, and their usages can have no legal validity when in contradiction to the terms of a contract. Usages have been rejected as open to this objection, allowing the bank to disregard the express terms of powers of attorney, or the forms of indorsement, or to extend or limit the scope of words whose meaning is settled by legal decisions.<sup>1</sup>

4. **Usages of Carriers.**—In contracts between carriers and their customers usages have frequently been set up to modify or limit the terms of the agreements; but have almost uniformly been rejected. And whether the contract may have been an express one and evidenced by a bill of lading, or one implied from the mere receipt of goods for transportation without an express contract, the result is the same. Whenever the effect of the usage is to vary or contradict the terms of the express or implied contract of

to render nugatory express stipulations of the contract.

In *Smyth v. Ward*, 46 Iowa 339, it was said that customs are subordinate to contracts, and will not control or affect the rights of parties whose contracts contain conditions not in harmony therewith. In *Duncan v. Green*, 43 Iowa 679, it was held that a contract will not be set aside upon proof of a custom in conflict with its provisions. In *Phillips v. Starr*, 26 Iowa 349, it was said that a custom cannot control the express stipulations of the parties.

1. *English Bank v. Barr*, 31 Abb. N. Cas. (N. Y.) 7. In *First Nat. Bank v. Taliaferro*, 72 Md. 164, certain blank powers of attorney executed by T and by her delivered to V, merely authorized V to sell certain registered *Virginia* consols belonging to T, and by her intrusted to V for sale. In an action by T against a bank in Baltimore, to which V had hypothecated the said consols as security for his own debt thereto, it was held that evidence was inadmissible to prove that, according to a custom or usage among banks, bankers and brokers in Baltimore, registered *Virginia* consols were treated as negotiable, when accompanied by powers of attorney like those executed by T. "No custom or usage prevailing amongst banks, bankers and brokers could possibly change the legal character of the powers of attorney, and convert them into totally different instruments, capable of effecting results

never contemplated by the person who executed them."

In *Shaw v. Spencer*, 100 Mass. 393; 1 Am. Rep. 115; 97 Am. Dec. 107, it was held that the insertion of the word "trustee," after the name of a stockholder, indicates and gives notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The circumstance that stock certificates issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. "A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts."

In *Security Bank v. National Bank*, 67 N. Y. 458; 23 Am. Rep. 129, which was an action by a bank to recover the amount paid upon a raised check which had been certified by it, the court rejected evidence that, by the custom and common understanding of banks and merchants, the word "certified," at the time of the certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged. "The nature and meaning of the contract, evidenced by the certification of a check, was clearly defined by law, when the plain-

carriage, it cannot be received. The cases embrace usages to exempt the carrier from liability for injury to goods in its charge, or for goods lost, or for misdelivery or non-delivery, and other instances.<sup>1</sup>

tiff certified the check in question. The offer to prove that the contract of certification, by the understanding of the bankers and merchants, had a larger scope and meaning than it had by settled legal construction, was inadmissible."

In *People's Bank v. Bogart*, 16 Hun (N. Y.) 270, it was held that the acceptances in the case, being valid obligations, and no express warranty having been made in regard to them, no implied warranty could be established by proof of any local usage or custom, as to what acceptances were understood to be, in the commercial community of *New York*. See also *Allen v. State Bank*, 1 Dev. & B. Eq. (S. Car.) 3.

1. *Usages of Carriers*—In *Coxe v. Heisley*, 19 Pa. St. 243, it was held that a common carrier, who received into his canal-boat certain furniture to be carried from Lycoming county to Philadelphia, a portion of which became wet whilst in his charge, no express contract existing limiting his responsibility, cannot show that a usage exists, in relation to carriers on the Pennsylvania canal, that the dangers of navigation, fire, and unavoidable accidents, are excepted from the risks of common carriers. "The contract between the parties, if construed by the common law of the land, bound the defendant to deliver the goods in Philadelphia in as good order as he received them, unless he was prevented from doing so by the act of God, or by a public enemy. He undertook to show that this contract was not to be performed according to its legal import, but according to a custom which prevailed among that class of carriers who are engaged in business on the Pennsylvania canal. The custom, in this case, is set up to defeat the contract. The receipt of the goods implied a promise to deliver them safely in Philadelphia; implied it as clearly as such a promise could be expressed in words or writing. Now, a custom cannot be received to defeat the essential terms of a contract; 3 Kent. Com. 360. The cases which rule this principle are mostly upon express contract; but it cannot be doubted that where a well-understood and clearly-defined rule of law implies

a contract from the act of the party, from the consideration paid to him, and from the known duties of his calling, such a contract is, and ought to be, no less secure against a local usage inconsistent with it, than the same contract would be if made in express words. Our own decisions on this subject have not been very consistent. This court, in the early cases, stood over the law and guarded it against invasion faithfully enough. A rule among merchants to charge interest for goods sold after six months; *Henry v. Risk*, 1 Dall. (U. S.) 265; a usage of plasterers to charge for their work at a certain rate; *Jordan v. Meredith*, 3 Yeates (Pa.) 318; a custom to re-enter for a forfeiture, incurred by non-payment of rent; *Stoevoer v. Whitman*, 6 Binn. (Pa.) 417. All these were held to be inadmissible. But in 1822 a custom on the Ohio river was permitted to vary the responsibility of a carrier there, *Gordon v. Little*, 8 S. & R. (Pa.) 533; and nine years later a usage in Philadelphia was allowed to add a warranty to a contract of sale, which in fact and in law did not embrace one. *Snowden v. Warder*, 3 Rawle (Pa.) 101. In both these cases Chief Justice Gibson dissented from a bare majority, and his warning, though unheeded at the time, was remembered when the question came up again. *Rapp v. Palmer*, 3 Watts (Pa.) 179. Our latest decisions are consistent with the oldest. The law of *Pennsylvania* may therefore be considered as settled in accordance with reason, and with the judicial authorities of other commercial states. A local usage, if it be ancient, uniform, notorious and not unreasonable, may enter into and become part of a contract which is to be executed at the place where the usage prevails; but here, as elsewhere, it is checked by this wholesome limitation, that it must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

In *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200, it was held that where a shipper and a carrier of goods have entered into a valid contract, the one to load the other's vessel with a cargo of coal, at a specified port, and to pay

freight at a certain rate per ton, and the other to carry such cargo to the place of contract for that price, a practice among persons engaged in that kind of business at such place of contract, to treat such contract as binding upon the parties only as might suit the convenience of either of them, cannot be upheld as a commercial usage to affect such written contract, because of its repugnancy thereto, and to the principles of law. "It nullifies the contract and subverts the very objects for which it was entered into. A contract which is absolute in terms, it makes conditional; an obligation expressly enjoined upon both parties, it makes optional with either. . . . Instead of subserving the purposes of the parties, as disclosed in their contract, it dominates over and controls them. . . . It is difficult to understand how such a practice could ever have assumed the proportions necessary to give it the cognomen of a commercial usage in a commercial community; it is less difficult, however, to understand that it could never have the sanction of law." In *The Reeside*, 2 Sumn. (U. S.) 567, Judge Story held that evidence was not admissible to vary the common bill of lading, by which the goods were to be delivered in good order and condition, the danger of the seas only excepted, by establishing a custom, that the owners of packet vessels between New York and Boston, should be liable only for damage to goods occasioned by their own neglect.

In *Cox v. Peterson*, 30 Ala. 608; 58 Am. Dec. 145, which was an action against the owners of a steamboat, as common carriers, for failing to deliver goods at the place specified in their bill of lading, it was held that evidence of a custom among the steamboat men to ascend the river as high as the stage of water in it permitted, and then to land their cargo and deposit the goods in warehouses, is not admissible for the defendants. Its plain effect would have been to vary or contradict the written contract.

In *Boon v. Steamboat Belfast*, 40 Ala. 184; 88 Am. Dec. 761, it was held that the owners of a steamboat were liable, as common carriers, for a loss by robbery; and where the only exception specified in the bill of lading was "dangers of the river," parol evidence could not be received to show a custom among the persons who were engaged in navigating the river, which exempted

the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. "The decision in *Steele v. McTyer*, 31 Ala. 677; 70 Am. Dec. 516, lays down a contrary principle; and so much of that decision as holds that parol evidence is admissible, to show that by a custom existing on a particular river, flatboatmen were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception, being in opposition to the principle announced in this opinion on that question, is overruled. *Sampson v. Gazzam*, 6 Port. (Ala.) 123; 30 Am. Dec. 578, has been so often recognized and followed by this court, in cases involving the identical question, that the principle established by it must now be regarded as the settled law of the state, in its application only to cases of the particular class to which it specially relates; we are unwilling to extend its application beyond this limit." Other *Alabama* cases upon this point are *Hibler v. McCartney*, 31 Ala. 501; *Ezell v. Miller*, 6 Port. (Ala.) 311; *Ezell v. English*, 6 Port. (Ala.) 307; *McClure v. Cox*, 32 Ala. 617; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135; 24 Am. Dec. 716; *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145.

In *Stinson v. Jackson*, 58 N. H. 138, the defendants offered to prove an established custom of express carriers to deliver packages to the proprietor of the store, or shop, etc., named in the direction, whenever the person to whom the package is addressed is not there found, and that such delivery satisfies the terms of their undertaking. The court said that the liability of common carriers continues until delivery of the goods at their destination. "The agreement in this case was expressed and in writing, and evidence of usage would not be competent to vary its terms; but if such usage was known to the plaintiff, or was so established and notorious as to be presumed to be known to him, and that he contracted in reference to it, evidence of it, and that the defendants delivered the package according to such usage, might be introduced to show his understanding of the mode of delivery by the defendants, and that they had performed the contract according to its terms."

In *Collender v. Dinsmore*, 55 N. Y.



**5. Usages Between Employer and Employee—*a*.** IN CONTRACTS FOR WORK AND LABOR.—The cases involving usages to vary contracts for work and labor chiefly embrace questions growing out of agreements made between builders and their customers. Workmen in particular crafts are apt to use words and expressions relating to their craft in a different sense from that which they would usually bear. But agreements upon matters of workmanship, measurement, number, quality, etc., when expressed in clear terms, cannot be varied by proof of a usage inconsistent with the terms used.<sup>1</sup>

***b*.** IN CONTRACTS OF HIRING.—Local usages in reference to contracts of hiring have been passed upon by the courts, and uniformly rejected when in conflict with the terms of the agreements

200; 14 Am. Rep. 224, the court held that the meaning of the letters "C. O. D.," as used in an express receipt, was so well known and established that usage could not be introduced to give them a different meaning.

In *Simmons v. Law*, 3 Keyes (N. Y.) 219, which was an action to recover the value of a quantity of gold-dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered, an attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading, by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, said: "A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined." See also *Aymar v. Astor*, 6 Cow. (N. Y.) 266; *Farmers', etc., Bank v. Erie R. Co.*, 72 N. Y. 188; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 312; *Bazin v. Steamship Co.*, 3 Wall Jr. (C. C.) 229; *McGovern v. Helsenbuttel*, 8 Ben. (U. S.) 46; *Sager v. Portsmouth R. Co.*, 31 Me. 228; 1 Am. Rep. 659; *Martin v. Union Pac. R. Co.*, 1 Wyoming 143; *Phillips v. Briard*, 1 H. & N. 21; *Wardell v. Mourillyan*, 1 Esp. 693; *Hayton v. Irwin*, 28 W. R. 138.

1. In *Corcoran v. Chess*, 131 Pa. St. 356, it was held that where a mason contracts in writing to do work at a certain price per cubic yard, the contract is not to be affected by evidence of a usage for "masons' measurement,"

a mere usage of trade, recent in its date, and not general in its application. "A cubic yard means twenty-seven cubic feet; and when the parties have used this term in their contract, it must be presumed, in the absence of evidence to the contrary, that they understood it in its ordinary and popular meaning."

In *Sweeney v. Thomason*, 9 Lea (Tenn.) 359; 42 Am. Rep. 676, it was held that in suit upon a contract to pay "eight dollars per thousand for brick in the wall," proof of the usage or custom that the number of brick in the wall was to be ascertained by measurement, and not by actual count, is incompetent. "The terms of the contract are not ambiguous. The words and terms of the contract are not terms of art having any special signification or meaning different from their ordinary or popular meaning. The number of brick should be counted, but if not practical to ascertain the number by actual count, there can be no objection to adopting estimates based upon measurement, as the best means of approximating the number."

In *Cook v. Hawkins*, 54 Ark. 423, it was said that the fact that plasterers were in the habit of slighting their work, and violating their contracts, by doing "drawn work" when three-coat work was contracted for, could not excuse the violation of such a contract.

In *Chambers v. U. S.*, 24 Ct. of Cl. 387, it was held that where a contract provides that the price named per square yard of plastering work "will include all surfaces, whether curved or flat, all edges, angles, and corners, whether salient or reentrant," the language is too plain to admit of a custom being implied, whereby a curved sur-

between the parties. The cases embrace usages to terminate at pleasure a contract for a definite period; usages respecting the character of service, and the modes of payment, and other instances.<sup>1</sup>

face is computed as being equal to double the plane surface of the area. See also *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407.

In *Pavey v. Burch*, 3 Mo. 314; 26 Am. Dec. 682, P. agreed to pay B. "seven dollars per thousand for making and laying brick, counting the neat brick in the building." B. introduced witnesses who testified that, "The rule known and established among masons for measuring their work and ascertaining the number of neat brick in a building, was to ascertain the number of cubic feet, by multiplying the aggregate length of the walls from out to out, by the height of the story, and that product by the thickness of the wall (which would give the cubic feet in the wall), counting the corners twice, and then, by multiplying the number of cubic feet thus ascertained, by twenty-two and a half, the product would be the number of neat brick." The case was reversed. "The covenant is to be constructed according to the plain and obvious meaning of the terms used by the community at large, and not according to their meaning as used among brick-masons."

In *Holmes v. Stummel*, 15 Ill. 412, a contract required a person to clear, grub, and pile the brush on all of a certain piece of land; evidence that it was not usual in the neighborhood to "grub" such lands, or that a farm would be better without having them grubbed, was held inadmissible. "The court below erred in admitting evidence showing that it was not usual to grub ravines such as this, and that it was thought to be better for the farm not to have them grubbed. H. had a right to contract to have the whole land grubbed as he did. Whether it was a matter of utility in his judgment or of mere taste, it was his privilege to differ with others on that subject. . . . The fact that he had made a contract to have that portion of his land grubbed, showed that he chose to differ with those who thought it better not to have it done."

In *Harper v. Pound*, 10 Ind. 32, the contract was to clear land.

In *Harvey v. Cady*, 3 Mich. 431, the agreement was to dig a ditch.

In *Charlton v. Gibson*, 1 C. & K.

541; 47 E. C. L. 540, the controversy was as to unmining stones.

In *Detroit Advertiser*, etc., Co. v. *Detroit*, 43 Mich. 116, the contract was held to exclude certain "figure work" used by printers and in newspaper work.

Other similar cases are *Fellows v. New York*, 17 Hun (N. Y.) 249; *Wheeler v. Nurse*, 20 N. H. 220; *George v. Bartlett*, 22 N. H. 496.

1. *Contracts of Hiring*.—In *Sweet v. Jenkins*, 1 R. I. 147; 36 Am. Dec. 242, which was an action upon a contract under which a person agreed to work for another for a certain specified time, evidence of a local custom that either party may terminate such a contract at will, without giving a reason for so doing, was rejected. "This court has permitted evidence of a usage to discharge, on giving a fortnight's notice, to be proved in the trial of an action for the breach of a contract similar to that described in the declaration; for in such a case a contract, absolute on the face of it, is complete at its inception, and may well stand consistently with the usage, just as a deed, absolute on the face of it, may stand with a condition existing in parol, which makes it a mortgage. But in the case at bar, the contract and the usage cannot stand together. Either the contract must prevail and make void the usage, or the usage must prevail and make void the contract. And can there be a doubt which of these alternatives should be sustained at law? At law, the contract is valid—is a legally binding contract from its inception, and shall that law permit a usage to be proved, which makes it void at and from its inception? The contract described in the declaration, is not a contract made with reference to the usage, but against it. The contract described, is to labor for a year, but the usage terminates it at will."

In *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374, the court rejected evidence of a usage to construe a provision in a contract of hiring, that the hirer should "lose the negro's lost time," as meaning that the hirer should lose the time under certain contingencies, not under others.

In *Cooper v. Purvis, 1 Jones (N. Car.) 141*, which was an action upon a contract of hiring, there was proof of a long and well-established custom in the county, embracing the place of the transaction, and the residences of the parties, to allow a certain sum to the hirer of a woman who was not able to work for the full period of her hiring. "The decisive objection to the allowance of such neighborhood customs is the uncertainty in relation to the proof of them, and the great inconvenience of having local laws, in any part of the state, to regulate matters which ought to be the subjects of express contracts. The parties here entered into an express and specific contract, which was neither general nor doubtful, and therefore left nothing to be presumed or inferred."

In *Bedford v. Flowers, 11 Humph. (Tenn.) 242*, a slave was hired to be employed in cutting cordwood and for no other purpose. The hirer put him to assist in the removal of cordwood in a boat and on rafts, whereby he was drowned. Evidence that it was the custom, and considered part of the business of hands employed in cutting cordwood, to take it to the highlands when necessary, was rejected as varying the contract. The express stipulation in the contract, restricting the service of the slave to cutting cordwood alone, and excluding all other kinds of service, manifested the intention of the parties to exclude the operation of usage, and such evidence would be repugnant to and inconsistent with the written contract.

In *Petty v. Gayle, 25 Ala. 472*, it was held that when a slave, who is hired for one month, does not work the full term agreed upon, no recovery can be had upon the contract, as it is entire; and evidence of a particular usage to pay *pro rata* on such a contract cannot be received, since the usage, if proved, would vary the terms of the contract. "We have said nothing as to the evidence of a usage in Mobile to pay *pro rata* in contracts of hire, where the slave fails to work the full time agreed on, for the reason that, if proved, it could not be recognized. A particular usage may be given in evidence to influence the construction of a contract, or to explain the sense in which words or terms are used; but when the contract is established, and is not governed by the commercial law, it is not allowable to change its charac-

ter, and attach to it conditions in opposition to the established rules of law. *West v. Ball, 12 Ala. 340.*"

In *Metcalf v. Weld, 14 Gray (Mass.) 210*, the plaintiffs, seamen, entered into shipping articles with the defendants, owners of a vessel, by which they were entitled to receive a stipulated sum as advance wages. The custom relied upon in the defense was a custom for the owners to pay this advance to their shipping agent, who was employed by them to procure a crew, and for him in his turn to pay it to the boarding-house keeper who brings the seamen to him. "It is not a question of the meaning of terms in a contract which have a meaning peculiar to the port of Boston, and known to the contracting parties. The contract is intelligible and complete in itself. It obliges the defendants to pay, and entitles the plaintiff to receive, a certain sum of money at a certain time. Under such a contract, we do not think the mode of payment is the proper subject of a custom, and no authority has been cited in support of such a proposition. It would amount to a custom of seamen to employ a certain class of agents—a custom for the owners to transfer the direct personal responsibility resting upon them to another, and perhaps an irresponsible party. There are many usages of trade which have nothing to do with the contracts of parties, and which cannot be set up to modify or control them. It is very customary for merchants to pay their debts by checks upon a bank; and this may be very well known to persons who deal with them, and yet no one is bound to receive a check in discharge of a promise to pay money. It may be a custom in some kinds of business to pay workmen in orders for goods, or in goods kept for sale by their employer, or not to pay wages punctually at the time they are due, and the fears or necessities of the laborer may induce him to yield to the custom and accept payment in a manner or at a time convenient to the employer; but it would hardly be contended that such a custom could be regarded in determining the legal effect of a written agreement. We fear it would not be difficult to prove a custom in many ports to defraud and impose upon seamen in various ways—a custom to subject their persons and property to a kind and degree of control which has its origin only in their ignorance and vices—but these are not the customs

**6. Usages in Contracts of Insurance—*a.* USAGES ASSERTED BY THE INSURER.**—In the first class, the usages rejected as varying the terms of the policy, include various usages attempted to be set up by insurance companies for the purpose of limiting their liability as determined by the policies of insurance; usages to pay less than the amount due in certain cases, and to add conditions not expressed in the policy.<sup>1</sup>

***b.* USAGES ASSERTED BY THE INSURED.**—So, also, usages have been offered by the insured to relieve themselves from the consequences of the non-performance of some act required of them by

which give an interpretation to their contracts."

**1. Usages Asserted by the Insurer.**—In *Blackett v. Royal Exchange Assur. Co.*, 2 C. & J. 244, it was held, in an action on a policy of insurance on a ship, her tackle, apparel, boat, and other furniture, that evidence of a usage that boats slung on the outside of the ship, on the quarter, are not protected, is inadmissible, as contradicting the express terms of the contract. The objection to the parol evidence is, that it was not to explain any ambiguous words in the policy—any words which might admit of doubt—not to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.

In *Insurance Co. v. Wright*, 1 Wall. (U. S.) 456, it was held that where a written contract is susceptible on its face of a reasonable construction, resort cannot be had to evidence of custom or usage to explain its language. And this general rule of evidence applies to an instrument so loose as an open or running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way. Rating of vessels in insurance policies means the determination of their relative state or condition in regard to their insurable qualities. The usage that the rating referred to in the policy was that on the register of the company, if it is admissible at all, can only apply to the case of a vessel which has an actual rating on the books of the company so recent as to be recognized as a valid rating.

In *Lewis v. Thatcher*, 15 Mass. 431, which was an action upon a policy on

property on board "the Swedish brig *Sophia*," it was held that these words amounted to an absolute warranty that the vessel was Swedish; and that no parol evidence was admissible, to show that anything different was thereby intended by the parties to the insurance. "The cases mentioned, in which the usage of trade has been held to control the description of a voyage in the policy, are by no means analogous. The underwriter and the assured are both presumed, by the law, to make their contracts with reference to such usages; and they, in fact, make a part of the contract. But there cannot be a usage, by which a warranty that a vessel was neutral, should be held to mean that she was not neutral, but only pretended to be so."

In *Insurance Co. v. Wright*, 1 Wall. (U. S.) 456, in which a usage as to the rate of premium was offered, the Supreme Court of the *United States* said: "The usage attempted to be set up cannot be sustained. It contradicts directly the written contract. It proposes to set aside all that was said about the rate of premium, and substitute the discretion of one of the parties to the instrument. It goes upon the assumption that all that is written in the contract which fixes, or ascertains, or limits the amount that may be claimed for premium of insurance by the company is nugatory, and that the whole field is left open, and the power placed in the hands of one of the parties exclusively. No such usage can be admitted thus to contradict, vary, and control this contract."

In *St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co.*, 5 Bosw. (N. Y.) 238, the court held that proof of a usage and custom, however uniform and universal among insurance companies in the city of New York, not to require a reinsuring company to pay the full

premium which, by the policy of re-insurance, it is stipulated shall be paid, cannot legally operate to impair the effect of an agreement to pay a fixed rate settled by the policy. A written agreement, which is in no wise of ambiguous or uncertain import, is to have effect according to its terms, and the parties are bound thereby; and the express stipulations of parties cannot be overruled or set aside by any custom not to require their performance according to their tenor. This is not a question regarding the mere incidents to the defendants' undertaking, but it is a question whether a written agreement is itself binding.

In *M'Gregor v. Pennsylvania Ins. Co.*, 1 Wash. (U. S.) 39, the court held that the alleged custom in Philadelphia to strike off one-third of the gross freight for charges and to pay two-thirds only to the assured, in a policy on freight, where a total loss has occurred, is in direct opposition to the terms of the policy, and is invalid. "The usage of a particular trade, is supposed to be known by those who engage in that trade; it is or ought to be equally well known by the person who insures against the risks incident to that trade, as to the person engaging in it. But that which is called a usage, in this case, is nothing more than a rule established by a particular class of men, to control a contract entered into by them with others, not privy nor consenting to the rule; and who are and can be under no legal obligation to know of its existence. It is a law governing this species of contract, different from the general law upon the subject, and varying the general rules of evidence."

In *Swamscot Machine Co. v. Partidge*, 25 N. H. 369, a policy provided that the company should "settle and pay to the assured all losses within three months after notice shall have been given as aforesaid, and that the payment of the loss ascertained should be made within the time prescribed by the charter, without deduction from the sum decreed by the adjustment," a usage on the part of the company, in case of a total loss, to retain of the amount of the ascertained loss two per cent. per month on the balance of the premium-note, from the date of the last assessment upon it until the expiration of the term of the policy, was rejected. "The object and effect of the proof offered of the usage were

plainly to vary and limit the plain and unequivocal terms of the policy, and to control and limit their construction and legal effect. To give the evidence of the usage the effect claimed for it, would be to allow the exact converse of the true and well-settled rule of law upon this subject to prevail. It would be to hold that while the contract, in express and unmistakable terms, provides that the whole loss shall be ascertained and paid to the assured, the usage shall control the express terms and give them the effect of a contract for the payment of a sum less than the whole loss sustained. It would be to allow the usage to control an express written contract and to limit its terms and effect, while it is well-settled—in accordance with sound reason, too—that a usage shall be regarded as waived by the express terms of a contract when they are in conflict with each other."

In *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.) 632, a policy contained no condition requiring the assured to give notice of changes in adjoining premises. On the trial, evidence was rejected by the trial court, which went to show that by a usage in New York, where the contract was made, upon the occurring of any circumstance whereby the risk was increased by the act of the assured, after the effecting of the insurance, notice thereof was to be given to the insurers, so that they might have the option of continuing the policy or annulling it. On appeal the ruling was affirmed, on the ground that "it could not be given in evidence to alter the legal operation and effect of the policy."

In *Rankin v. American Ins. Co.*, 1 Hall (N. Y.) 619, a marine insurance company bound themselves to pay all damage to the property insured arising from "the perils of the sea." It was held incompetent for the company to prove that, "by the established usage of trade in the port of New York and other ports, the master of the vessel is in all cases responsible for any damage sustained by the goods delivered by him to the owner or consignee, unless there has been an actual survey made on board the vessel by the wardens of the port or other officers, and on such survey the surveyors shall have found that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that, by a similar usage as between the assurers

their contract with the insurer; or to excuse the misrepresentation or suppression of some material fact; or to extend the liability of the insurer beyond the terms of the policy. In all such cases, the usages offered have been rejected.<sup>1</sup>

and the assured, the survey so made by the wardens is a document indispensable to be produced in order to charge the underwriters, and that the preliminary proof is deemed insufficient unless such document be established as part of it."

In *Macomber v. Howard Fire Ins. Co.*, 7 Gray (Mass.) 257, it was held that under a policy of insurance against fire on a stock in trade, which provides that a use of the premises for the purpose of keeping or storing any of the articles denominated hazardous in the condition annexed to the policy, shall avoid the policy, unless otherwise specially provided for, and in which conditions "rags" are enumerated as hazardous, is avoided by the keeping of rags as part of the stock; although it is usual for shopkeepers, having a general stock of goods like that insured, to keep rags in the same manner. "The effect of the evidence to prove a usage to keep rags in a country store was to control the written agreement of the parties. The evidence was therefore incompetent."

#### 1. Usages Asserted by the Insured.—

In *Smith v. Mobile Nav., etc., Co.*, 30 Ala. 167, it was held that parol evidence of a custom could not be received to show that a marine policy of insurance on goods shipped from New Orleans to Mobile, the language of which is plain and unambiguous, covers the overland transportation of the goods by railroad. "If the policy had contained the distinct statement that the insurers only agreed to indemnify the owners of the goods while they were waterbound, no one, we apprehend, would contend that these terms could be shown by usage, or local custom, to embrace land risks. To allow such evidence, would be to change the entire character of the written contract."

In *Cande v. Citizens' Ins. Co.*, 4 Fed. Rep. 143, the question was whether evidence was admissible of an alleged custom of insurance companies, alleged to have been known to the agent of the plaintiff, that upon the happening of a future event the policy should become void, which condition was not inserted among the numerous

detailed and clearly-expressed conditions subsequent to the policy. The court held that it was not admissible to add to the carefully-drawn and accurately-defined provisions of an express contract, like an insurance policy, a new stipulation contained in an unexpressed custom.

In *Van Alstyne v. Aetna Ins. Co.*, 14 Hun (N. Y.) 360, the owner of a canal boat procured a policy of insurance of the defendant on his boat, the policy providing that it should become void if any other insurance should be made upon the boat. Subsequently, he procured another policy to be issued upon the boat by another company. In a suit against the first company, it was held that evidence was not admissible to show a custom to take out what is called a "trip policy," whereby a party takes out a policy for a particular trip he desires to make, and that according to the custom the time policy is suspended during the life of the trip policy, and that such a policy is not considered as "other insurance" in the sense these words were used in the first policy. Such a usage would be in direct opposition to the terms of the policy.

In *Odionre v. North England Mut. M. Ins. Co.*, 101 Mass. 551, it was held that neither the oral statement of the president of an insurance company, at the time of issuing a policy on a vessel, that the violation of a warranty not to enter certain waters or ports would not avoid the policy; nor a usage, among the underwriters of the port where the insurance is made, to consider such a violation as not avoiding a policy, is admissible, in an action on the policy to control or vary its construction. The usage which was offered to be proved is inadmissible. *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.) 305. It is merely a usage among underwriters in Boston to construe a clause of the policy in a particular way. There is nothing in this language so technical or peculiar, or having such application to a particular branch of business, or a particular method of managing business, as to require the evidence of usage to explain it, within the principles stated in *Eaton v. Smith*, 20 Pick.

**7. Usages Between Landlord and Tenant.**—The usages rejected, as varying contracts between landlord and tenant, relate to about the same matters as those collected in a previous section, and held to be admissible as explaining the terms of such contracts.<sup>1</sup> Thus, an agreement providing for the away-going crop may exclude proof of a usage which would otherwise give it to the tenant. Other cases pertain to contracts. And so, also, various other customary rights of the tenant may be found to be inadmissible to vary the terms of the lease; and when the agreement provides for the fixtures, evidence of usage in regard to them is necessarily excluded.<sup>2</sup>

**8. Usages in Maritime Contracts.**—In the construction of charter-parties, evidence of usage must be excluded, when its effect would

(Mass.) 150; *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354; or *Crocker v. People's Mut. F. Ins. Co.*, 8 Cush. (Mass.) 79. But the proposition is, in effect, to resort to the underwriters in Boston as authority for the legal construction of a contract containing ordinary language.

In *Farmville Ins. and Bank Co. v. Butler*, 55 Md. 233, it was held that the attempt to establish a usage in contradiction of the provision of the policy, is contrary to the best considered authorities. It is elementary law, that a custom may be established by proper evidence to show the true construction of a contract, but not to control, alter and vary it. *Foley v. Mason*, 6 Md. 49; *Murray v. Spencer*, 24 Md. 520; *Chesapeake Bank v. Swain*, 29 Md. 483.

In *Busby v. North American L. Ins. Co.*, 40 Md. 572; 17 Am. Rep. 634, the policy provided as follows: "And it is also understood and agreed by the assured, that in case the said premium shall not be paid on or before the date hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine." The court said that the plaintiff could not show that there existed a usage among the general agents of foreign insurance companies doing business in the city of Baltimore, and in the state generally, and among domestic insurance companies, to accept premiums after the time when they became due and payable by the terms of the policies.

For other instances see *Gabay v. Lloyd*, 3 B. & C. 793; 10 E. C. L. 229; *Bend v. Georgia Ins. Co.*, cited in *Ang. on Ins.*, § 25; *Crofts v. Marshall*,

7 C. & P. 597; 32 E. C. L. 646; *Hall v. Janson*, 4 El. & Bl. 500; 82 E. C. L. 500; *Hare v. Barstow*, 8 Jur. 928; *King v. Enterprise Ins. Co.*, 45 Ind. 43; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549; 32 Am. Rep. 78; *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Turner v. Burrows*, 5 Wend. (N. Y.) 541; 8 Wend. (N. Y.) 144; *Lat-tourns v. Farmers' Mut. Ins. Co.*, 3 Houst (Del.) 404.

1. See *supra*, this title, *Usages to Explain Contracts*.

**2. Usages Between Landlord and Tenant.**—In *Stultz v. Dickey*, 5 Binn. (Pa.) 285; 6 Am. Dec. 411, an agreement by a tenant that the landlord should have the away-going crop was held to exclude the custom of the country that such crop should be the property of the tenant.

In *Werner v. Footman*, 54 Ga. 128, it was held that the legal right of a landlord under an express contract for a time certain cannot be evaded by a custom.

In *Webb v. Plummer*, 2 B. & Ad. 746, in reference to a lease the court said: "Where there is a written agreement between the parties, it is naturally to be expected, that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone. The custom of the country applies to those cases only where the specific terms are unknown."

In *Stoddard v. Emery*, 128 Pa. St. 436, it was held that if the parties to a demise of land for oil and gas purposes have provided therein, by express terms, how many wells shall be put down, no implication can be raised that

be to vary or contradict the terms of the contract. The cases embrace customs of the port with reference to approaching a wharf, and unloading, and various other instances.<sup>1</sup>

any greater number are to be drilled in accordance with a custom for the most effective operations.

In *Roberts v. Baker*, 1 C. & M. 808, the question was whether a covenant in a lease whereby the tenant bound himself not, on quitting the land, to sell or take away the manure, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure and was entitled to be paid for it. The court held that it did. In that case Lord Lyndhurst said: "It was contended that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect there was no necessity for any stipulation, as, by custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part."

In *Roxburgh v. Robertson*, 2 Bligh 156, a lease contained an express provision as to the disposal of the away-going crop, and specified and regulated the particular allowances that were to be made by an incoming tenant to an outgoing one; under these provisions the custom of the country in respect to the matters referred to is excluded.

Other similar cases in which the terms of the contract between the landlord and tenant are held to exclude any custom are *Clarke v. Royston*, 13 M. & W. 752; *Sutton v. Temple*, 12 M. & W. 63; *Stafford v. Gardner*, L. R., 7 C. P. 242; *Wiltshire v. Cottrell*, 1 El. & Bl. 674; 72 E. C. L. 674; *Thorpe v. Eyre*, 1 Ad. & El. 926; 28 E. C. L. 243; *Dalby v. Hirst*, 1 B. & B. 224.

In *Webb v. Plummer*, 2 B. & Ad. 746, there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, 'in the last year of the term, to carry out the manure on parts of the fallowed farm

pointed out by the lessor, the lessor paying for fallowing the land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for foldage (a mode of manuring the ground); but the court held, as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist on that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

In *Boyd v. Shorrock*, L. R., 5 Eq. 72, a deed was made conveying certain fixed machinery, looms and other machinery, fixed or movable. In a contest as to the looms, the court said: "It is said that there is a custom in this trade that all these looms are regarded as not being fixtures, and I am asked to give credit to the evidence upon the subject. No such custom, however, I apprehend, can be produced in evidence to alter the meaning of the words of the deed, those words being that the mill shall be assigned, with all its machinery, fixed and movable. It appears to me that the parties must be bound by what has been done, and if I come to the conclusion that they have fixed those things for the term, and have treated them as so fixed, and not as things to be transported from one place to another, the case is at an end."

In *Martyr v. Bradley*, 9 Bing. 24; 23 E. C. L. 249, the lease provided for the fixtures, fastenings, etc., set up during the demise; this necessarily excluded evidence of any custom in regard to the articles.

#### 1. Usages in Maritime Contracts.—

In *Holloway v. McNear*, 81 Cal. 154, it was held, in an action against a charterer for breach of a charter-party, which recites that "a commission of five per cent. on this charter shall be paid by the vessel, after completing the loading," to the charterer, that evidence of a custom of trade, by which the charterer was not entitled to the entire amount of the commissions specified in the charter-party, will not be admitted.



**9. Usages Between Principal and Agent.**—The usages rejected as varying contracts in the relation of principal and agent, are chiefly in cases where the agent has claimed commission in excess of that agreed upon, relying upon a usage in the trade to do so.<sup>1</sup>

In *Turnbull v. Citizens' Bank*, 16 Fed. Rep. 145, the contract declared that the consignees were to take the cargo "from alongside;" "that means that it is to be taken from where the ordinary appliances of the ship would leave it in discharging, at the end of the ship's tackle, on a wharf, if the ship was discharging at a wharf; on a lighter, if the ship could not reach a wharf and was discharging in the stream." But the consignees urged a custom of the port, that the term "taken from alongside," in its general acceptance with merchants at the port of delivery, did not mean that the merchant was to take it from within a foot or two of the ship, but that the ship was to deliver on the earthwork, as was customary at this port. And that the term "alongside" had ordinarily been construed there to mean delivery at the port; and as the custom-house authorities required that the cargo should be delivered on *terra firma*, and as the wharf-master always insisted that the wharf property could not be jeopardized by the delivery of any heavy weights on the woodwork, the delivery on the earthwork has almost always been customary. In reply to this the court said that the custom of the port could not vary the terms of an unambiguous contract, and that to allow such a custom to come in where the parties have specified that the cargo is to be taken from alongside, would be to render nugatory such a provision.

In *Hearne v. New England Mut. Marine Ins. Co.*, 20 Wall. (U. S.) 488, it was expressed in the policy that the vessel should proceed to a certain port in *Cuba*, and thence to *Europe*. "It was implied that she should visit no other port in *Cuba*. *Expressum facit tacitum cessare*. Under such circumstances, usage can have no application, and proof of its existence is inadmissible. In no case can usage be received where it is inconsistent with, or repugnant to, the contract. Otherwise it would not explain, but contradict and change the contract which the parties have made; substituting for it another and different one, which they did not make. To establish such inconsistency it is not nec-

essary that it should be excluded in express terms. It is sufficient if it appear that the parties intended to be governed by what is written and not by anything else."

In *The Alhambra*, L. R., 6 P. D. 68, a vessel was chartered to proceed with a cargo from Baltimore to Falmouth for orders, "thence to a safe port in the *United Kingdom* as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat." The vessel was ordered to Lowestoft. Her draught of water when loaded was such that she could not lie afloat in Lowestoft Harbor without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The court rejected evidence that it was the custom of the port of Lowestoft for vessels to be lightened in the roads before proceeding into the harbor, and said that the custom, if it is proved, is in no way admissible to control what is the true construction of the charter-party. The custom alleged is that Lowestoft does not mean Lowestoft, but means something else, *i. e.*, Lowestoft Roads.

In *Cobb v. Lime Rock F. etc., Ins. Co.*, 58 Me. 326, it was held that in a policy of insurance on a vessel, the words "prohibited from the River and Gulf of St. Lawrence between September 1st and May 1st," constitute a warranty that the vessel shall not enter those waters within the time mentioned. The words are to be construed in their ordinary and popular sense, unless by some known usage of trade they have a different meaning.

In *The Gazelle*, 128 U. S. 474, it was held that evidence of a custom to consider as safe a particular port, which in fact is not reasonably safe, would directly contradict the charter-party, and would therefore be incompetent as matter of law.

1. In *Lonergan v. Courtney*, 75 Ill. 580, which was a suit where the plaintiff sought to recover, for building certain houses, a commission of ten per cent. on the cost, and where the evidence tended to prove a contract to pay such per cent. as commissions, "evidence on the part of the defendant, as

**10. Usages Between Vendor and Purchaser.**—The usages rejected as varying contracts made between vendor and purchaser, embrace usages offered in evidence to directly contradict the terms of a

to what was the general or customary commissions paid on such buildings, is properly rejected, as the same is wholly immaterial."

In *Stagg v. Connecticut Mut. L. Ins. Co.*, 10 Wall. (U. S.) 589, it was held that where there was an express contract for the compensation of an insurance agent, no proof of a general custom as to such compensation was admissible which was in conflict with the contract. "By the language of the second circular, it is quite clear there was no room for usage, for it is there expressly stated that the commission on the renewal premiums, like those on the original premiums, was to be paid only so long as the plaintiff continued to be the agent of the company."

In *Castleman v. Southern Mut. Ins. Co.*, 14 Bush (Ky.) 197, the agent's contract provided that he should be allowed certain commissions, "as compensation in full for any and all services under the agreement." A usage in the insurance business giving the agent commissions on the renewal premiums on policies obtained by him was rejected.

In *Osborne v. Rider*, 62 Wis. 235, a sub-agent agreed, by written contract, that notes taken by him on sales made for the principal, should be notes of persons of well-known responsibility, and that if the principal should find, at any time within six months after any settlement, that any notes taken and passed upon at such settlement, were doubtful or worthless at the time of sale, he (the sub-agent) would replace them with cash or good notes. "No general custom among agents upon taking notes to receive and act upon a property statement by the maker without further inquiry as to his financial condition, would abrogate the positive provisions of the contract."

In *Ware v. Hayward Rubber Co.*, 3 Allen (Mass.) 84, there was a written contract, by which commission merchants agreed that they would receive goods consigned to them, and insure and sell the same in accordance with provisions therein contained, and charge on all such sales a certain specified commission. "This being a written and express contract, the evidence offered in respect to the usage of com-

mission merchants to charge half commissions when goods consigned to them in the ordinary way for sale are taken back, is not applicable to this case; for an express contract cannot be controlled or varied by usage."

In *Partridge v. Phoenix Mut. L. Ins. Co.*, 15 Wall. (U. S.) 573, the *Missouri* agent of a *Connecticut* life-insurance company, having inquired of the company concerning the terms on which he was employed, received the following answer from them: "Concerning your status in *Missouri*, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay." In consequence of subsequent disputes, the agent was soon after discharged by the company, there being at the time the sum of \$1,772 in his hands, which they claimed. The agent brought suit for his commission, and on the trial offered to prove, by men familiar with the business of life insurance, that the words of the letter had a peculiar and well-understood meaning among insurance men; that its meaning, as understood in that business, was that the agent should have the right to solicit and cause policies to be issued according to the published rules and rates of the company, and should have the right, during the life and force of such policies, to collect all renewed premiums thereon, and have commissions on such renewals; and that, if he was discharged by the company without sufficient cause, he was entitled to be paid immediately the present value of his commissions, to be computed by the actuarial rule used by such companies to value policies. The trial judge excluded the evidence, and in the Supreme Court of the *United States*, where the case was taken, his ruling was affirmed. "It appears to us, as it did to the circuit court," said Mr. Justice Miller, "that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage, to discover its meaning. To have admitted the usage

contract; usages which, while not expressly contradicting the terms of the contracts, would control them by superadding obligations not contemplated by them; usages allowing the performance of a contract in a manner different from that agreed on, although perhaps not involving any detriment to the contractee; and other usages involving variations in, or inconsistent additions to, the contract as made.<sup>1</sup>

offered in evidence in this case, would have been to make a contract for the parties, differing materially from the written one under which they had both acted for some time."

In *Kimball v. Brawner*, 47 Mo. 398, the defendant (the principal) contracted to pay the plaintiff (the agent), "twenty per cent. upon all original or first-year premiums collected and paid in by him upon policies issued upon applications taken" by him. The plaintiff offered evidence to show that it was the established "usage, custom and method of doing business by the insurance company, in regard to such policies as were referred to in the contract, to treat all premiums as 'collected,' though, for the convenience of the assured, payable in installments." The court said: "There is nothing here for a construction. The plaintiff is simply suing to recover commissions on money which he did not collect and pay over, and seeks, by the aid of a construction founded on usage, to so enlarge the scope of the stipulation as to include commissions on all original premiums, whether collected and paid over or not. The parties might have so contracted, but did not. The usage must yield to the express stipulations contained in the written agreement."

In *Park v. Piedmont, etc., L. Ins. Co.*, 48 Ga. 601, the defendant's counsel asked the witness if he knew of any usage in the life-insurance business as to the commutation of value of renewals on the discharge of agents, and what such usage was, if there was any? which being objected to, the court sustained the objection, and said: "The contract of the parties in this case was, that the defendants should receive for their services twenty per centum on all sums collected by them for first year's premium insurance, and seven and one-half per centum on all sums received by them for continued renewals of policies. This contract is plain and explicit; there is no doubt or ambiguity as to the meaning of it, or as to the intention of the parties."

1. In *Atkins v. Howe*, 18 Pick. (Mass.) 16, goods consigned by the defendants to an auctioneer, were sold by him to the plaintiff, on the condition of sale, that no allowance should be made for damage unless applied for within three days from the sale. It was held that the condition of sale limited the liability of the defendants for such damage, as well as of the auctioneers, to three days from the sale, notwithstanding the damage was not discovered till after the lapse of such time. Hence, in an action to recover back the price of such goods, evidence to prove that, according to the custom of merchants, goods were returned by purchasers at auction to the owners, and received by them or allowances made, after the expiration of three days, was held to be inadmissible. "It seems to the court, that the evidence of custom, as offered, was plainly inadmissible. Custom is often of importance, to show how parties are to be understood, in the language which they have used; but this is not such a case. Here was a claim for damage. The terms of sale were, that all claims for damage must be made within three days, and before the bills were settled. The stipulation was one which the parties might lawfully make, and if it varied from the common custom, it shows that these parties intended to make terms differing from those usually made; *conventio legem vincit*. They had a right to make a law for themselves, and are bound by it."

In *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463, the plaintiff, a tailor, agreed to make the defendant a satisfactory suit of clothes; the defendant received the suit, but returned it as unsatisfactory. There was evidence to show that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations which might be necessary to make them fit. The plaintiff contended that, as there was such a custom to remedy such defects when they occur, the plaintiff was entitled to

a reasonable opportunity to remedy the defects. But the court held that, "When an express contract like that shown in the present case was proved to have been made between parties, it was not competent to control it by evidence of a usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made."

In *Oelrichs v. Ford*, 23 How. (U. S.) 49, the court held that where there was a contract to deliver flour at a certain time, place, and price, there could be no room for evidence of a usage to require margins from the vendor as security for the delivery according to contract. "There is no ambiguity or uncertainty in its terms or stipulations, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days, at the price of \$9.25 per barrel, in the consideration of which the defendants agree to receive the flour and pay the price. This is the substance of the written contract. But the defendants insist that, besides the obligations arising out of the written instrument, the plaintiff is under an additional obligation to give security, whenever called upon, for the faithful performance, and this by the deposit in bank of the sum of \$5,000. The written instrument bound only the personal responsibility of the plaintiff; the parol evidence seeks to superadd, not a responsible name as security, but in effect the same thing—a given sum of money. The parol proof not only adds to a written instrument, but is repugnant to the legal effect of it."

In *Oelrichs v. Ford*, 21 Md. 489, the same question arose between the same parties, and was decided by the court of appeals of *Maryland* in the same manner, the usage being rejected as tending to control the written contract.

In *Gibney v. Curtis*, 61 Md. 192, G. offered to prove that when a sale of grain in quantities of a thousand bushels and more, is made to a merchant in

Baltimore, to be delivered within a limited time, and after such sale, and before the delivery of the whole, grain advances in price, there is a uniform, well-established custom in that city, which permits the vendee to exact a reasonable sum of money, as margin, from the vendor, if none of the grain has been delivered; and if part has been delivered, such custom enables the vendee to retain in his hands a reasonable sum of money, the proceeds of sales made, as margin or security for future deliveries. The contract, in respect to the mode and time of payment for the barley that might be consigned to the appellant, G., was, that he should pay for it as delivered, by the acceptance of five-day drafts, to be paid when due. The court held that no evidence of custom or usage was admissible to alter or modify this express provision of the contract. "The purpose of the evidence of custom was to incorporate an additional provision or term in the contract, and that, too, in respect to a matter for which the contract had expressly provided."

In *Scott v. Hartley*, 126 Ind. 239, which was an action for the breach of a contract to purchase from the plaintiff corn in *Indiana* at a certain price, "net, track, Philadelphia, Union Line," brought on the defendants refusing to receive the corn, the defendants alleged a custom of persons engaged in the grain trade that, upon a sale of grain, to be delivered in Philadelphia or other cities in the eastern states, at a stated price on the "track," or "net," or "net track," such grain was to be delivered on the track at such city without payment of freight by the seller, and that the purchaser should pay the freight, and deduct it from the purchase price of the grain, and thus fix the net price; the rates of freight thus paid being fixed by contracts between the purchasers and the transportation companies. It was held that there was no ambiguity in the terms of the contract, and evidence of such custom, tending to contradict the contract as to the "net price," was inadmissible.

In *Wilkinson v. Williamson*, 76 Ala. 163, it was held that under an express contract for the sale of timber, all the terms being agreed on at the time, and a controversy afterward arising as to the price agreed on, evidence of custom or usage cannot be received to determine it. "Evidence of usage and custom is not permitted, in other words, to

prevail over and nullify the express provisions and stipulations of the contract."

In *Mulliner v. Bronson*, 14 Ill. App. 355, it was said that the claim that the appellee was entitled to a return of the rejected lumber or to be paid for it, upon the ground that such had been the accustomed mode of dealing between the parties in many prior transactions, could not be sustained in the case, for such a private and special custom could not control the express words of the contract.

In *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, it appeared that by a written contract, the plaintiff, who was cultivating tomatoes, agreed to deliver them to the defendant as they should ripen, from day to day, and the defendant agreed to receive, unload, and weigh them "on unusual business hours, from 6 o'clock on Monday morning till 10 o'clock on Saturday morning of each week during the season." A stipulated amount was to be paid as liquidated damages for any default. It was held in an action for such damages for the defendant's failure to attend at its place of business and receive the tomatoes, according to contract, that evidence of a usage by which, under like contracts during previous years, the defendant's warehouse was not open until seven o'clock in the morning, was not admissible.

In *Woods v. Miller*, 55 Iowa 168; 39 Am. Rep. 170, the contract called for Early Rose potatoes. There was evidence tending to show that the potatoes were mixed. One witness said that about three-fourths of them were Early Rose. As to the kind of potatoes, a witness was allowed to testify that the potatoes were what, according to the understanding of dealers, would be called Early Rose potatoes. "In one view this testimony was not objectionable. It was proper for plaintiffs to show, by a person acquainted with the different kinds of potatoes, that these were Early Rose. But it is manifest, from the examination of the evidence generally, that the plaintiffs sought to show by Leow that the lot, notwithstanding the potatoes were mixed, had enough Early Rose potatoes in it to enable it to pass in the potato trade as a lot of Early Rose potatoes. Now, it may be that where a lot of potatoes has a large predominance of a particular kind, the lot would be designated by potato dealers by the name of the

predominant kind. Where a specific lot of potatoes is bought, upon inspection, it is evident that it is of no consequence what they are called. But in the case at bar, the potatoes were contracted for simply by name. Under the contract, it appears to us that the defendants were entitled to have the contract performed by a delivery only of the kind named. Of course, if there was any precise degree of mixture within which a mixed lot of potatoes would, in the custom of the trade, not only be called by the name of the predominant kind, but would be deemed sufficient to fill contracts made without inspection, and when the potatoes were designated only by name, and such custom was general, or, if local, was within the knowledge of the party sought to be bound, so that he must be presumed to have contracted with reference to it, then the custom might be shown and the contract read in the light of it. *Rindscoff v. Barrett*, 14 Iowa 101."

In *Gilbert v. McGinnis*, 114 Ill. 28, it appeared that in February a person agreed to sell to another a quantity of corn at a stipulated price per bushel, to be delivered in the months of August and September following, and the purchaser, as a part of the same agreement, promised to make advances on the contract to the seller of what money he might, from time to time, require. It was held, in a suit upon the contract brought by the purchaser for non-delivery of the corn, that evidence that a custom or usage prevailed requiring the vendor to give to the vendee his note, upon receiving any such advances, was not admissible in behalf of the plaintiff, as it was inconsistent with the express contract. "Instead of collecting something on his corn, as provided by the agreement, the seller is offered a loan of money on his individual note, which would be a complete change of the legal relations of the parties. Whereas the seller was before a mere creditor of the purchaser, he at once, upon giving such a note, becomes the debtor of the purchaser, and no part of the debt due him on account of the sale is thereby discharged."

In *Beals v. Terry*, 2 Sandf. (N. Y.) 127, a usage of trade, to the effect that on a contract to deliver flour of a particular mark or brand, a delivery of flour of equal or better quality, of a different mark or brand, will satisfy the contract, was held to be inadmissible.

"There is nothing equivocal in this contract; nothing to require the aid of any usage, or mercantile understanding, to ascertain the meaning of any of its terms or phrases. . . . We cannot recognize a usage which will authorize a party to deliver one article in fulfillment of a contract positively to deliver another."

In *Greenstine v. Borchard*, 50 Mich. 436; 45 Am. Rep. 51, evidence was offered to the effect that it is usual and customary for manufacturers, where customers bargain for walnut counters, to make the panels or other parts, where it would be especially desirable and important to have the wood firm, hard, and rich, of mere whitewood. The judge excluded the evidence. The ruling was held correct on appeal. "The effect of such evidence, if any, must have been to derogate from the intent of the plaintiff and to defeat a right secured to him by the contract."

In *Atkinson v. Allen*, 29 Ind. 375, a contract was made between A and B for the purchase, killing, and packing of hogs. It was agreed, among other things, that the hogs were to be killed and packed by B "on joint account, each party to have one-half interest." It was held that evidence of a custom of the trade that when, under such a contract, the packers themselves slaughtered the hogs, they were entitled, to the exclusion of the other contracting party, to the profits on the sale of the bristles, gut, fat, and grease from the hogs packed, was inadmissible, as being in direct conflict with the express terms of the contract.

In *O'Donohue v. Leggett* (Supreme Ct.), 8 N. Y. Supp. 426, it was held that where a contract is to purchase "1,700 piculs of Free Preanger coffee, to arrive," it cannot be shown that on sales of coffee to arrive the exact quantity was not always realized; that it overran in some cases, and fell short in others; and that when 1,640 piculs would arrive it would be regarded a good delivery on a contract for 1,700. The contract being definite and certain in respect to quantity, evidence of a custom to change or vary it cannot be received.

In *Marshall v. Perry*, 67 Me. 78, the court said that a party who sells butter with a warranty of its quality, cannot limit or control the legal effect of such warranty by proof of a local usage among merchants in the trade, where the sale is made, to the effect that

in the ordinary transactions in the trade, the seller is not liable to take back the butter or make any deduction from the price agreed, unless the purchaser examines the butter as soon as may be after delivery, and, in case of defect in quality, returns it to the seller, or gives him notice of the defect at once. "Under the contract of warranty claimed by defendants, the rights and liabilities of the parties were fixed and well defined by the general principles of the common law. The usage claimed steps in and supersedes the well-defined legal effect of the contract as made by the parties, and substitutes therefor the qualified and limited liability under the local usage. This could not have been the intention of the parties. If they knew the usage, and their rights and liabilities under it, and made an express contract of warranty, it must be presumed that they were not satisfied with their rights and liabilities under the usage, and therefore made the express contract, taking the case out of the usage."

In *Yates v. Pym*, 6 Taunt. 445, it was held that a usage of trade cannot be set up in contravention of an express contract; therefore, on a warranty of prime singed bacon, evidence is not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted as prime singed bacon; nor of a practice to preclude the purchaser from all remedy, if he does not discover and point out the defect by an early day.

In *Willmering v. McGaughey*, 30 Iowa 205; 6 Am. Rep. 673, it was contended, in an action for breach of contract, that a clause providing for delivery "at any time in December" meant upon the last days of the month. But the court rejected the evidence as in conflict with the contract.

In *Cash v. Hinkle*, 36 Iowa 623, the contract provided for the delivery of "sixty-five head of fat hogs, to weigh 225 pounds and over." Upon a question as to whether evidence could be given that this meant an average of 225 pounds for the animals, and not that each animal should weigh 225 pounds, the court said that there was no ambiguity. "There is simply an omission of a word to express whether the weight specified is the weight of each hog or the aggregate weight of all the hogs. It is very clear that the former was intended, and that the word

11. *Miscellaneous Cases.*—In the note are collected a number of cases upon various usages which have been rejected by the courts as varying the terms of the contracts to which it was sought to connect them.<sup>1</sup>

'each' is to be implied." Of this decision Mr. Lawson remarks (Lawson, Usages and Customs, § 214): "But if it was the custom of the trade, when buying and selling a lot of hogs over a certain weight, to receive or deliver hogs aggregating that weight throughout, though some fell under and some went over, it is clear that the contract would purposely omit to specify what the court here thought was accidentally omitted. The understanding of the trade as to what the contract really meant was more likely to be correct than the unaided opinion of a bench of lawyers. Of this belief was the chief justice, who dissented from the ruling of the majority, and who did not fail to give reasons for his dissent. The chief justice of the court dissented from the opinion, and said in part: 'In the contract before us, the parties agree that the hogs sold are "to weigh 225 pounds." Now, the custom in question does not change the import of the words. It simply implies to them a meaning. The language of the contract is not explicit, and is left by the parties to interpretation. Its meaning, whether each hog, or the average of all the hogs, must be 225 pounds in weight, may well be ascertained by proof of a custom governing the trade, in view of which the law presumes the parties contracted.'"

In *Hedden v. Roberts*, 134 Mass. 38; 45 Am. Rep. 276, the plaintiff sued the defendant for the price of a monument. The defendant set up that the contract was for a monument and two tablets to be made and erected in the defendant's cemetery lot; and that the plaintiff had not performed or offered to perform this contract. At the trial the plaintiff offered evidence of a general custom that when a special contract is made for a monument and accompanying tablets to be set up in a cemetery lot, and when the contract includes tablets and a monument and the setting of the same, not to furnish the tablets until the purchaser has selected them and furnished the lettering for them. It was held that evidence of the custom offered was inadmissible. "The general understanding of manufacturers of monuments and tablets, as to their

rights and obligations under similar contracts, could not be received to vary the rights of these parties under this contract. The custom put in evidence, if it had any pertinency to the case, contradicted the rules of law applicable to the contract, and was inadmissible."

In *O'Donohue v. Leggett* (Supreme Ct.), 8 N. Y. Supp. 426, it was held that the sale of the coffee in controversy having been in writing, and no mention made of samples, the seller could not show a custom making it the duty of buyers of coffee to accept or reject it immediately after the receipt of overland samples, and that, consequently, the buyer had accepted the coffee by retaining such samples for two days, and returning them with instructions that the coffee be sold as the sort bought. See also *Clamorgan v. Guisere*, 1 Mo. 141; *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196; *Rogers v. Woodruff*, 23 Ohio St. 632; 13 Am. Rep. 276; *Smith v. Jeffries*, 15 M. & W. 561; *Polhemus v. Heiman*, 50 Cal. 438; *Ford v. Yates*, 2 M. & G. 549; 2 Scott N. R. 645; *Lockett v. Nicklin*, 2 Exch. 93; *Cross v. Englin*, 2 B. & Ad. 106; 22 E. C. L. 36; *Corwin v. Patch*, 4 Cal. 204; *Schenck v. Griffin*, 38 N. J. L. 462; *Marks v. Cass County Mill, etc., Elevator Co.*, 43 Iowa 146; *Duncan v. Green*, 43 Iowa 678.

1. In *Sigsworth v. McIntyre*, 18 Ill. 126, the defendant having entered into a written contract to build the plaintiff a dwelling house, etc., and a barn, each with a cellar, and all of specified dimensions, sought to limit and interpret the meaning by reference to a neighborhood usage among mechanics. "The very attempt in this case to make the parties speak in their writing, through the mouths of witnesses, shows the soundness of the rule which excludes such testimony. One carpenter would not include, under such an agreement, either the foundation of that portion not required to have a cellar, nor shutters or blinds, nor to paint the outside, nor plaster the inside of the dwelling. Another carpenter would lay a foundation and plaster, but would not paint or put on

blinds. This would introduce great uncertainty into contracts, where it is supposed that the parties intended to have meant and understood each other definitely. No one would be willing to accept of a contract, the meaning of which was to be treated as a matter of fact, to be settled by the interpretation of witnesses. . . . If the defendant has entered into a contract in terms which will compel him to do more than he intended, it is his misfortune; but he may not relieve himself by a resort to the usages of that neighborhood, if, indeed, any exist. None, however, are shown, but the witnesses are permitted to give each his private opinion of the extent of such an undertaking."

In *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485, which was an action against a telegraph company for a mistake in sending a message, it was held that evidence of a usage in a local office of the company is inadmissible to vary the terms of the contract under which the message is sent.

In *Palmer v. Clark*, 106 Mass. 373, it was held that where a written agreement provided that certain work should be "measured by the city engineer," a usage that the city engineer's assistants could attend to such work was inadmissible. See also *Carkin v. Savory*, 14 Gray (Mass.) 528; *Union Bank v. Forrest*, 3 Cranch (C. C.) 218; *Goodfellow v. Meegan*, 32 Mo. 280; *Richmond v. Smith*, 8 B. & C. 9; 15 E. C. L. 144; *Reading v. Menham*, 1 M. & R. 234.

A usage or custom of baseball clubs to discharge a player on ten days' notice, if he is deficient in playing, cannot modify a special contract for a definite time, especially when the player has no reciprocal right to cancel the contract. *Baltimore Base Ball, etc., Co. v. Pickett* (Md. 1894), 28 Atl. Rep. 279.

In *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357; 3 Am. Dec. 439, it was said that evidence of usage was inadmissible to explain the language of a deed not ambiguous or equivocal.

In *Tucker v. Smith*, 68 Tex. 473, it was held that proof of a custom whereby one is denied a right to land embraced within the boundaries set forth in his title papers, or which changes the legal effect of the deeds under which he claims, is inadmissible in evidence.

In *Suse v. Pompe*, 8 C. B. N. S. 538;

98 E. C. L. 537, it was held, in an action against a drawer of a bill of exchange drawn and indorsed in *England* and payable abroad, and dishonored, evidence is not admissible to prove a usage among merchants in *England* to entitle the holder, at his option, to demand from the drawer the amount of re-exchange, or the sum which he gave for the purchase of the bill, this being a usage which in terms contradicts the written instrument.

Other cases stating or illustrating the rule that usage is not admissible to vary the terms of a contract are *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 506; 51 Am. Rep. 489; *Mason's Ben. Soc. v. Baldwin*, 86 Ill. 479; *Wilson v. Bauman*, 80 Ill. 493; *Everingham v. Lord*, 19 Ill. App. 565; *Corbett v. Underwood*, 83 Ill. 324; 25 Am. Rep. 392; *Fay v. Strawn*, 32 Ill. 295; *Spears v. Ward*, 48 Ind. 541; *Rafert v. Scroggins*, 40 Ind. 195; *Foley v. Mason*, 6 Md. 37; *Cooke v. England*, 27 Md. 14; 92 Am. Dec. 613; *Stultz v. Locke*, 47 Md. 562; *Bodfish v. Fox*, 23 Me. 90; 39 Am. Dec. 611; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200; *Macomber v. Parker*, 13 Pick. (Mass.) 182; *Snelling v. Hall*, 107 Mass. 134; *Boardman v. Spooner*, 13 Allen (Mass.) 353; 90 Am. Dec. 196; *Bell v. Smith*, 99 Mass. 617; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Van Hoesen v. Cameron*, 54 Mich. 609; *Erwin v. Clark*, 13 Mich. 10; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 241; *Maguire v. Woodside*, 2 Hilt. (N. Y.) 59; *Holmes v. Pettengill*, 1 Hun (N. Y.) 316; *Lane v. Bailey*, 47 Barb. (N. Y.) 395; *Wadsworth v. Olcott*, 6 N. Y. 64; *Hinton v. Locke*, 5 Hill (N. Y.) 437; *Vail v. Rice*, 5 N. Y. 155; *Parsons v. Miller*, 15 Wend. (N. Y.) 561; *Chandler v. Belden*, 18 Johns. (N. Y.) 157; 9 Am. Dec. 193; *Goodyear v. Ogden*, 4 Hill (N. Y.) 104; *Mercantile Mut. Ins. Co. v. State Mut. F., etc., Ins. Co.*, 25 Barb. (N. Y.) 319; *Dutch v. Harrison*, 37 N. Y. Super. Ct. 306; *Bradley v. Wheeler*, 4 Robt. (N. Y.) 18; 44 N. Y. 495; *Farmers', etc., Bank v. Logan*, 74 N. Y. 568; *Larrowe v. Lewis*, 44 Hun (N. Y.) 226; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Bogert v. Cauman, Anth.* (N. Y.) 97; *McClusky v. Klosterman*, 20 Oregon 108; *Bryan v. Spurgin*, 5 Sneed (Tenn.) 681; *National Bank v. Burkhardt*, 100 U. S. 686; *Savings Bank v. Ward*, 100 U. S. 195; *Sterling Organ Co. v. House*,



12. *Usage Cannot Vary Legal Import.*—Evidence of usage is not admissible when its effect would be to contradict the legal import as distinguished from the express terms of a contract, as determined by the court independently of the usage. Where, by judicial construction, a contract is held to have a certain meaning, that meaning cannot be varied by evidence of usage. Where the court decides that, under the terms of a contract, the parties have certain rights and obligations, such rights and obligations cannot be varied by proof of a usage that the contract means otherwise. In other words, the legal import of a contract cannot be varied by usage. This legal import may arise, either from a judicial construction of the meaning of the terms of the contract, or, when the meaning of the terms is clear, from a judicial determination of the rights of the parties under the contract. Usage is not allowed, either to contradict the judicial construction in the former case, or the judicial determination in the latter. This must be clearly distinguished in the first case, however, from cases in which it is proper to explain the meaning of a word or expression of doubtful import, or one used in a certain business, in a different sense from the usual one; but where words or expressions have received a judicial interpretation in a certain character of contract, they cannot be shown to mean something different when drawn in question in such a contract.<sup>1</sup>

In the latter case, when the court holds that, upon the proper construction of a contract, the parties are entitled to certain rights and are under certain obligations, such judicial construction cannot be controlled by proof of a usage to the contrary. Very pointed instances illustrating this rule have grown out of contracts made with stock-brokers and others, upon pledges of securities for loans of money. The law determines the rights of pledgor and pledgee under such contracts, and decides in what manner it is proper for the pledgee to sell the securities in default of payment of the loan. The legal import of the contract between the parties being thus fixed by the construction of the court in the particular case, the court will not allow its construction to be controlled by a usage contrary thereto. Any such us-

25 W. Va. 64; *Exchange Bank v. Cookman*, 1 W. Va. 69; *Knox v. The Ninetta, Crabbe* (U. S.) 534; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420; *The Isabella*, 2 Rob. Adm. 199; *White v. Wilson*, 2 B. & P. 116.

1. In *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.) 305, Bigelow, C. J., said: "There can be no doubt that, in the interpretation of written contracts, especially those of a mercantile character, evidence of usage is competent and frequently admitted, to explain the sense in which particular words or phrases are used, and to show that, as

applied to the subject-matter, the language of the instruments was understood by the parties to have a special and peculiar meaning, differing from that which might ordinarily be attributed to it; especially is this true in respect to policies of insurance. These contracts, like others of a mercantile nature, when first introduced as subjects of exposition in the courts of common law, contained many loose, undefined, and indeterminate words and phrases, which, if interpreted literally, and without reference to the course of trade and the customs of merchants,

would have increased the risk assumed by the insurers or abridged the indemnity secured to the assured, contrary to the real intentions of the parties. But it is obvious that the necessity which gave rise to the liberal rules which have heretofore been adopted by courts of justice in admitting usages as explanatory of this class of customs has in great measure ceased to exist. By a long course of judicial decisions, that which was originally indefinite and uncertain and difficult of application in the language of the instrument has become clear, determinate, and well settled. The consequence is, that of late years, the tendency of courts of law has been to apply the rules regulating the competency of usages to explain and interpret the language of written instruments with great strictness, and to guard with increased vigilance against the danger of allowing extrinsic evidence to vary or control the words in which the parties have deliberately expressed their meaning. Many of the early authorities in *England* and in this country go much farther in the admission of testimony to prove usages for the purpose of aiding in the interpretation of written contracts than would be deemed to be reasonable or safe at the present day. We are inclined to doubt whether in any case it would now be deemed to be competent to offer evidence to show that a description of a voyage, in a policy which is susceptible of a clear and definite exposition, in conformity to the interpretation of the words, as established by adjudicated cases, has another and different meaning by mercantile usage, from that which has been so recognized and settled."

In *Bargett v. Orient Mutual Ins. Co.*, 3 Bosw. (N. Y.) 385, the court said: "It is not competent to show that words written in a policy, and which have received a judicial interpretation, have acquired by the usage of trade a peculiar commercial meaning, variant from or in conflict with that which the courts have adjudged to be their true meaning."

In *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137, in an action upon a policy of reinsurance, the court rejected evidence to limit the meaning of the word *reinsure*, and said: "The word '*reinsure*,' has a definite meaning, settled in the law for two centuries past, and having the same meaning in its ordinary and popular sense. It

is equally effective with the word '*insure*,' and it has been decided that the word '*insure*' may be used in a policy of reinsurance with the same force and validity. The proof offered attempts to wrest the term '*reinsure*' from the established sense, and make it correlative, as between the first insurer and the reinsurer, whenever the former insures more than the latter, with the distinct and different contract of double insurance. In our view, it seeks to vary an express agreement between these parties, couched in plain language, having an established legal as well as conventional meaning, and we are entirely clear that the testimony of usage ought not to be received."

In *Lombardo v. Case*, 45 Barb. (N. Y.) 95, the plaintiff was not permitted on the trial to prove the alleged custom, for the reason that effect could not be given to the custom without making a new contract between the parties. "Six months from date" cannot, by proof of any custom, be extended or explained to mean or include "a day or two before date."

In *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; 81 Am. Dec. 284, the court refused to allow evidence as to the meaning of the words "current funds," as the terms have a settled meaning. When a word has a general well defined signification, it is not competent to change that meaning by evidence. On the contrary, if a word is employed which has no definite and specific general meaning, its local meaning may be proved. See also *Moore v. Morris*, 20 Ill. 255; *Marc v. Kupfer*, 34 Ill. 286; *Osgood v. McConnell*, 32 Ill. 74.

In *Gross v. Criss*, 3 Gratt. (Va.) 250, it appeared that a merchant in Philadelphia wrote to his debtor in Clarksburg, reminding him that his debt had been due for some time, and said: "We must request you to remit the amount." This did not authorize the admission of evidence of a local usage or understanding, to give a meaning to the terms of the letter different from that which they obviously bore. "The meaning of the terms used is plain and unequivocal, importing a demand of payment of a debt, which had been due for some time, and nothing more."

In *Lawrence v. Gallagher*, 42 N. Y. Super. Ct. 309, it was held that where the contract, by unambiguous terms, was in a certain event to clothe one of the parties thereto with the rights of an owner of certain property, the subject

age would change the rights of the parties to the contract as construed, and would contradict its legal effect.<sup>1</sup>

of the contract, a usage which would annul such right, was inadmissible.

1. In *Allen v. Dykers*, 3 Hill (N. Y.) 593; 7 Hill (N. Y.) 497, A. borrowed money of D., a stock-broker, on a promissory note payable in sixty days; the note stating that the former had deposited with the latter two hundred and fifty shares of the stock of a certain bank as collateral security, with authority to sell the same in case the note was not paid at maturity. D. proposed to prove that, where stock was deposited with a broker as collateral security, it was the general usage for the latter to hypothecate or dispose of it at pleasure; and, on payment or tender of the principal debt, to return an equal number of shares of the same kind of stock. But the court held that the evidence was inadmissible as tending to contradict the legal import of the note.

In *Wheeler v. Newbould*, 16 N. Y. 392, it was held that the pledge of commercial paper as security for a loan of money does not, in the absence of a special power for that purpose, authorize the pledgee, upon the non-payment of the debt and upon notice to the pledgor, to sell the securities pledged either at public or private sale. "In order to authorize a sale of the subject of a pledge, by the act of the party without judicial proceedings, personal notice to redeem, and of the time, place, and manner of the intended sale, which must be public, must be given to the pledgor. Evidence is inadmissible of a local custom in the city of New York to sell commercial paper, pledged as security for a loan, at private sale and for the best price that can be obtained, after demand of payment and notice that such sale will be made in case of default. Such a custom, if it existed, would be illegal and void." See also *Taylor v. Ketcham*, 5 Robt. (N. Y.) 507; *Stentor v. Jerome*, 54 N. Y. 480.

In *Markham v. Jaudon*, 41 N. Y. 235, the defendants, stock-brokers, purchased certain stocks for the plaintiff in their own names and with their own funds, he depositing with them a margin of ten per cent., which he agreed to keep good. The plaintiff having failed to keep the margin good, the defendants sold out the stock without notice to him. It was held that the relation

between the parties was that of pledgor and pledgee; that a sale under such circumstances without notice was a conversion; and that, in an action by the plaintiff for such conversion, evidence of a usage that stock held, as in this case, might be sold by the broker, whenever, by the fall of the stock in the market, the margin was exhausted and not renewed, was inadmissible, because in direct variance with the rules of law applicable to the relation of the parties. "This was an offer, not to explain the meaning of particular terms, or to prove attending circumstances to enable the court to construe the agreement, but to change the rights of the parties to a contract. By the law, as I have interpreted it, the customer did not lose the title to his stock by any process less than a sale upon reasonable notice, or by judicial proceedings. The brokers had no right to sell without such a notice. A practice or custom to do otherwise would have no force."

In *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80, the court followed *Markham v. Jaudon*, 41 N. Y. 235, and held that the relation of broker and customer, under the ordinary contract for a speculative purchase of stocks, was that of pledgee and pledgor; that a sale of the stock by the broker, under such a contract, without notice to the customer of the time and place of sale, was a conversion; and that proof of the usage of brokers in such cases was not admissible, to add to or make part of the contract.

In *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771, it was held that a dividend upon corporate stock belonged to the owner of the stock at the time it was declared, although the dividend was made payable at a future time. In the absence, therefore, of any provision to the contrary in a contract of sale and purchase of stock, made outside of and not subject to the rules of the stock exchange, dividends previously declared, but made payable thereafter, belonged to the seller, and are not transferred by the contract, notwithstanding a usage to that effect. "Usage and custom may not be proved to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity, or to make the legal rights or liabilities

And similarly in various other cases it is held that the legal construction of a contract cannot be controlled by usage. The court decides upon the rights of parties under their contracts, and in rendering its decision, it cannot be affected by what may be the understanding or usage of persons in respect to the determination of legal propositions.<sup>1</sup>

of the parties other than they are by the terms thereof. When the terms of a contract are clear, unambiguous and valid, they must prevail, and no evidence of custom or usage can be permitted to change them. The evidence offered in this case would have been inconsistent with the rules of law and would have contradicted the plain terms and legal effect of the contract."

In *Spear v. Hart*, 3 Robt. (N. Y.) 420, the court similarly said: "Upon a sale of stock deliverable at a future day, at the option of the seller, a dividend declared before the sale, but not payable until after the day fixed for delivery of the stock, belongs to the seller, and does not pass to the buyer, under the contract. Under a contract to sell 100 shares of stock, a custom that something more passes to the purchaser, cannot be allowed. It varies the agreement by adding to it, and it would not be merely an explanation or interpretation of it."

1. In *Groat v. Gile*, 51 N. Y. 431, the defendant contracted to sell the plaintiffs two flocks of sheep, which had been examined by the plaintiffs. The plaintiffs paid twenty-five dollars upon the purchase, and were to take the sheep and pay the balance at a subsequent, specified time. Within the specified time the plaintiffs paid the balance of the purchase-money and took the sheep; but before this, the defendant had sheared the sheep and appropriated the wool. In an action for the conversion, it was held that the title to the sheep became vested in the plaintiffs immediately upon the completion of the contract and payment of the twenty-five dollars, which title necessarily included the wool; and that the legal effect of the agreement could not be controlled or varied by showing a custom in the county where the transaction took place that the wool of sheep, sold under such circumstances, does not go to the purchaser, and that evidence of such custom was incompetent. "Where the terms of a contract are undisputed, the question as to the nature, extent and effect thereof, and of

the interest of the parties thereto, is to be determined by the contract, and is a question of law for the court."

In *Davis v. Galloupe*, 111 Mass. 121, the plaintiffs, stonecutters, agreed in writing with the defendant to furnish stone for his building according to the plans of an architect. Wooden patterns were necessary for cutting the stone according to the plans, and the plaintiffs procured and paid for them, without asking the defendant or the architect to furnish them. It was held in an action to recover the amount paid for these patterns, that evidence of a usage for stonecutters, in cutting stone for a building, to procure such patterns and recover the cost from the owner of the building, was inadmissible. "By the legal construction of such a contract, the plaintiffs were to furnish the patterns. A usage that the defendant should pay for them would be contrary to the terms or construction of the contract, and therefore would not be valid."

In *Potter v. Smith*, 103 Mass. 68, it was held that a provision, in shipping articles for a whaling voyage, that if any officer or seaman should be judged by the master incompetent, the master might "displace him and substitute another in his stead," and that a corresponding reduction of the lay of such officer or seaman, should thenceforth take effect, did not authorize the master to discharge from the vessel one who had shipped under these articles as second mate; and the effect of such a provision could not be varied by evidence of a usage in the whaling trade never to disrate an officer to a seaman, but, when the necessity for displacing him occurred, to discharge him from the vessel. "The usage alleged to exist cannot avail the defendants. Its effect, if proved, is to control and vary the written contract, unambiguous in its terms, into which the parties have deliberately entered."

In *Wilson v. Knott*, 3 Humph. (Tenn.) 473, it was held that where a contract was made between the owner of the soil and a carpenter for building a house, and the house was burnt

**XII. USAGES IN VARIOUS RELATIONS**—1. **In General.**—Having examined the principles governing the admissibility of usages to affect contracts in various relations, we now come to consider the cases which cannot conveniently be classified under the preceding divisions of our subject. In various branches of business, usages have grown up which determine the rights of parties who conduct their affairs with reference to them. By these usages, the propriety of the conduct of parties is measured. They constitute a kind of local law for those who subject themselves to their operation.

2. **Usages of Banks**<sup>1</sup>—*a.* **DAYS OF GRACE.**—Days of grace are said to be the mere creature of usage, varying in different countries, and of no compulsory force. The usage of almost all banks in *America* has been to allow three days of grace; but as usage established the number, so it may also change the number. In a leading and interesting case in the Supreme Court of the *United States*, it was held that usage in Washington and the *District of Columbia* could establish four days of grace as the rule in those

down after much work was done, but before completion, that "proof of the usage as to the party on whom the loss would fall was inadmissible." This was regulated by the contract and the circumstances of the transaction, and not the usage of builders.

In *Randall v. Rotch*, 12 Pick. (Mass.) 107, it was held that it was not competent for a master cooper to send his apprentice abroad on a whaling voyage and receive his earnings on such voyage, and a custom to that effect was bad, being repugnant to the objects and terms of the contract of apprenticeship. "A high trust and confidence are reposed in the person of the master. All the considerations which go to support the rule that an apprentice cannot be assigned over, are arguments against the right of the master to place the apprentice out of his own control and instruction, for from two to four years, a large portion of the usual period of apprenticeship. It is directly repugnant to the leading stipulation on the part of the master, to instruct the apprentice in his trade. The evidence of custom was therefore rightly rejected. The custom was relied upon to establish rights and duties directly repugnant to the objects and terms of the contract."

In *Ripley v. Crooker*, 47 Me. 370; 74 Am. Dec. 491, it was held that proof of a custom in the vicinity for persons building a vessel together, that each should be responsible for his own share

only, was inadmissible to modify a written contract, which under a proper construction bound all the parties building the vessel. "To allow such a custom to modify the written contract of the parties would be to set it up against their express agreement and manifest intentions, which the law will not permit."

In *Rice v. Codman*, 1 Allen (Mass.) 377, it was held that a bill of sale of gunny cloth, specifying the invoice weight, was not a warranty that the actual weight was substantially the same with the invoice weight; and evidence that such was the understanding among dealers in that article in Boston was inadmissible. "There is no doubt that it is competent to prove by parol that words used in a contract have, by commercial usage, a settled meaning different from their common and ordinary acceptation. But we do not understand the plaintiff's offer of proof to come within this rule. They asked to be allowed to prove, that the defendants, by warranting that the cloth was described as of a certain weight in the invoice, warranted that the statement in the invoice was substantially true. This does not seem to us to be explaining the meaning of the terms used in the contract, but an attempt to give to the contract a force and effect which its terms do not warrant."

1. See *BANKS AND BANKING*, vol. 2, pp. 106–110, inclusive, where this subject is treated at some length.

places; and that this would be binding upon those who contracted with knowledge of the usage. This decision has been followed in other states, and it is generally recognized that, in the absence of statutory law, the usage of a place controls in the matter.<sup>1</sup>

1. In *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, a usage on the part of all the banks of Washington and Georgetown to demand payment and give notice to indorsers of commercial paper on the fourth day of grace, was held binding upon an indorser who knew of the usage. The court said: "This court must assume as established facts that the custom of the Bank of Columbia, and all the other banks in Washington and Georgetown, from their first institution, had been to demand payment of notes due them, on the fourth day after the time limited therein, and that this custom was known and well understood by the defendant when he indorsed the note in question; and, it may be added, with full knowledge and expectation that this note was to be dealt with in the same way. Under such circumstances, it would seem that nothing short of some positive and unbending principle of law could shield the defendant from responsibility. But, so far from trenching upon any such principle, we think his liability completely established by well-settled rules of law. It seems to be assumed as the settled law of promissory notes, that in order to charge an indorser, demand of the maker must be made on the third day after that limited in the note, and that this is so stubborn a rule that parties are not permitted to violate it even by their mutual agreement. We admit in the most unqualified manner that the usage of making the demand on the third day of grace has become so general that courts of justice will notice it *ex officio*, and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note when they put their names upon it. But that this rule has any attributes so inviolable as not to be touched by the parties to negotiable paper, cannot be admitted. It has its origin in custom, and that custom, too, comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, and which contributed to make up the common-law code, which is so justly venerated. So far from this,

that the allowance of any days of grace is in derogation of the common-law rule applicable to other contracts. They are emphatically the mere creatures of usage, varying in different countries to suit the views and convenience of men in business, originally gratuitous, and not binding on the holder. When the allowance of only three days of grace is said to be the law of the contract by bills of exchange and promissory notes, nothing more can be intended than that custom has so long sanctioned this rule that all dealers in paper of this description are understood to govern themselves by it. The custom under which this bank has transacted business for five and twenty years, of demanding payment of the drawers of notes on the fourth instead of the third day after the time limited for payment, is not unreasonable or repugnant to any principles of general policy. It does not stand alone, but is in accordance with the usage of every other bank in Washington and Georgetown. The defendant indorsed the note in question with full knowledge of the custom. A demand on the fourth day is in perfect harmony with the principles of the common law, if applied to the contract, the maker having the whole of the third day to pay his note, and not being in default until the fourth. The inconveniences suggested on the argument, growing out of a usage here differing from that which is in practice in other places on this subject, are not of great public concern. If they exist, they affect the banks and their customers only. And if felt to the prejudice of either the one or the other, we may rest assured it would be altered."

In *Sharp v. Ward*, 7 Ohio 223, it was said: "Are days of grace allowed, in this state, upon notes like this? In the absence of litigation, and of decided cases, this depends upon custom, that is, upon the usual mode of transacting the business upon which the controversy arises. Upon such notes, and upon commercial bills of exchange, it is a well-established usage, to allow days of grace. In relation to mere ordinary notes of hand, made in the

b. DEMAND AND NOTICE.—The usages of banks are of special interest in connection with matters of demand for payment of commercial paper, and notice to parties liable as indorser or otherwise. It may be said, in general, that all usages of banks pertaining to demand and notice are presumed to enter into the contract of the parties, and that all acts done in accordance with

common transactions of life, no such usage is understood to prevail."

In *Godden v. Shipley*, 7 B. Mon. (Ky.) 579, it was said that when the local law of a state does not fix the days of grace which shall be allowed upon negotiable notes, the law merchant fixes it, which is by custom, varying in different places, and the custom should be proved.

In *Reese v. Mitchell*, 41 Ill. 365, it was said that whatever may have been the usage of bankers and a portion of the business community, the custom of allowing days of grace did not obtain among the great majority of the people in *Illinois*. The precise question, however, was presented to the court in the case of *Elston v. Dewes*, 28 Ill. 436. It was there held, that days of grace did not exist as a right, prior to the passage of the Act of 1861, so far as it related to promissory notes.

In *Cookendorfer v. Preston*, 4 How. (U. S.) 317, the court said, that at one time it was the usage in the city of Washington to allow four days of grace upon notes discounted by banks, and also upon notes merely deposited for collection. "But since then the usage has been changed as to notes deposited for collection, and been made to conform to the general law merchant, which allows only three days of grace. Although evidence is not admissible to show that usage was in fact different from that which it was established to be by judicial decision, yet it may be shown that it was subsequently changed."

In *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 25, it was said: "It is the usage of the Bank of Washington, and of other banks in the *District of Columbia*, to demand payment of a bill on the day after the last day of grace; and this usage has been sanctioned by the decisions of this court. The usage is equally binding on parties who were not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable. The usage of a place on which

a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed."

In *Fowler v. Brantly*, 14 Pet. (U. S.) 318, it was said, that the known custom of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, entered into the contract of those giving notes for the purpose of having them discounted at the bank; and the parties to the note must be understood as having agreed to govern themselves by such customs and modes of doing business; and this, whether they had actual knowledge of them or not; and it was the especial duty of all those dealing with the note to ascertain them, if unknown. This is the established doctrine of the supreme court, as laid down in *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581; in *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, and in *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 32.

In *Planters' Bank v. Markham*, 5 How. (Miss.) 397, it was held that where a note is made payable at a banking house, the usage and custom of the bank constitute a part of the contract. Where, by the usage of the bank, all persons having notes payable there are allowed until the expiration of banking hours for payment, a demand of payment at the bank before that time is insufficient, unless the note is permitted to remain in bank until the close of banking hours.

In *City Bank v. Cutter*, 3 Pick. (Mass.) 414, it appeared that the day of commencement at Harvard College was not a holiday; but the court said that a usage of any bank, in respect to notes falling due on that day, to make a demand on the maker and give notice to the indorser on the day preceding, will be binding on an indorser of a note discounted for him at the bank, who is consunt of such usage; and whether the note is made payable at such bank or not, is immaterial. See also *Weld v. Gorham*, 10 Mass. 367, note (a).

the usage will be recognized as valid. Such usages are received because the parties must have intended that their commercial paper should be treated according to the established usage.<sup>1</sup>

c. DUTIES AS COLLECTING AGENT.—The proper performance of the duties of a bank as a collecting agent may be determined by usage. Under this heading may be included, the duty of presenting a check within a certain period after receiving it for

1. See DEMAND, vol. 5, pp. 528z, 533.

In *Lincoln, etc., Bank v. Page*, 9 Mass. 155; 6 Am. Dec. 52, it was held that where a banking company have established usages and by-laws respecting demands on makers of promissory notes, and notices to indorsers thereof, the dealings and contracts of those doing business with such company are to be understood and enforced according to such usages and by-laws.

In *Central Bank v. Davis*, 19 Pick. (Mass.) 373, the court said: "An established usage of a bank, known to its customers, would be evidence against them. All who transact business at a bank must be presumed to agree to conform to their modes of doing business, so far as they are known to them. They incorporate its known usages into and make them a part of their contracts. They are therefore bound, not by the force of the usage, but by virtue of their own contracts."

In *Warren Bank v. Parker*, 8 Gray (Mass.) 221, a bank in Boston, with whom a promissory note was placed for collection, gave notice to the maker before the note fell due, according to the usage in Boston, of the day when the note would be payable, and requested him to come and pay it; and the note remained in the bank through the banking hours of that day. It was held that if the maker was a trader and accustomed to transact business at the bank, his consent to the general usage which made such notice sufficient might be shown, and, if shown, rendered any other demand immaterial.

In *Carolina Nat. Bank v. Wallace*, 13 S. Car. 347; 36 Am. Rep. 694, it was held that while the general rule requires that, where the parties reside in the same city or town, notice of dishonor must be given personally to the indorser, or, in his absence, must be left at his residence or place of business, yet where the note is made payable at a bank whose usage it is to give such notice through the post office, that mode of giving notice will be sufficient.

In *Sahlien v. Bank*, 90 Tenn. 221, it was held that a person sending paper to a bank for collection, without special instructions, is bound by a custom of the bank to hold paper sent to it for collection for some days after presenting it and receiving a promise of payment, if such usage is not in violation of the general law. The great weight of authority is that such a custom of banks, though not known to the party sending paper for collection, is binding upon the sender as a part of the contract of agency, to which the sender impliedly assents by selecting the bank as agent, without inquiry or without special instructions. *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 25; 1 Morse on Banks, § 221.

In *Bell v. Hagerstown Bank*, 7 Gill (Md.) 227, it was said, in reference to bank usages, that they "have grown up as a part of the settled law of the land. In obedience to this usage, it is that the law dispenses with personal notice, and charges the indorser by the bare deposit of the notice in the post office, if in due time, even if the notice never comes to hand. The importance of fixed and uniform rules in reference to mercantile dealings, has converted usage into law. It is adapted to expedite commercial and banking operations."

In *Statesville Bank v. Pinkers*, 83 N. Car. 377, it was held that the usage of a particular bank, known and acted upon by its customers, may be proved to modify the general law merchant, as applicable to such bank.

In *Grinman v. Walker*, 9 Iowa 426, it was said that the rule of the commercial law is, that if the parties live in the same town, notice should not be sent by mail. It must be sent either to the place of business or the residence of the party to be notified. The note was made payable at a banking house in the city of Keokuk. Plaintiff proposed to prove that it was the custom of these banking houses to give notice to indorsers through the post office, as was done in this instance, and that defendants knew of this custom. "It is



objected that this usage, or custom, if proved, would be inconsistent with the rule of law, above referred to, and would therefore be void. Usage, when established, affords the same evidence of intention as the most direct language, and may have the same effect upon the application of legal rules. If, therefore, it would be competent to prove that the parties contracted that notice should be given through the post office, the same may be shown by proving a usage to that effect."

In *Camden v. Doremus*, 3 How. (U. S.) 515, it was held that evidence of the general custom of banks to give previous notice to the payer, of the time when notes will fall due, was properly rejected, unless the witness could testify as to the practice of the particular bank at which the note was made payable.

In *Williams v. National Bank*, 70 Md. 343, it was held that evidence offered by W., the defendant, to prove the existence of a custom among the Baltimore banks to send notice of notes held by them to all persons whose names were on such notes, and that this was the custom when the notes were held as collateral security, and that no such notice had been sent to the defendant, was properly rejected, as no rule of law required such notice to be sent, and the plaintiff had not adopted such custom.

In *Farmers' Bank v. Duvall*, 7 Gill & J. (Md.) 78, a written notice was served upon the maker of the note, stating when it would mature, etc. This was in pursuance of the usage of the bank, and was relied on as a sufficient demand in accordance with the usage. The court said: "It is supposed that this language of the witness constitutes evidence of a usage on the part of the bank to make demand of payment at a time and under circumstances different from the general rules of law, and that efficacy should be given to such usage, if found by the jury, so as to validate as a demand that which without such a usage would be a nullity. In the view which we take of the evidence, it is immaterial to examine the question as to the legal effect of such usage, if established, because we consider that the witness proves no usage bearing on the question of demand. The only conclusion which can be drawn from the evidence is, that it is the practice of this bank, as it is of all banks, to give notice of the falling due of notes, that the parties may be apprised, not only of the

holders of the notes, but reminded and admonished of the near approach of the time for the payment of their liabilities. The witness does not state the existence of any usage to treat this common notification as a substitute for a legal demand on the holder. The rule established is, on the contrary, perfectly consistent with the necessity of presentment for payment when due, and in the accustomed legal mode. . . . The plaintiff should have gone further, and proved that, by the usage of the bank, demands against the drawers of notes, in order to charge the indorsers, were always made by the alleged notification on the day notes first fell due, instead of being made according to the rules of law, and that such notice was made by usage a substitute for the lawful demand. In such a state of facts, the question would have been brought before the court how far, in point of law, such a notice could operate as a demand."

In *Marrett v. Brackett*, 60 Me. 524, it was held that the acceptance of a check implies an undertaking on the part of the holder to use due diligence in presenting it for payment. "The holder is in the exercise of due diligence when he presents it for payment in accordance with the usage of the banks where payable, and of the persons having accounts with such banks, provided the usage is well established, reasonable, and lawful, and recognized by the mercantile community and the parties to the check."

In *Blanchard v. Hilliard*, 11 Mass. 85, it was said that the usage of a bank, at which the parties to a promissory note are accustomed to transact business, respecting the time of demand and notice on such notes, may be shown, not as forming rules for the decision of the court, but as evidence of the assent of the parties to such usage, and of their waiving their legal claims.

In *Chicopee Bank v. Eager*, 9 Met. (Mass.) 584, it was held that where a bank is the holder of a note made payable at its banking house, the indorser is bound by a notice of non-payment by the maker, given conformably to the established usage of the bank, though not conformably to the general law. The defendant, being charged as an indorser of a promissory note payable, by its terms, at the Chicopee Bank, is bound by a notice conformable to the established usage of that bank. *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431.

collection;<sup>1</sup> the question whether the duty of making demand upon the maker of a note may be delegated to a notary,<sup>2</sup> and whether a bank need notify all the indorsers on notes sent to it for collection.<sup>3</sup> The bank being an agent for collection, it is presumed that the agency will be executed according to usage.

*d.* POWERS OF OFFICERS.—As between a bank and its customers, usage may determine the powers of the bank's officers; and customers are entitled to rely upon the usage in making contracts with the bank.<sup>4</sup> The cases embrace instances in which usage has been looked to for the purpose of determining whether various acts of presidents, cashiers, tellers, clerks, and others were within the scope of their respective powers.<sup>5</sup>

The case stated shows that there was such a mode of giving notice established by usage, and that the notice in the present case was given conformably to it.

Other cases upon usages affecting demand and notice are *Heywood v. Pickering*, L. R., 9 Q. B. 428; *Bank of Alexandria v. Deneale*, 2 Cranch (C. C.) 488; *Patriotic Bank v. Farmers' Bank*, 2 Cranch (C. C.) 560; *Bank of Washington v. Triplett*, 1 Pet. (U. S.) 25; *Brent v. Bank of Metropolis*, 1 Pet. (U. S.) 89; *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431; *Forbes v. Omaha Nat. Bank*, 11 Cent. L. J. 209; *Gindrat v. Mechanics' Bank*, 7 Ala. 325; *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Hartford Bank v. Stedman*, 3 Conn. 489; *Kilgore v. Bulkley*, 14 Conn. 367; *Godden v. Shipley*, 7 B. Mon. (Ky.) 579; *State Bank v. Rowell*, 6 Mart. N. S. (La.) 267; *Marrett v. Brackett*, 60 Me. 524; *Bell v. Hagerstown Bank*, 7 Gill (Md.) 227; *Bank of Columbia v. Fitzhugh*, 1 Har. & G. (Md.) 329; *Raborg v. Bank of Columbia*, 1 Har. & G. (Md.) 231; *Jackson v. Union Bank*, 6 Har. & J. (Md.) 146; *Bank of Columbia v. Magruder*, 6 Har. & J. (Md.) 172; *Jones v. Fales*, 4 Mass. 252; *Lincoln, etc., Bank v. Page*, 9 Mass. 157; 6 Am. Dec. 52; *Pierce v. Butler*, 14 Mass. 303; *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177; 3 Am. Rep. 445; *Weld v. Gorham*, 10 Mass. 366; *Whitwell v. Johnson*, 17 Mass. 449; 9 Am. Dec. 165; *Widgery v. Munroe*, 6 Mass. 449; *Warren Bank v. Parker*, 8 Gray (Mass.) 221; *Boston Bank v. Hodges*, 9 Pick. (Mass.) 420; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Chicopee Bank v. Eager*, 9 Met. (Mass.) 584; *Wood v. Corl*, 4 Met. (Mass.) 205; *Borup v. Nininger*, 5 Minn. 523; *Commercial, etc., Bank v. Hamer*, 7 How.

(Miss.) 448; 40 Am. Dec. 80; *Lewis v. Planters' Bank*, 3 How. (Miss.) 267; *Planters' Bank v. Markham*, 5 How. (Miss.) 397; 37 Am. Dec. 162; *Cohea v. Hunt*, 2 Smed. & M. (Miss.) 227; 41 Am. Dec. 589; *Overman v. Hoboken City Bank*, 30 N. J. L. 61; *Ransom v. Mack*, 2 Hill (N. Y.) 587; 38 Am. Dec. 602; *Sheldon v. Benham*, 4 Hill (N. Y.) 129; 40 Am. Dec. 271; *Ireland v. Kip*, 10 Johns. (N. Y.) 490; 11 Johns. (N. Y.) 231; *Bowen v. Newell*, 5 Sandf. (N. Y.) 326; *Trask v. Martin*, 1 E. D. Smith (N. Y.) 505; *Isham v. Fox*, 7 Ohio St. 317; *Halls v. Howell*, Harp. (S. Car.) 427.

1. *Rickford v. Ridge*, 2 Camp. 537; *Mohawk Bank v. Boroderick*, 13 Wend. (N. Y.) 133; 27 Am. Dec. 192; *Boddington v. Schlenker*, 4 B. & Ad. 752; 24 E. C. L. 153.

2. *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582. But see also *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. Rep. 489.

3. *Smedes v. Bank of Utica*, 20 Johns. (N. Y.) 372.

4. *Jones v. Fales*, 4 Mass. 252; *Widgery v. Munroe*, 6 Mass. 449; *Lincoln, etc., Bank v. Page*, 9 Mass. 157; 6 Am. Dec. 52; *Smith v. Whiting*, 12 Mass. 6; 7 Am. Dec. 25; *Whitwell v. Johnson*, 17 Mass. 449; 9 Am. Dec. 165; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Hartford Bank v. Stedman*, 3 Conn. 489; *Stamford Bank v. Ferris*, 17 Conn. 272; *Yeaton v. Bank of Alexandria*, 5 Cranch (U. S.) 52; *Brent v. Bank of Metropolis*, 1 Pet. (U. S.) 89; *Bank of Metropolis v. New England Bank*, 1 How. (U. S.) 234; *Neiffer v. Bank of Knoxville*, 1 Head (Tenn.) 162; *Pope v. Bank*, 57 N. Y. 131; *Palmer v. Yates*, 3 Sandf. (N. Y.) 137; *Shimmel v. Erie R. Co.*, 5 Daly (N. Y.) 396.

5. In a *Massachusetts* case, *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306, it

2. MISCELLANEOUS.—Certain other cases in which the usages of bankers have been considered are stated in the note.<sup>1</sup>

3. Usages of Carriers—*a*. DELIVERY BY CARRIERS.—Carriers' usages which have come before the courts for consideration are to a great extent those relating to the delivery by the carriers of goods received by them for transportation. The cases show that great latitude has been allowed the carriers in this connection.

was held that a usage for a teller to certify checks as "good" in the absence of authority was void. This has not been followed, and the contrary has been held in numerous cases. See *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604; *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592; *Meads v. Merchants Bank*, 25 N. Y. 143; 82 Am. Dec. 331; *Farmers', etc., Bank v. Butchers, etc., Bank*, 16 N. Y. 125; 69 Am. Dec. 678; *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121; *Girard Bank v. Bank of Penn. Tp.*, 39 Pa. St. 92; 80 Am. Dec. 507. See also *Cooke v. State Nat. Bank*, 52 N. Y. 96; 50 Barb. (N. Y.) 339; *U. S. Bank v. Fleckner*, 8 Mart. (La.) 309; 13 Am. Dec. 387.

1. In *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230, a note payable at the Mechanics' Bank in New York was presented and payment demanded fifteen minutes after bank hours; and this was held sufficient, it appearing that although it was a quarter of an hour after the usual time of closing the bank as to other business, it was within bank hours, it appearing that, according to the general course of doing business at this bank, these fifteen minutes were the usual and accustomed time for these presentations, and of this course of business the defendant ought to have informed himself.

In *Dodge v. National Exchange Bank*, 30 Ohio St. 1, it was held that the rightful possession of a check, made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee. "The duty of the drawee upon acceptance of such check, to pay the same only upon the genuine indorsement of the payee named therein, is not affected by a custom among bankers as to the mode of ascertaining the identity of the person indorsing the name of the payee and receiving payment."

In *Sims v. U. S. Trust Co.*, 103 N.

Y. 472, it was said that the custom of the trust company to require the signature of a customer to accompany a deposit was one adopted for the safety and protection of the bank, which it was at liberty to enforce or omit as it deemed best under the circumstances.

In *Planters' Bank v. Farmers', etc., Bank*, 8 Gill & J. (Md.) 449, it was held that a usage established by proof, that current deposits made in a bank, and the proceeds of notes and drafts placed for collection, are to be paid to the depositor, upon demand, at the counter of the bank, would prevent the running of the Act of Limitations against such depositor.

In *McCurdy v. Society of Savings*, 8 Wkly. Law Bull. (Ohio) 69, it was held that the right of the drawer of a check to have it paid according to his order, without indorsement by him, or the right of a holder of it to be paid according to its terms without any new contract arising from indorsement by him, cannot be affected or destroyed by such usage. "What good reason is there why a holder of such a note, bill, or check shall be required to indorse a paper as a condition to getting his money when he is lawfully entitled to it without such indorsement? It does not make the person's indorsement genuine, if it was in fact forged; it does not increase his liability to the bank in such a case; it may cause the holder, who is frequently a person who has no actual interest in the paper, to wit: an agent's attorney, trustee, etc., to run the risk of a liability by a fraudulent or improper reissue of the note and bill with his indorsement on it; neither can it be fairly justified on the ground that the signature is in effect a receipt of the holder, that he has received money; first, for the reason that the possession of the bill or check is evidence of its payment; second, because a party having the obligation of paying money cannot insist on a receipt as a condition precedent to payment." See generally CHECKS, vol. 3, p. 211.

The ground upon which such usages have been received, is, of course, as in other relations, that the usage entered into the contract of the parties.<sup>1</sup>

The proper method of delivering varies in different places. In a sparsely settled country, it would be unreasonable to expect the same method of delivery as in a large city. The usages, there-

1. See CARRIERS OF GOODS, vol. 2, p. 891. In *Dixon v. Dunham*, 14 Ill. 324, the court said, in reference to the effect of usage upon delivery by carriers: "While the convenience of commerce may require different rules for the delivery of goods when transported by sail or steam vessels on the great lakes, on the rivers, on the canal, or by railroad, by plank or the common roads, it would be very inconvenient for each commercial point on these thoroughfares to establish an independent usage by which the same contract would receive different constructions, depending upon the place at which it was to be performed. Where the necessities of any particular line of commerce may render a particular usage so indispensably necessary as to commend itself to, and force itself upon all those engaged in that line of commerce, there may be great propriety in allowing such usage, when it has become universal and well understood, and acquiesced in by all, to be proved in order to explain the intention of parties upon points as to which the contract itself is not explicit, although without such usage the law might give it a different construction. This is allowed upon the same principle which allows other extraneous facts to be proved, in view of which parties have entered into engagements, and by the aid of which their intentions are ascertained where otherwise they might be doubtful. In construing contracts of affreightment, the courts themselves take notice of the course of trade, and the means of transportation in use in carrying on that commerce; and, in aid of the means of information which the courts are supposed to possess in reference to commercial transactions, usages which the necessities of a particular trade have established have been allowed to be proved to the courts, to aid them in giving a construction to contracts made in reference to such trade."

A custom of railroads for the delivering carrier to take up bills of lading before delivering freight to the

consignee, for the purpose of holding such bills as evidence of having delivered the freight to the right party, is unenforceable. *Gulf, etc., R. Co. v. McCown* (Tex. Civ. App. 1894), 25 S. W. Rep. 435.

In *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175, it was said that the usages of business in a vicinity, are of importance to show when a wharfinger acquires, and when he ceases to have the custody of goods in that capacity, as in the case of common carriers. The cases are numerous where evidence, as to the usages of business, is received to show when goods are considered as delivered to, and received by, common carriers, and when their liability commences. Hence the evidence of the customs and usages of merchants, in the vicinity of the defendant's wharf, was properly received to show that goods landed on the wharf, as was the flour in this case, were not considered as in their custody, and that they did not receive and take care of them, as wharfingers.

In *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103, it was held that if a transfer company has been for a considerable time in the habit of hauling freight belonging to the consignees from the depot to their place of business, and paying charges thereon and collecting them from the consignees, and this is recognized by the consignees and is in accordance with the custom between them, the transfer company has a right to continue in the said habit or custom until notified by the consignees to desist therefrom.

In *Cahn v. Michigan Cent. R. Co.*, 71 Ill. 96, it was held that the *prima facie* obligation of a carrier with respect to delivery may be affected by a well-established and generally well-known custom and usage; but to have that effect, it must be so universally acquiesced in, by length of time, that the jury will feel themselves constrained to say that it entered into the minds of the parties, and made a part of the contract.

fore, vary in such cases.<sup>1</sup> So, also, usage may prescribe that goods should be stored upon arrival at their destination in the carriers' warehouse or elsewhere.<sup>2</sup> The character of notice of the arrival of goods may also be regulated by usage; in some cases, indeed, actual notice has not been required.<sup>3</sup> Similarly, the method of unloading, the place prescribed, and the time allowed for it, may

1. In *The Mill Boy*, 13 Fed. Rep. 181, it was said that the rules regulating the liability of a carrier of goods by water to landings where there are wharves and warehouses, and where the consignee resides or may be found, are not applicable to neighborhood or way landings on the river banks of the southwest, where there is no wharf and no warehouse, and where the consignee does not reside, and is not to be found. Furthermore, the usage and custom has been uniform that when the boat put goods off at such a landing in good order and condition, and the person living at or near the landing was notified of the fact, and requested to look after them and notify the consignees, the liability of the boat was at an end, and, being reasonable, contracts of affreightment will be presumed to have been made with reference to such usage and custom. Hence, where the consignees had notice in fact of the precise character of the landing, and ordered a mill consigned to such landing, and lived at a distance from it, with no direct or speedy means of communication between the landing and themselves, it was their duty to have been in attendance to receive the mill, or to have had an agent at or near the landing for that purpose, if they did not desire to be bound by delivery in accordance with the usage and custom of the landing.

In *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, it appeared that it was the custom of the railroads terminating in Boston to deliver to the consignee goods "billed straight," as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the way-bills to determine the consignee and the form of the consignment. Under this usage, the court said that there was no laches in not calling for the bill of lading; and, in thus delivering, there was no violation of any of the terms of its contract, express or implied. Such delivery, therefore, was not a misdelivery which would amount to a con-

version and render the defendant liable to the plaintiffs.

2. In *Alabama, etc., Rivers R. Co. v. Kidd*, 29 Ala. 221, a railroad company gave a receipt for freight "to be delivered to R. R. agent;" the agent deposited it in a warehouse of a third party under a usage to do so; the railroad proposed to prove the custom, and under it justify the deposit of the cotton in the warehouse as a means of preserving the cotton after its delivery to the agent. This, then, could not relieve the railroad from observing its written contract to deliver to the agent; but, if the custom existed, and was proved according to the rules governing in questions of custom or usage of trade, it might relieve the road from the liability which would otherwise rest on it, for the loss of the cotton in the hands of its agent.

In *McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247, it was held that the owner of goods, delivered to a common carrier, is bound to take notice of a usage to store them, on arrival at their place of destination, in the carrier's warehouse, and the carrier is thereafter liable only as a warehouseman. "If the owner neglects to make the necessary inquiries as to the usage or custom of business, or to give direction as to the disposal of goods, it is his own fault; and the loss, if any, after the carrier has performed his duty according to the course of his trade and business, should fall upon such owner, and not upon the common carrier."

3. In *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121, it was held that where a manufacturing company has been in the habit of shipping its goods daily by a common carrier to its agent for sale, and it has been the long established course of dealing for the consignee to call daily and receive the goods upon their arrival without notice, no notice to the consignee of the arrival of any consignment is necessary, but the carrier is discharged when the goods are unloaded at the accustomed place and the consignee has had time to remove them. Where,

be the subject of usage;<sup>1</sup> in the case of carriers by water, these usages are particularly effective, the usages of the port of delivery being impliedly incorporated into every contract of affreightment.<sup>2</sup> It is, however, in the power of every shipper and carrier to make special contracts with reference to the matters that would otherwise be regulated by usage; and if the shipper gives particular directions, and the carrier accepts the goods, he will be bound

however, the usage has been for the consignee not to receive or remove goods arriving upon a holiday, as to goods arriving upon such day the ordinary rule applies, and the carrier, to relieve himself from liability as such, must give notice and a reasonable time to remove, otherwise the liability attaches until after a reasonable time for removal upon the next day.

In *Huston v. Peters*, 1 Metc. (Ky.) 558, it was said that in the case of a carrier by water there must be a landing of the goods at the wharf, or usual landing-place, with reasonable notice thereof to the consignee. "But this rule may be affected by a well-established, reasonable, and generally known local custom and usage, of such age, uniformity of observance, certainty, fixedness of character, and notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it." In this case the usage was that steamboats deliver freight at N. by putting it on the wharf and exhibiting a manifest of the cargo in some public place, the consignees taking notice of the arrival of boats and of freight for them.

1. In *Consolidation Coal Co. v. Shannon*, 34 Md. 144, where, the contract being silent as to the time of unloading, the court held that a reasonable time was implied, and a claim for demurrage would lie for detention beyond such time; that evidence of the existence of a custom of the trade at the place of unloading to unload boats within twenty-four hours, was admissible, "for the purpose of showing what was regarded, in the regular course of the trade, as the reasonable time within which boats should be unloaded. The regulations incorporated into the contract, fixed no definite time within which boats would be unloaded and discharged; but if by usage, established in the trade at appellant's wharf, twenty-four hours were taken as reasonable time, the fact of such usage was certainly admissible as tending to show

what the appellant, or its agent, regarded as reasonable time, and its own practice upon the subject."

In *McCullough v. Helewegg*, 66 Md. 269, a bill of lading for a cargo of wood provided that the cargo was to be delivered at the wharf of the owner of the cargo, in the city of Baltimore. It was held that the parties were presumed to have contracted with reference to a custom proved to exist in the port of Baltimore, requiring a cargo of wood to be unloaded on the wharf of the owner of the cargo, and piled in suitable form for measurement and inspection, before freight can be demanded.

In *Steel Works v. Dewey*, 37 Ohio St. 242, D. agreed in writing to deliver to S. a certain quantity of iron ore, at a specified price per ton, "on the landing at C.," and gave him an order therefor, and S. brought an action on the agreement, alleging that D. refused to deliver the ore. It was held competent to show that, by the settled, uniform usage at C., well known to the parties when they contracted, one holding such order is entitled to have the ore taken from the pile on the landing and placed in his boats; that ore is not permitted to be removed, nor is it practicable to remove it, in any other manner; and that the ore is weighed when it is carried in the boats to its destination, and then payment therefor is made. This extraneous evidence shows the rights and obligations of the parties to this instrument to be very different from those implied in the absence of such evidence. But the usage is not inconsistent with the terms of the contract.

2. In "*Norden*" *Steamship Co. v. Dempsey*, 1 C. P. Div. 654, timber was consigned, under a charter-party made at Riga, to the *Canada* dock in the port of Liverpool, a given number of days being allowed for unloading there. It was held that although, by the general law, the lay days commenced from the time the ship arrived in the dock, it was competent for the consignee to

show, notwithstanding the plaintiff was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay days commenced only from the mooring of the vessel at the quay where, by the regulations of the dock, she alone was allowed to discharge.

In *The Mary Riley v. 3000 Railroad Ties*, 38 Fed. Rep. 254, it was held that where a custom is established requiring vessels to wait their turn in unloading at a particular port, the master is held to contract with reference to it; and, if no stipulation for demurrage is made in the contract, he assumes the risk of delay. The custom of the port respecting the delivery of such cargoes is a part of the contract of shipment, and binding upon the vessel as fully as if reduced to writing therein. *The M. S. Bacon v. Erie, etc., Transp. Co.*, 3 Fed. Rep. 344; *Henley v. Brooklyn Ice Co.*, 14 Blatchf. (U. S.) 522; *The Glover*, 1 Brown Adm. 166; *One Hundred and Seventy-Five Tons of Coal*, 9 Ben. (U. S.) 400; *Wordin v. Bemis*, 32 Conn. 268; 85 Am. Dec. 255.

In *Shepherd v. Lanfear*, 5 La. 342; 25 Am. Dec. 181, it was said that parties are presumed to know the usages and laws of the port where the contract is to be performed, and to contract in reference to them. The mode of delivery depends much on the usage of the place where that delivery is to be made, and if the general laws of the country change the place of delivery in case of quarantine, the freighter is bound to receive it.

In *Irzo v. Perkins*, 10 Fed. Rep. 779, it was held that it is the duty of the vessel to make delivery of cargo, and where the bill of lading is silent as to the particular place and mode of delivery, it must be made according to the usage and regulations of the port, or the arrangements made with the consignee.

In *Hostetter v. Gray*, 11 Fed. Rep. 179, it was held that, if nothing is expressed to the contrary in the bill of lading, established usages relating to a voyage are impliedly made part of the contract. After the express provisions of the contract, the usage of the trade is the predominating test as to deviation, and of what belongs to the voyage, and the proper course in prosecuting it.

The time, place, and manner of delivery of a cargo may be regulated by a usage of trade, when there is no express

contract upon the subject; under such circumstances, the usage enters into and forms part of the contract. *Pickering v. Weld* (Mass. 1894), 34 N. E. Rep. 1081.

In *Devato v. 823 Barrels of Plumbago*, 20 Fed. Rep. 510, it was held that where a cargo is, by the bill of lading, to be delivered at a designated port of wide extent, without naming the particular place within the port, delivery must be made according to the established custom and usage of the port, and in that part of it customarily used in the discharge of similar goods. To ascertain this, proof of usage, either general or in particular lines of trade, is competent. Where the consignees are numerous, a usage for the majority to name the place of discharge is valid, if the place named be suitable, and within the limits where such cargo is ordinarily landed. *The Boston*, 1 Low. (U. S.) 466; *The E. H. Fittler*, 1 Low. (U. S.) 114; 1 Pars. Shipp. and Adm.

In the case of *Blossom v. Smith*, 3 Blatchf. (U. S.) 316, *Nelson, J.*, held valid an established usage of trade less obviously reasonable than this; namely, that the largest single consignee of a cargo of naval stores, such as resin, turpentine, etc., might select a yard in Brooklyn at which the whole cargo should be delivered, and that the other consignees must accept delivery there. Consignees of goods at a designated port have a right to expect a delivery of their goods, according to the established custom and usage of the port, and in that part of the port customarily used for the discharge of such goods; and the vessel is bound, and has a right, to make delivery accordingly. *Abb. Shipp.* 378; *Vose v. Allen*, 3 Blatchf. (U. S.) 289; *The Grafton*, 1 Blatchf. (U. S.) 176; *Gatliffe v. Bourne*, 2 N. & R. 100; *Cargo ex Argos, L. R.*, 5 P. C. 134, 160; *Irzo v. Perkins*, 10 Fed. Rep. 779.

In *Bradstreet v. Heron, Abb. Adm.* (U. S.) 209, it was held by *Betts, J.*, under a usage proved in that case, and upon a defense precisely similar to the defense in this case, that a delivery of goods at quarantine, during the quarantine season, was a compliance with a contract of the bill of lading to deliver at "the port of New York." The same, also, in substance, was held in the case of *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.) 75.

In *Sleade v. Payne*, 14 La. Ann. 457, it was said that the manner of deliver-

to obey the directions, any usages to the contrary notwithstanding.<sup>1</sup>

*b. DELIVERY TO CARRIERS.*—What constitutes a delivery to a carrier may be determined in many cases by the usage which the carrier has allowed to grow up, and under which it receives goods. Thus, whether the articles have been delivered at the proper place, or to the proper employee of the carrier, is in great measure a matter of usage. The previous course of dealing in such cases is always a matter of importance. But when an act is done which the law recognizes as a delivery, the carrier cannot avoid it by proof of its usage to require something more, or different.<sup>2</sup>

ing the goods, and consequently the period at which the responsibility of the master and owners will cease, depends upon the custom of particular places, and the usage of particular trades.

1. Of course, if a customer gives special directions as to the delivery of the goods, the usage is excluded, and the carrier will disobey the directions at his peril. *Wardell v. Mourillyan*, 1 Esp. 693; *Sager v. Portsmouth R. Co.*, 31 Me. 228; 1 Am. Rep. 659; *Bazin v. Steamship Co.*, 3 Wall. Jr. (U. S.) 229; *Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *The Star of Hope Church*, 17 Wall. (U. S.) 651; *Hastings v. Pepper*, 11 Pick. (Mass.) 41; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514; 6 Am. Rep. 124; *Dunseth v. Wade*, 3 Ill. 285; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Farmers', etc., Bank v. Erie R. Co.*, 72 N. Y. 188; *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Streeter v. Horlock*, 1 Bing. 34; 8 E. C. L. 389.

In *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264, a usage was sustained that, at a way station, where the business of the railroad was not of sufficient importance to justify the erection of a warehouse, or to have a freight agent, goods should be delivered at the station without storing them and without notice.

In *Gibson v. Culver*, 17 Wend. (N. Y.) 305; 31 Am. Dec. 297, it was the usage of the defendant line of stages to leave freight carried by it directed to T. at the stage house at that place, and not to deliver it to the residence or business address of the consignee, the usage prevailing at all the stopping-places of the line.

Other cases respecting delivery of goods by carriers are *Banister v. Hodgson*, 2 Camp. 488; *Rogers v. For-*

*rester*, 2 Camp. 485; *Petrocochino v. Bott*, L. R., 9 C. P. 355; *The Felix*, 2 Ad. & El. 273; *Hyde v. Trent, etc., Nav. Co.*, 5 T. R. 389; *Garside v. Trent, etc., Nav. Co.*, 4 T. R. 581; *Bradstreet v. Heron*, Abb. Adm. 209; *Strong v. Carrington*, 2 Am. L. Reg. 287; *Fulton v. Blake*, 12 Am. L. Reg. N. S. 779; *Dixon v. Dunham*, 14 Ill. 324; *Witzler v. Collins*, 70 Me. 290; 35 Am. Rep. 327; *Consolidation Coal Co. v. Shannon*, 34 Md. 144; *Croucher v. Wilder*, 98 Mass. 322; *Chickering v. Fowler*, 4 Pick. (Mass.) 371; *Cross v. Beard*, 26 N. Y. 85; *Ely v. New Haven Steamboat Co.*, 53 Barb. (N. Y.) 207; *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Gibson v. Culver*, 17 Wend. (N. Y.) 305; *Eagle v. White*, 6 Whart. (Pa.) 505; 37 Am. Dec. 434; *M. S. Bacon v. Erie, etc., Transp. Co.*, 11 Pittsb. L. J. (Pa.) 35; *McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247; *Galloway v. Hughes*, 1 Bailey (S. Car.) 553; *Steamboat Sultana v. Chapman*, 5 Wis. 454; *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541; 9 Am. Rep. 465.

2. In *Green v. Milwaukee R. Co.*, 38 Iowa 100; 41 Iowa 410, it was held that a usage of draymen to leave trunks at the waiting room of a railroad station without notice to the carrier's employees, was valid. The court said: "That a delivery may be made at the proper place of receiving baggage under the express assent or authority of the carrier, without notice to its employees, will not, we presume, be disputed. . . . There was evidence tending to show a course of business on the part of defendant, a custom to receive baggage left at the station house, as in this case, without notice to plaintiff's servants. Upon evidence of this character, it was proper that the facts should have been left to the



determination of the jury, whether there had been a delivery of the property within the rules above announced, whether a course of business—a custom had been established to the effect that a delivery of baggage at the station-house without notice was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom."

In *Wright v. Caldwell*, 3 Mich. 51, are the following observations: "It is well settled that, if a uniform custom is established and recognized by the carrier, and is known to the public, that property intended for carriage may be deposited in a particular place, without express notice to him that a deposit of property for that purpose in accordance with the custom, is constructive notice, and would render any other form of delivery unnecessary. The rule is founded in reason, as the usage, if habitual, is a declaration by the carrier to the public that a delivery of property in accordance with the usage will be deemed an acceptance of it by him for the purpose of transportation. To allow a carrier, when property is thus delivered, to set up by way of defense the general rule, which requires express notice, would operate as a fraud upon the public and lead to manifest injustice."

In *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396; 49 Am. Rep. 54, it was held that a deposit of cotton in a street along the side of the platform of a railroad depot, or in the railroad cotton yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent, may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the company, known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the company. "The trading public, as a rule, have no access to the superintendent, and can only know the station agents, with whom they have dealings. Whatever regulation, custom, or usage such station agent adopts, or permits to be adopted, the public must either conform to, or will feel itself justified in conforming to. The rules observed by shippers in their general transactions, if continuous or frequent, although not universal, grow into a usage, which would authorize others to treat it as the proper rule, and

as an element of the contract of affreightment. This constitutes the very spirit, the intent of a usage of trade. It supplies, by implication, an unexpressed fact, or link in the chain of facts, which go to make up and prove the contract. And we think it no answer to this, that no testimony was offered of this violation of instructions on the part of the agent, tending to trace notice of it to the superintendent. It was the duty of the corporation to keep itself informed of the manner in which its station agents conducted their agency, their habit, or usage in the matter of receiving and delivering freight; and we think it would be highly detrimental to the public service, if we were to permit a railroad corporation to escape responsibility for the consequences of a usage, which its own trusted agents had permitted to grow up, and be acted upon."

When a delivery has in fact been made to a carrier, the latter's liability cannot be avoided by proof of a usage not to regard itself as liable until some further act is done. If a delivery is made of merchandise, the legal effect of the delivery is not affected by a usage to be liable only as provided in a bill of lading to be afterward made out. *Illinois, etc., R. Co. v. Smyer*, 38 Ill. 354; 87 Am. Dec. 301. Nor, after a passenger trunk is delivered to the carrier, can it avoid liability by proof of a usage to be liable only after a check is given the passenger. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; 83 Am. Dec. 143.

In *Cobban v. Downe*, 5 Esp. 41, it was held that a delivery to the mate of a ship, in accordance with the usage of the wharf, was valid. Lord Ellenborough said: "What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained usage of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them, from which time it has been considered that their responsibility is then at an end." This case was followed in *Leigh v. Smith*, 1 C. & P. 638; 11 E. C. L. 506.

In *Hutchinson on Carriers*, section 93, it is said in reference to usages in respect to constructive delivery to carriers: Cases may arise in which the

c. THE CARRIER'S CONNECTIONS.—One who ships goods by a carrier is held to be bound by a usage of such carrier to deliver the goods to its connecting lines at the end of its own line.<sup>1</sup>

d. NEGLIGENCE.—What is usual for other carriers to do in like circumstances, is a means of determining whether a particular act is one of negligence or not. The usual methods of navigation may thus be of value in determining questions of negligence.<sup>2</sup>

usage and course of dealing between the parties should undoubtedly have that effect. But certainly, to do so, they should be shown to have existed, and to have been uniformly acted upon by the parties, by the most satisfactory proof, and for a sufficient length of time to have become an established usage, tantamount to an agreement to that effect, or to a declaration to the public that a delivery in accordance with the usage will be deemed an acceptance by him for the purpose of the transportation; and perhaps it should be shown that a reliance upon the previous course of dealing, or the usage, or the notice, had controlled the action of the shipper in the particular instance.

Other cases upon this point are *Ford v. Mitchell*, 21 Ind. 54; *O'Bannon v. Southern Express Co.*, 51 Ala. 481; *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; 83 Am. Dec. 143; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354; 52 Am. Dec. 344; *Green v. Milwaukee, etc., R. Co.*, 38 Iowa 100; 40 Iowa 410; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; *Packard v. Getman*, 6 Cow. (N. Y.) 757; 16 Am. Dec. 475; *Wright v. Caldwell*, 3 Mich. 51; *Buckman v. Levi*, 3 Camp. 414; *Burrell v. North*, 2 C. & K. 681; 61 E. C. L. 679; *Leigh v. Smith*, 1 C. & P. 638; 11 E. C. L. 506.

1. In *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157, reversing same case in 25 Wend. (N. Y.) 660, it was held that a shipper is bound by the usage of a carrier to deliver at the end of his own line to a connecting carrier, whereupon his liability ceases.

In *Indianapolis, etc., R. Co. v. Murray*, 72 Ill. 128, it was held where it is the general and long-established custom of a railroad company, in delivering freight to connecting lines, to deliver as consignors, a shipper who has been in the habit of shipping over such

road, will be presumed to be familiar with that custom, and to contract with reference to it.

In *Simkins v. Norwich, etc., Steamboat Co.*, 11 Cush. (Mass.) 102, it was held that if it be the general custom of a carrier to forward by sailing vessels all goods destined beyond the end of his line, he is not liable for not forwarding a particular article by a steam-vessel, unless the directions to do so be clear and unambiguous.

In *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81; 9 Am. Rep. 439, it was held that where a bill of lading is given by a carrier, to the terminus of his line, of goods addressed to a point beyond, he may show a usage to deliver in such cases to a connecting carrier. And see also *The Convoy's Wheat*, 3 Wall. (U. S.) 225; *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324; *Knapp v. U. S., etc., Exp. Co.*, 55 N. H. 348.

2. In *The Titania*, 19 Fed. Rep. 101, it was held that the seaworthiness of a vessel was to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. Stowage, according to custom and usage, and the best judgment of experienced persons, was sufficient to protect the ship from the charge of negligence, as against insurers.

In *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135; 24 Am. Dec. 716, it was held that a custom among the navigators of steamboats on a river, to preserve particular situations, in ascending and descending, would seem salutary and reasonable, and analogous to the rule governing ships passing each other at sea. Such custom, if proved, would bind navigators of steamboats to its observance, and a failure to do so would be at the peril of the owners.

In *Myers v. Perry*, 1 La. Ann. 378, it was held that in the absence of any

*e.* STOWAGE.—In questions regarding the proper stowage of goods, the usage of the carrying trade is of importance to determine whether the carrier has done its duty.<sup>1</sup>

law, an established usage among those engaged in navigating the Mississippi with steamers, must be considered in determining questions of fault or negligence in the management of the boats on that river.

In *Schouler on Bailments*, § 448, it is well said that usage among ordinarily prudent carriers of the same class under similar circumstances will largely determine what care, skill, and diligence should be employed toward averting or lessening the injurious consequences of a disaster otherwise excusable. *Baxter v. Leland*, 1 Blatchf. (U. S.) 526; *The Reeside*, 2 Sumn. (U. S.) 567; *Rich v. Lambert*, 12 How. (U. S.) 347. Usage may thus enlarge rather than diminish the scope of a carrier's duties. Thus, if it be the custom of an express company to seal valuable packages, the omission to do so may be considered culpable negligence. *Overland Mail, etc., Co. v. Carroll*, 7 Colo. 43. But usage cannot be set up to absolve a carrier from the ordinary duties which public policy, his general undertaking, or an express promise may have bound him to; instead of diverting, it shapes the natural course of the current; and its controlling influence is spent, after all, within narrow and well-recognized confines. See *Newall v. Royal Shipping Co.*, 33 W. R. 342; *Merx v. National Steamship Co.*, 22 Fed. Rep. 680; *Coxe v. Hesley*, 19 Pa. St. 243; *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145; *Steamboat Sultana v. Chapman*, 5 Wis. 454; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; 8 Am. Rep. 264.

1. In *Lamb v. Parkman*, 1 Sprague (U. S.) 343, the court said, in reference to the general question of usage in stowage: "Now, it having been shown that this cargo was stowed in accordance with an established usage, why is not that decisive in favor of the libellants? . . . It is a usage as to the mode of stowing a cargo of merchandise for a sea-voyage, a usage of trade as to the details in the mode of carrying it on. It violates no rule of law or principle of public policy, but is a matter of business between private individuals, to be regulated by them. There is no controversy that the parties may make a contract for any mode of stow-

age which they may see fit. What contract have they made in this respect? In the absence of express stipulations, the usage of the trade answers this question; to that usage the contract tacitly refers, not to contradict or vary its terms, but for expounding its meaning, and supplying details in the mode of its execution. Let us look into this charter-party. It contemplates the conveyance by sea of a full cargo of great value by a long voyage, and yet not a word is said as to the manner in which that cargo shall be protected at the bottom, at the sides, or on the top. . . . The contract being silent in this respect, how are the rights and duties of the parties to be ascertained? The answer is, by the usage of the trade." In this case the court, in determining the rights of the parties, admitted a usage in the trade from Calcutta to Boston, to load vessels at Calcutta with full cargoes, including gunny cloth and gunny bags, close up to the upper deck, without dunnage or air space at the top, although gunny cloth thus stowed is liable to damage from the condensation of vapor on the under side of the upper deck.

In *Baxter v. Leland*, 1 Blatchf. (U. S.) 526, a general ship took on board at New Orleans, a quantity of flour, under the common bill of lading, for a voyage to New York. The flour was stowed upon hogsheads of sugar and under sacks of corn, and was damaged by such stowage. But it being shown that it was the usage to stow flour in that manner, in voyages from New Orleans to New York and other northern ports, it was decided that the shipper was bound by the usage, and that the carrier was not responsible for the damage.

In *Meaher v. Lufkin*, 21 Tex. 383, it was held, in the absence of any general usage or course of trade, that goods carried on deck and jettisoned, give no claim for contribution. But where they are so carried, according to common usage and the course of trade on the voyage for which they are shipped, their jettison does give a claim for contribution.

In *Chevallier v. Patton*, 10 Tex. 344, a common carrier, being sued upon a bill of lading for failure to deliver in

*f.* MISCELLANEOUS.—Various other cases in which usages have been received are given in the note.<sup>1</sup>

**4. Usages of Corporations.**—The usages of corporations may be of service in determining various questions relating to their contracts; especially in regard to the validity of the acts of their officers or agents; and although the charter of a corporation may prescribe a rule for its affairs, yet a usage may make valid many acts which would otherwise be rejected as beyond its powers.<sup>2</sup>

like good order, etc., pleaded a custom to carry goods in open vehicles, of which the plaintiff had notice, and that the only damage sustained by the freight (cotton) was caused by rains which fell upon it during the transportation. It was held that this plea was good.

**1. Miscellaneous Usages of Carriers.**—Although the principal business of a carrier is to convey goods, yet it may by usage extend its functions and become liable for the transportation of other things. Thus, a steamboat may become liable as a carrier of cash letters, as in *Hosea v. McCrory*, 12 Ala. 349; *Knox v. Rives*, 14 Ala. 249; 48 Am. Dec. 97; *Garey v. Meagher*, 33 Ala. 630; or of money, as in *Lee v. Salter*, Lator 163; *Harrington v. McShane*, 2 Watts (Pa.) 443; 27 Am. Dec. 321; *Taylor v. Wells*, 3 Watts (Pa.) 65; *Emery v. Hersey*, 4 Me. 407; 16 Am. Dec. 268; *Kemp v. Coughtry*, 11 Johns. (N. Y.) 109.

The lien of the carrier upon consigned goods in its charge may be extended by a usage known to the consignor, and entering into the contract, as in *Rushforth v. Hadfield*, 6 East 522; *Holderness v. Collinson*, 7 B. & C. 202; 14 E. C. L. 30. And see also *Crawshay v. Homfray*, 4 B. & Ald. 50; *The Eddy*, 5 Wall. (U. S.) 481; *Raitt v. Mitchell*, 4 Camp. 145; *Rex v. Humphrey*, 1 McCl. & Y. 191.

The charges for transportation may be determined by usage. *Weber v. Kingsland*, 8 Bosw. (N. Y.) 415; *Holford v. Adams*, 2 Duer (N. Y.) 471; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452; *Bancroft v. Peters*, 4 Mich. 619; *Bastard v. Bastard*, Show. 81; *Sutton v. Great Western R. Co.*, 11 Jur. N. S. 879; *Lewis v. Marshall*, 7 M. & G. 729; *Hayward v. Middleton*, 3 McCord (S. Car.) 121; *Middleton v. Heyward*, 2 Nott & M. (S. Car.) 9.

Under what circumstances the carrier is authorized to sell goods in its charge may also be determined by us-

age. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 109; *Taylor v. Wells*, 3 Watts (Pa.) 65; *Rapp v. Palmer*, 3 Watts (Pa.) 178; *Bryant v. Commercial Ins. Co.*, 6 Pick. (Mass.) 131; *Pickering v. Busk*, 15 East 44.

**Limitation of Liability.**—In *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, it was held that neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common-law liability.

See MUNICIPAL CORPORATIONS, vol. 15, p. 1048.

**2. Usages of Corporations.**—In *Bulkeley v. Derby Fishing Co.*, 2 Conn. 252; 7 Am. Dec. 271, the act of incorporation of the defendant provided that policies of insurance issued by it should be countersigned by the secretary of the company; in the case at bar the policy was not countersigned; the plaintiff offered evidence that it had not been the usage of the defendant for its secretary to countersign; the court held that in all cases where banks and similar corporations conform to their charter, their acts are binding on them. "So in cases where they do not conform literally to their charter, they may be liable. Suppose a banking corporation should by vote agree to issue bills in a different form or with different signatures from those prescribed, they would by their own act be rendered liable to pay them. If such a corporation, without a vote, should introduce a usage and practice in the transaction of their business different from that prescribed by law, they would by the same reason be rendered liable; for, though such conduct might be improper in itself, yet the bank cannot take advantage of their own wrong to avoid their contracts. . . . Banks, like individuals, must be liable in the character which they hold out to the world; and whatever may be the forms of their obligations, if they are according to their

**5. Usages in Insurance Contracts.**—Although in some instances usages have been admitted to affect policies of insurance more freely than is allowed in other contracts, it is now established that the same legal principles must be applied in all cases.<sup>1</sup>

charter, their corporate votes, or their known usage and practice, they ought to be binding. A corporate act is not required in all cases. It is sufficient if there be a usage and practice under such circumstances as may be presumed to be within the general knowledge and by the consent of the company. Nor can the stockholders or members of the company be subjected to any inconvenience or damage. If any officer vested with certain powers should in any instance violate them, and attempt illegally to subject the corporation to any obligation, such corporation may, instantly on the discovery, disavow the act and prevent a repetition; and then, as there will be neither law nor usage to sanction the transaction, it will not be binding. But where the corporation will suffer such practice to continue, it is to be presumed that it is done with their consent, and be made obligatory on them. In the present case, it appears to me that the evidence offered conduced to prove that it was the usage and practice of this company to underwrite policies of insurance, and draw bills of exchange in the form now under consideration, and, of course, that it ought to have been admitted."

In *Hood v. Lynn*, 1 Allen (Mass.) 106, it was held that an unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued. Hence, a custom in Lynn to celebrate the Fourth of July was not legally sufficient to sustain a vote of money for the purpose, not authorized by the charter. "Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute a usage. It must not only be general, reasonable and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case, if established, would not satisfy either of these last-named requisites,

which are necessary to give it validity. It was said by this court, in a recent case, that there are many things in the management of town affairs, which are done without objection and pass by general consent, which cannot, when objection is made and they are brought to the test of judicial investigation, be supported as strictly legal. *Sikes v. Hatfield*, 13 Gray (Mass.) 347. The present case is an illustration of the truth of this remark."

In *Spaulding v. Lowell*, 23 Pick. (Mass.) 71, Shaw, C. J., said: "There are some subjects which have long been regarded as within the authority of towns, not made so by statute, but derived from usage. Indeed, a recurrence to the history of the formation of towns, will show that most of the powers originated in usage, founded on the convenience and necessities of the inhabitants, and were afterward recognized and confirmed by statute."

**1. Usages in Insurance Contracts.**—*Long v. Allen*, Park. 390. And see *Merchants, etc., Transp. Co. v. Associated, etc., Ins. Co.*, 53 Md. 448; *Arnould on Insurance*, ch. 3; *Walsh v. Horner*, 10 Mo. 6; 45 Am. Dec. 342.

In *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137, the court said: "In fine, we believe that the rule of construction applicable to policies of insurance does not differ from that applied to other mercantile instruments. Its sense and meaning are to be ascertained from the terms of the policy, taken in their plain and ordinary signification, unless such terms have, by the known usage of trade in respect to the subject-matter, acquired a meaning distinct from the popular sense of the same terms, or unless the instrument itself, taken together, shows that they were understood in some peculiar manner, and that, while we may not enlarge or restrict the clear and explicit language of the contract by proof of a custom or usage, yet in the application of a contract to its subject-matter, in bringing it to bear upon any particular object, the customs and usages of trade are admissible to ascertain what subjects were within and what were excluded from its opera-

The general rules relating to usages in insurance policies are summarized as follows by Mr. Arnould in his work on Insurance: *First*, Every usage of a particular trade which is so well settled or so generally known that all persons engaged in that trade may be fairly considered as contracting with reference to it, is considered to form part of every policy designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference.<sup>1</sup> *Second*, The usage, in order to be binding, must be

tion. Such evidence is proper, on the same principle that proof of the meaning of technical words, and words of science and the arts, is permitted in arriving at the intention of the parties in the construction of contracts."

In *Union Cent. L. Ins. Co. v. Potter*, 33 Ohio St. 459; 31 Am. Rep. 555, it was held that where, by the terms of a policy of life insurance, the non-payment of the required annual premium, at the designated time, is declared to be a ground of forfeiture, but the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policyholder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured.

In *Grant v. Alabama Gold L. Ins. Co.*, 76 Ga. 575, it was held that the custom and usage of an insurance company in giving personal notice to the holder of a life policy as to premiums falling due became, if not part of the contract, yet such an incident to it or so incorporated in the spirit of the dealings as to require the company to keep it up.

In *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252, it was said: "The replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. New York L. Ins. Co. v. Eggleston, 96 U. S. 572, is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready."

In *Burger v. Farmers' Mut. Ins. Co.*, 71 Pa. St. 421, it was held that the rules of an insurance company, requiring that notice of the transfer of a policy should be given to the company, in an action by a transferee, who had not given notice, to recover for loss by fire, evidence that the company had "always permitted and do now permit such transfers to be made," was inadmissible. The case of *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St., 107; 100 Am. Dec. 62, does not support the contention of the plaintiff in error. There, the offer was not to show that the insurance company sued had, in other instances, allowed thirty days' grace for the payment of premiums due, when a clause for forfeiture for non-payment on the day existed; but that such was the custom of all life insurance companies. In other words, the offer was to prove a usage of trade.

In *Home Ins. Co. v. Favorite*, 46 Ill. 263, it was held that where a contract of insurance refers to a policy, which both parties knew had no existence, to define the conditions of the contract, and where it is apparent that both understood that the agreement was to be governed by the same terms and conditions as such an instrument would contain, if in existence, the contract will be governed by the uniform and settled custom of the company with reference to the conditions contained in like policies.

In *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.) 320, which was an action against an insurance company, upon a policy of insurance and also upon an agreement to insure, it was held that evidence was competent to prove a usage that where there had been a verbal agreement for insurance, and the terms agreed upon and entered in the books of the company, the contract for insurance was considered as valid for the insured, although the premium was not paid.

1. In reference to his first rule, it

either a general usage of the whole mercantile world, or a particular usage of universal notoriety in the trade upon which, and of the place at which, the insurance is effected. The usage of a particular place or a particular class of persons cannot be binding on non-residents or on other persons, unless they are shown to have been cognizant of it. *Third*, Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in a given case. *Fourth*, A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal. Such evidence will never be admitted to set aside or control its plain and unambiguous terms.<sup>1</sup>

**6. Usages in Cases of Partnership.**—Usages may be invoked in cases of partnership to determine the proper conduct of the business, the mutual powers of the partners, the rights of the partners as between themselves and in respect to third persons, the proper construction of the articles of partnership, and various other matters.<sup>2</sup>

is said in Arnould on Insurance, § 43 : "The principle upon which evidence of usage is received at all to explain a policy, is that the parties to it are supposed to have contracted with reference to such usage. With regard to usages, which are either common to all trades, or perfectly well known and settled in the particular course of trade to which the insurance relates, it is obviously a fair presumption that the parties to the policy, as mercantile men, are conversant with such usages and have contracted with reference to them. Such usages, in fact, form part of the law merchant, and to incorporate them with the policy is merely to admit the addition of known terms not inconsistent with the tenor of the instrument, and well understood by the contracting parties; but with regard to usages which only prevail in a given place, or amongst a particular description of persons, the presumption is the other way, and in such cases, accordingly, it must be satisfactorily shown that the party sought to be affected by the usage either had or might have had cognizance of it." The cases upon this point are as follows: *Pittsburgh Ins. Co. v. Dravo*, 2 W. N. C. (Pa.) 194; *Fabbri v. Phoenix Ins. Co.*, 55 N. Y. 129; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151; *Hazard v. New England Marine Ins. Co.*, 8 Pet. (U. S.) 557; *Block v. Columbian Ins. Co.*, 42 N. Y. 393; *Stan-*

*ton v. Natchez Ins. Co.*, 5 How. (U. S.) 744; *Murray v. Hatch*, 6 Mass. 477; *Gray v. Swan*, 1 Har. & J. (Md.) 142; *Hartshorne v. Union Mut. Ins. Co.*, 5 Bosw. (N. Y.) 536; 36 N. Y. 172; *Union Bank v. Union Ins. Co.*, *Dudley (S. Car.)* 171; *Hancox v. Fishing Ins. Co.*, 3 Sumn. (U. S.) 132.

1. Arnould on Insurance, § 43.

2. In *Waring v. Grady*, 49 Ala. 465, 20 Am. Rep. 286, it appeared that it had been the usage for many years on the Alabama river, for the proprietors of steamboats, when the ordinary freight was scarce, and therefore deemed advantageous to increase the freights of the boat, to purchase salt at Mobile to be carried up the river and sold, or exchanged for wood or expenses; and that this usage of the trade was deemed good economy, and was recognized and known to all the steamboatmen, merchants, and others, and to owners engaged in the said trade, and was considered within the scope of the business. In an action against one of the proprietors of a boat for salt furnished, the defense was that the defendant had no knowledge, and did not assent to the purchase of the salt. The question was whether the usage could influence the powers of a partner. The court said: "A partnership is created by an agreement of the parties who constitute it, and it may be entered into with reference to a custom or usage of the place where its business is to be

**7. Usages Between Principal and Agent**—*a.* **USAGES IN CONTRACT OF AGENCY.**—The usages of a particular place or of a particular business are impliedly incorporated into every contract of agency, unless the contrary is specially mentioned. The principal and agent are presumed to adopt such usages and to agree to govern themselves in accordance with them.<sup>1</sup> It is the duty of the principal to inform himself of such usages, and he

transacted. If this custom is a legal one, and such as the law will enforce, it may modify the legal effect of the partnership agreement; and such a custom may be shown, in connection with the contract, to establish the intention of the parties in entering into it, for such a custom becomes a part of the contract itself, and explains its stipulations."

In *Scudder v. Ames*, 89 Mo. 496, it was held that a usage between partners that either one may draw out of the funds of the partnership more in any one year than the other, if long continued, may become engrafted in the written contract of partnership.

In *Morris v. Allen*, 14 N. J. Eq. 44, it was said that the right of a partner to receive interest on advances made by him for the benefit of the firm, in the absence of an express agreement for that purpose, rests upon the usage of trade, the usage raising an implied contract to pay interest on the principal advanced. *Collyer on Partnership*, § 338; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Hodges v. Parker*, 17 Vt. 242; 44 Am. Dec. 331. And see generally *PARTNERSHIP*, vol. 17, pp. 904, 905.

1. *Massey v. Banner*, 1 J. & W. 241; *Caffrey v. Darby*, 6 Ves. 496; *Belchier v. Parsons*, Amb. 219; *Russel v. Hankey*, 6 T. R. 12; *Brady v. Todd*, 9 C. B. N. S. 592; 99 E. C. L. 591; *Pickering v. Busk*, 15 East 38; *Graves v. Legg*, 2 H. & N. 210; *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 Ad. & El. 27; 37 E. C. L. 25; *Young v. Cole*, 3 Bing. N. Cas. 724; 32 E. C. L. 302; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Rosenstock v. Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Smith v. Tracy*, 36 N. Y. 79; *M'Kinstry v. Pearsall*, 3 Johns. (N. Y.) 319; *Daylight-Burner Gas Co. v. Odlin*, 51 N. H. 56; 12 Am. Rep. 45; *Willard v. Buckingham*, 36 Conn. 395; *Day v. Holmes*, 103 Mass. 306; *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586; 59 Am. Rep. 163;

*Goodenow v. Tyler*, 7 Mass. 36; 5 Am. Dec. 22; *Randall v. Kehlor*, 60 Me. 37; 11 Am. Rep. 167; *Greely v. Bartlett*, 1 Me. 172; 10 Am. Dec. 54; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Frank v. Jenkins*, 22 Ohio St. 597.

In *Long v. Armsby Co.*, 43 Mo. App. 253, the court said: "A person who deals in a general market is bound to inquire into what its usages are; and those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belonged to the place. He is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to have known. *Cothran v. Ellis*, 107 Ill. 413; *Talcott v. Smith*, 142 Mass. 542; *Whitmore v. Coats*, 14 Mo. 9; *Walsh v. Homer*, 10 Mo. 6; 45 Am. Dec. 342; *Walls v. Bailey*, 49 N. Y. 473; 10 Am. Rep. 407; *Wallace v. Bradshaw*, 6 Dana (Ky.) 382. And usage may be general, though confined to a particular city, town, village, or district. *Gleason v. Walsh*, 43 Me. 397; *Van Ness v. Packard*, 2 Pet. (U. S.) 137. So, when a person employs a broker to do business for him at a particular place, he must be taken to have contracted according to the custom of that place. *Greaves v. Legg*, 12 Exch. 642; *Graves v. Legg*, 2 H. & N. 210; *Bailey v. Bensley*, 87 Ill. 556; *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 348. And so, too, it has been conclusively settled that a non-resident merchant employing an agent, embodies the local usage in the authority conferred by the employment. *Sutton v. Tatham*, 10 Ad. & El. 27; 37 E. C. L. 25; *Bayliffe v. Butterworth*, 1 Exch. 425; *Bailey v. Bensley*, 87 Ill. 556. And such usage is the same, whether the sale is made by a broker for his principal, or by the principal directly to the broker. *Appleman v. Fisher*, 34 Md. 540. . . . The term in question may be proved like any other fact. The witnesses may testify as to their



cannot be allowed to say that he was ignorant of them.<sup>1</sup> Persons dealing with the agent have the right to assume that the agency will be executed as the usage requires.<sup>2</sup>

own experience and from information derived from others. *Hill v. Morris*, 21 Mo. App. 262; *Wear v. Sanger*, 91 Mo. 356; *Summer v. Tyson*, 20 N. H. 387; *Scudder v. Bradbury*, 106 Mass. 429; *Commercial Bank v. Union Bank*, 19 Barb. (N. Y.) 391; *Jones' Com. Con.*, §§ 111, 114." See also *Phillips v. Scott*, 43 Mo. 86; 97 Am. Dec. 369.

In *Graves v. Legg*, 2 H. & N. 210, the contract required that notice of the shipment in controversy should be given by the seller to the buyer. Here the notice was given by the seller to the broker who acted for both parties. There was evidence that, according to the usage of Liverpool, if notice was given to the buyer's broker, that was equivalent to a notice to the buyer himself; and the case was the same whether there be two brokers, one for the seller and the other for the buyer, or one broker who acted for both; the custom of the Liverpool market being that in such case notice to the broker as the agent of the buyer was notice to the buyer. "The only question is whether, when a merchant residing in London, contracts with a Liverpool merchant in Liverpool, he is bound by the usage of trade at Liverpool. We think that, as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal."

1. In *Kraft v. Fancher*, 44 Md. 204, the court said: "He who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place; and, in this last case, it is quite immaterial that the principal himself is unacquainted with the usage or custom with reference to which his agent or factor may deal. *Sutton v. Tatham*, 10 Ad. & El. 27; 37 E. C. L. 25; *Bayliffe v. Butterworth*, 1 Exch. 425; *Pollock v. Stables*, 12 Q. B. 765; 64 E. C. L. 765; *Graves v. Legg*, 2 H. & N. 210; 1 Tayl. Ev. (8th ed.) 183, § 148. Here, the appellant, by authorizing the appellees to make the contract of shipment at Baltimore, must be taken to have contemplated the operation of all such well-established and uniform usages and customs as be-

longed to and governed the trade there." See also *Lyon v. Culbertson*, 83 Ill. 33; 29 Am. Rep. 349; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Summer v. Stewart*, 69 Pa. St. 321; *Hodgson v. Davies*, 2 Camp. 530; *Colket v. Ellis*, 10 Phila. (Pa.) 375; *Rapp v. Grayson*, 2 Blackf. (Ind.) 130.

In *Dwight v. Whitney*, 15 Pick. (Mass.) 179, the court said that a factor is bound to conform to the instructions of his consignor as to the price of the article to be sold, the terms, and mode of payment. But in the absence of any instructions, the consignor is presumed by law to be acquainted with and to assent to the course of dealing which is usually practised at the same market by others in the same line of business.

In *Samuels v. Oliver*, 130 Ill. 73, the court said that a person dealing at a particular market will be taken to have dealt according to the known general custom and usage of that market, and if he employs another to act for him in buying or selling at such market, he will be held as intending that the business should be conducted according to such general usage and custom of such market; and this has been held to be the rule, whether he in fact knows of the custom or not. See also *Oldershaw v. Knoles*, 4 Ill. App. 63; *Bailey v. Bensley*, 87 Ill. 556; *Doane v. Dunham*, 79 Ill. 131; *Lyon v. Culbertson*, 83 Ill. 33; 29 Am. Rep. 349; *Loneragan v. Stewart*, 55 Ill. 44; *Home Ins. Co. v. Favorite*, 46 Ill. 263.

In *Guesnard v. Louisville, etc., R. Co.*, 76 Ala. 453, it is said that where a mercantile agency is to be executed at a particular place, the principal who employs the agent, is presumed to consent that he may execute it, in the absence of particular instructions, according to the general custom and usage relating to that kind of trade or business, whatever it may be. The law implies that he gives his assent for his agent to act as all other similar agents, who are honest and diligent, are accustomed to do. And it is immaterial, as a general rule, whether the principal is informed as to such customs and usages or not. To the same effect as to the principal's knowledge, is *Dreshler v. Beers*, 32 Ill. 368; 83 Am. Dec. 274.

2. In *U. S. L. Ins. Co. v. Advance Co.*, 80 Ill. 549, it was held that where

**b. CONDUCT OF AGENT.**—The agent must in all things conduct himself in accordance with the usages of the business in which he is engaged. He is taken to be informed as to those usages, and must obey them unless otherwise ordered. Whatever is required by usage to be done by the agent, must be done by him, or he will be liable to his principal for the consequences. And when he acts in accordance with the requirements of usage, he cannot be charged by his principal with any responsibility.<sup>1</sup>

a party contracts with a general agent of an insurance company, with knowledge of a custom prohibiting the agent from making such a contract, he cannot hold the company bound under the contract. Where an agency is exercised in respect to matters governed by known usage, it will be presumed, in the absence of proof to the contrary, that the agency is to be conducted in the manner and according to the practice which is allowed and justified by such usage.

In *Fraser v. Tenants*, 5 Rich. (S. Car.) 375, it was said that where the instructions of the principal are silent, much of necessity must often be left to the discretion of the agent; and if, in the absence of instructions, there be a known usage of trade, or a mode of transacting business applicable to a particular agency, the agent is not only permitted, but it is his duty to conform to it.

In *Leach v. Beardslee*, 22 Conn. 404, it was held that a general usage affecting any branch of business, furnishes good evidence of what is regarded as right and reasonable in that respect, and when it is conformed to, negligence or misconduct cannot be imputed. *Barber v. Brace*, 3 Conn. 9; 8 Am. Dec. 149; *Casco Mfg. Co. v. Dixon*, 3 Cush. (Mass.) 407; *Chitty on Cont.* 20; 1 Sw. Dig. 10.

In *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, it was said that in the case of a general agent the law permitted usage to enter in and enlarge the liability of the principal.

In *Phillips v. Moir*, 69 Ill. 156, it was held that the usage of a particular trade or business was properly admitted, for the purpose of interpreting powers given to an agent or factor. See also *Lyon v. Culbertson*, 83 Ill. 33; 29 Am. Rep. 349, where the same principle is announced.

1. An agent must insure the goods of his principal in his hands, whenever the usages of trade require him to do

so. *Walsh v. Frank*, 19 Ark. 270; *Collings v. Hope*, 3 Wash. (U. S.) 150; *Tonge v. Kennett*, 10 La. Ann. 800; *Lee v. Adsit*, 37 N. Y. 87; *Columbus Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 49; *French v. Backhouse*, 5 Burr. 2727; *Craufurd v. Hunter*, 8 T. R. 13; *Randolph v. Ware*, 3 Cranch (U. S.) 503; *Thorne v. Deas*, 4 Johns. (N. Y.) 101; *Crosbie v. McDoual*, 13 Ves. 138; *DeForest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.) 84; *Kingston v. Wilson*, 4 Wash. (U. S.) 310.

In *Bailey v. Bensley*, 87 Ill. 556, it was held that under the custom of trade in Chicago, a commission merchant, to whom grain is consigned, may dispose of the warehouse receipt given him for the same, although directed by the consignor not to sell, but to hold the grain for further orders, if he keeps on hand, ready for delivery when called on, other receipts for a like quantity and grade of grain.

In *Corbett v. Underwood*, 83 Ill. 324; 25 Am. Rep. 392, it was held that where a party conversant with the rules and usages of the Chicago board of trade employed a commission merchant to make purchases of grain for future delivery for him, and afterward sued the merchant for a loss incurred by the sale, which was made for want of necessary advances to meet a decline in prices, proof of the usage of the board of trade was properly admitted to justify the act of the commission merchant.

In *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211, it was held that where the only practical method of conducting a business, such as receiving and storing articles of commerce, is to render to each bailor the amount of goods stored in kind and quality, it is no conversion if the bailee, in the absence of a special contract, treats them according to the known and general usage in that regard; and evidence of such usage in the business of pork packing, and also of a usage

c. **AUTHORITY OF AGENT.**—In the absence of specific instructions, the authority of an agent in any particular trade is largely dependent upon the usages of such trade. Third parties are entitled to deal with the agent in the belief that he possesses all the authority that is usual for such agents to enjoy; nor can his authority, in respect to such third persons, be limited by secret directions contrary to the usages of trade and unknown to those dealing with him.<sup>1</sup>

known to the bailor in pursuance of which certain offal was retained for compensation, is admissible in such a case.

1. **Authority of Agents.**—See AGENCY, vol. 1. p. 354; AUTHORITY, vol. 1, pp. 1029, 1038; BROKERS, vol. 2, p. 573; COMMISSION MERCHANTS, vol. 3, p. 319; Wallace v. Bradshaw, 6 Dana (Ky.) 382; Rich v. Johnson, 61 Ind. 246; Oldershaw v. Knoles, 4 Ill. App. 63; 6 Ill. App. 325; U. S. L. Ins. Co. v. Advance Co., 80 Ill. 549; Corbett v. Underwood, 83 Ill. 324; 25 Am. Rep. 92; Greenfield Bank v. Crafts, 2 Allen (Mass.) 269; Goldsmith v. Manheim, 109 Mass. 187; Bucknam v. Chaplin, 1 Allen (Mass.) 70; White v. Fuller, 67 Barb. (N. Y.) 267; Easton v. Clark, 35 N. Y. 232; McMorris v. Simpson, 21 Wend. (N. Y.) 610; Wilcocks v. Phillips, 1 Wall. Jr. (U. S.) 47; The Hendrik Hudson, 7 Law Rep. N. S. 93; Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Morris v. Bowen, 52 N. H. 416; Haven v. Wentworth, 2 N. H. 93; Nobleboro v. Clark, 68 Me. 87; 28 Am. Rep. 22; Dingle v. Hare, 7 C. B. N. S. 145; 97 E. C. L. 145; Fay v. Richmond, 43 Vt. 25; Brown v. Arrott, 6 W. & S. (Pa.) 402; Green v. Disbrow, 7 Lans. (N. Y.) 381; 56 N. Y. 336; Hammond v. Varian, 54 N. Y. 398; Dickinson v. Lilwall, 4 Camp. 279; Baines v. Ewing, L. R., 1 Exch. 320; Whitehead v. Tuckett, 15 East 408; Howard v. Sheward, L. R., 2 C. P. 148; Wiltshire v. Sims, 1 Camp. 258; Early v. Reed, 6 Hill (N. Y.) 12; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 587; 59 Am. Dec. 163; Potter v. Morland, 3 Cush. (Mass.) 384; Mott v. Hall, 41 Ga. 117; Lebanon v. Heath, 47 N. H. 353; Jones v. Warner, 11 Conn. 40; Savage v. Pelton, 1 Colo. App. 148.

In Wiltshire v. Sims, 1 Camp. 258, it was held that an agent employed generally to do any act, is authorized to do it only in the usual way of business. Therefore, as stock is sold usually for ready money only, a broker employed

to sell stock cannot sell it upon credit, without a special authority, although acting *bona fide*, and with a view to the benefit of his principal.

In Pardridge v. Bailey, 20 Ill. App. 351, it was held that the usages of a particular trade may extend the scope of an agent's authority, when dealing with a person who has no knowledge of special or particular instructions. "It was therefore error to exclude the evidence offered in this case, as to the universal usage and course of business for dealers in the line of goods in question, to pay traveling men for samples sold and delivered by them, instead of paying the principal. In all cases where such usages exist and an agency is to be exercised touching such matters, the natural presumption, in the absence of all controverting proof, is, that the agency is to be conducted in the manner and according to the practices which are allowed and justified by such usages."

In White v. Fuller, 67 Barb. (N. Y.) 267, it was held that when there is a custom of the trade that an agent for the sale of coal has no right, unless specially authorized, to make a time contract extending over a long period, persons dealing with an agent are bound by such custom; and a principal will not be liable upon such a time contract, made by an agent without special authority. "This custom prevailing, the plaintiffs must be presumed to have dealt with reference to it. At least, existing in the trade, they are chargeable with notice of it. As is said by Wright, J., in Easton v. Clark, 35 N. Y. 232: 'The purchaser is bound to take notice whether the agent is departing from the usage of trade. He is presumed to understand the restrictions and limitations imposed by the usage of trade upon a general agency, Story on Agency (9th ed.), §§ 224, 225; and when, in making a sale, the agent has departed therefrom, the principal may repudiate the act.' It was the duty

*d.* SALE ON CREDIT.—Whether an agent is authorized to sell the goods of his principal on credit or for cash only, may, in the absence of specific directions, be determined by usage. In some branches of business it is the usage to sell for cash only, and in others on credit. The propriety of the action of the agent may in either case be determined by reference to the usage prevailing in the trade.<sup>1</sup>

of the plaintiffs, or incumbent upon them, to have ascertained whether or not the agents had the special power to make the sale on time, which they did make."

In *Baines v. Ewing*, L. R., 1 Exch. 329; 35 L. J. Ex. 194, it was held that the presumption which would have arisen of an insurance broker's authority to underwrite generally for the defendant at Liverpool, was rebutted by the custom proved to exist at Liverpool, by which an insurance broker's authority to underwrite is always, or nearly always, limited to a certain sum. And, therefore, where the defendant's broker had taken a risk in excess of his authority, the defendant was held not liable as principal on the contract, although the plaintiff, the assured, had not been aware that the broker had exceeded his limit.

1. *Sale on Credit*.—In *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 589; 59 Am. Rep. 163, it was held that a general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect. "When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold. (Story on Agency, § 60. See also *Shaw v. Stone*, 1 Cush. (Mass.) 228.) The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold, when such is the usage. *Alexander v. Gibson*, 2 Camp. 555; *Nelson v. Cowing*, 6 Hill (N. Y.) 336."

In *Goodenow v. Tyler*, 7 Mass. 36; 5 Am. Dec. 22, T., a factor, having goods consigned to him by G., sold them on three months' credit, taking in payment the purchaser's promissory note to himself; but the purchaser, before the maturity of the note, became bankrupt. In an action by G. against T. for the value of the goods sold, it

was held that evidence that he had acted according to the custom of the place was admissible, and would discharge him from liability. The court will take notice, as a part of the law merchant, that a factor may sell goods at a reasonable credit, at the risk of his principal, when he is not restrained by his instructions nor by the usage of the trade. A general usage in any place by which sales on commission are regulated may be given in evidence; for it is a reasonable and legal presumption that every man knows the usage of the place in which he traffics, whether by himself or his factor, and if the usage be not illegal he is bound by it. If, then, it be the well-known and uniform usage in Boston for the factor to take negotiable notes in his own name as a security for the payment for the goods of his principal, sold on credit, but in trust for his principal, such usage must bind the principal, unless he give his factor instructions repugnant to it; and such usage may be proved by a jury. See also Story on Agency (9th ed.), § 209.

In *Leach v. Beardslee*, 22 Conn. 404, the plaintiff delivered to the defendant, a drover, certain oxen, to be driven to the city of New York, and there sold for a commission, in the usual and customary manner. The defendant, having sold the oxen, received one note, for the price both of them and of his own oxen, sold at the same time, which note he retained in his own possession. Before the maturity of the note, the makers became insolvent. It was held that, in the absence of specific instructions as to the manner of selling such oxen, the implied undertaking of the defendant was, to sell them in the customary manner; and that the custom of drovers in reference to such sale might be shown, to show the extent of the duty and obligation of the defendant; and that, if he conformed to such custom, he incurred no liability thereby.

In *Deshler v. Beers*, 32 Ill. 368; 83

*e.* POWER TO WARRANT.—Whether a selling agent has authority to warrant the goods sold by him depends, in the absence of specific directions from the principal, upon the usage of the particular trade.<sup>1</sup>

*f.* EMPLOYMENT OF SUB-AGENT.—The rule that a delegated power cannot itself be delegated, does not apply to cases when, in the appointment of an agent, the recognized usage of trade permits the agent to employ sub-agents or brokers. The rule relates chiefly to powers involving discretion in the agent. Whenever the usages of business justify, an agent is authorized to employ other persons under him in order to properly perform the duties of his agency.<sup>2</sup>

Am. Dec. 274, it was held that if there be a custom or usage, of long standing, general and uniform, at the place to which property is consigned for sale, controlling the time within which payment may be made upon a cash sale, the consignor will be bound to take notice of it; and his ignorance in fact on the subject, will not effect the operation of the custom. If the sale by the consignee, although made for cash on delivery, did not exclude the operation of a usage of the character mentioned, under which a purchaser for cash had from one to three days in which to make payment, the purchaser being in good credit, the consignee would not be liable to the consignor, in the event of loss resulting from a failure to require payment from the purchaser immediately on delivery. Other cases to the same effect are *Dwight v. Whitney*, 15 Pick. (Mass.) 179.

1. Power to Warrant.—In *McCormick Harvesting Mach. Co. v. Snell*, 23 Ill. App. 79, it was held that an agent to sell has authority to do all that is necessary and usual in the course of the business of selling, and if it is usual in the trade for the seller to warrant, the agent has authority to warrant. See *AGENCY*, vol. 1, p. 358.

In *Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 877, the court said that an agent employed to sell has no implied power to warrant, unless the sale is one which is usually attended with warranty. But if, in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale.

In *Howard v. Sheward*, L. R., 2 C. P. 148, it was held that the agent or servant of a horse-dealer has an implied authority to bind his principal or

master by a warranty, even though, unknown to the buyer, he has express orders not to warrant. And that evidence of a general practice (not amounting to a technical usage) amongst horse-dealers not to warrant where the horse has been examined by a veterinary surgeon and certified by him to be sound, is not admissible to rebut the inference of authority to warrant.

2. Employment of Sub-Agent. — In *Darling v. Stanwood*, 14 Allen (Mass.) 504, it was held that if a commission merchant is employed in *Massachusetts* to buy goods in a distant market, and the custom of that market is for commission merchants to employ brokers to make such purchases, and this custom is understood by the principal, the commission merchant may properly employ a broker of experience and good reputation to make the purchases; and if he does so he will not be liable for such broker's errors or misconduct. When the defendant employed the plaintiff to buy cotton on his account in the New Orleans market, and to ship it to Boston, he was presumed to have contemplated that the purchases would be made in the ordinary course of such business at that port. The employment of a broker to effect the purchases was therefore a justifiable delegation of authority to a sub-agent, because this manner of transacting business was the usual and known custom of the New Orleans market.

In *Carter v. Philadelphia Coal Co.*, 77 Pa. St. 286, a coal company, indebted to the defendants, engaged them to sell their coal; the defendants employed brokers to sell for them; in settlement with the company, they charged commissions paid the brokers; in a suit by

*g.* OBEEDIENCE TO PRINCIPAL'S DIRECTIONS.—No usage can authorize an agent to disobey the instructions of his principal. The directions of the principal form the rule of action for the agent, and the consequences of a disobedience must fall upon the latter, although his acts may have been in line with usage. When the principal's instructions and the usage of the trade conflict, the agent must obey the former and disregard the latter.<sup>1</sup>

the company to recover back the commissions, the court held that evidence was proper that it was usual and customary in the Philadelphia coal trade, where the business was transacted, to sell through the agency of brokers'. "It is not necessary to prove all the elements of a custom to make a law; the object here is to interpret a contract. The usages of a particular trade or business are presumed to be known to those engaged therein. They furnish a most valuable aid in arriving at the mutual assent of the parties."

In *Guesnard v. Louisville, etc., R. Co.*, 76 Ala. 453, it was shown to have been the custom of importers in New Orleans, to employ brokers to attend to the receipts of imported goods, and look after the payment of custom duties on them. The court therefore held that an agent was justified, in view of this custom, in employing such a broker, and in paying him the usual and reasonable fee for his services in this particular.

In *Titus v. Cairo, etc., R. Co.*, 46 N. J. L. 393, it was held that, except where a known usage of trade justifies, or necessity requires, the employment of sub-agents, an agent whose powers and duties involve personal trust and confidence and the exercise of judgment and discretion, cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him.

Other cases recognizing the power of usage in such matters are *Johnson v. Cunningham*, 1 Ala. 249; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Moon v. Guardians of the Poor*, 3 Bing. N. Cas. 814; 32 E. C. L. 336.

1. Obedience to Directions of Principal.—In *Hatcher v. Comer*, 73 Ga. 418, it was said that a factor may exercise his discretion according to the general usages of the trade, but the primary obligation of an agent or factor, whose authority is limited by instructions, is to adhere faithfully to those instruc-

tions. "The defendants in error contend that, by the custom of merchants which obtains in Savannah, as they had advanced plaintiffs in error on the cotton, they were not bound to obey the instructions of the plaintiffs in error, but might hold this cotton and sell in their discretion." But the court rejected this view.

In *Clark v. Cumming*, 77 Ga. 64, it was held that the agent's power is limited by and ceases with his instructions; and this is true, even though it had been usual, in the course of dealings between the broker and his principal, for the broker to continue to sell at the prices last quoted by the principal.

In *Wootiers v. Kaufman*, 73 Tex. 395, the plaintiff shipped cotton to factors, directing them to sell only in the home market. It appeared that some factors in time of financial depression sometimes exported cotton, when satisfactory prices could not be had at home. The court held that this practice could not excuse the violation of instructions by the agent. "That some factors shipped to a foreign port under these circumstances could not make a transaction valid which otherwise was contrary to law. It was in direct violation of the contract shown by the evidence, of the express directions given by the plaintiff to his factors to sell the cotton in Galveston, and not ship the same abroad."

In *Hall v. Storrs*, 7 Wis. 253, it was held that where a factor receives wheat with instructions to be sold for cash, and he sells it on credit, he is liable for all losses that may accrue to his principal. "A sale of property for cash, means that the money shall be paid down when the title to the property passes, and a sale and delivery for a bank check payable the next day after the sale, is not a sale for cash. A custom of trade or business that can vary or modify the language of express instructions of an agent or factor from his principal, must be established by

the most certain, clear, and satisfactory proof. Such a custom must be ancient, uniform, notorious, and reasonable. We are aware that cases can be found which go to establish the doctrine that when a factor has received goods with direction to sell for cash, but which he does not sell for cash, but on short time, according to the usage and custom of the market, it has been held that such a sale was in compliance with the orders of the principal. We doubt exceedingly the soundness and correctness of the rule."

In *Parsons v. Martin*, 11 Gray (Mass.) 112, it was held that a broker, having written instructions from his principal to sell under certain circumstances, cannot transfer the shares for a different purpose, although there may be a custom for brokers to do so. "As an agent acting under a written authority contained in the letter addressed to him on the subject, the defendant was bound to regard the instructions given him in every particular. No usage or custom, such as that which he attempted to show was recognized by and prevalent among the brokers in Boston, could affect the legal rights of the parties; nor, if fully proved, would the law sustain or tolerate it. Proof of usage is admissible to interpret the meaning of the language of the contract, or, where its meaning is equivocal and obscure, to ascertain its nature and extent, but not to vary its terms, or introduce new conditions, or authorize the doing of acts which are in direct contravention of its provision."

In *Steward v. Scudder*, 24 N. J. L. 96, it was held that when a grain factor is directed to sell for cash, evidence may be given of a custom, on sales for cash, to allow the purchaser to receive the grain, and to call for the money in three or four days after delivery; "but unless the evidence is that such custom is uniform, well-established, and at the risk of the principal, it will not establish the usage so as to protect the factor. In the case of *Clark v. Van Northwick*, 1 Pick. (Mass.) 343, the same usage which was set up in this case was established and sanctioned by the court. In the case of *Bliss v. Arnold*, 8 Vt. 252; 30 Am. Dec. 467, the supreme court of *Vermont* held the same usage to be unreasonable and illegal. The usage spoken of is rather a matter of courtesy than a rule of law, and there is nothing in it to prohibit a demand

of the money on the delivery of the goods, or the commencement of a suit for the purchase-money immediately on the refusal to pay."

In *Wanless v. McCandless*, 38 Iowa 20, it was held that where an agent for the sale of land was instructed to sell for "one-third cash," a contract made by him to sell without a strict compliance with that condition could not be enforced against his principal. Proof that the custom of a county did not require purchasers of land to pay cash, though the terms of sale were for cash payment, will not sustain a contract of sale made by an agent who had violated an instrument to sell for "one-third cash."

In *Ireland v. Livingston*, L. R., 5 H. L. 395, it was said that in the Mauritius market it is often impossible to obtain so large a quantity of sugar as five hundred tons from one house, or to find one vessel to take it. *Quare*, whether an order to commission merchants there, to purchase such a cargo must be construed with reference to the customs of that market?

In *Porter v. Patterson*, 15 Pa. St. 230, an action was brought to recover damages for breach of orders, on the sale of an invoice of molasses consigned by the plaintiff to the defendant. It appeared that the plaintiff wrote to the defendant, inclosing the invoice and bill of lading of the goods, and said: "On the arrival of this cargo, unless a fair profit can be realized on landing, please put it into a good store, with the hope of sending a further cargo." The defendants sold the goods at a loss, and on the trial the court rejected evidence of a custom of the port, which the defendants offered, justifying their action under the circumstances. "If a usage be certain, uniform, ancient, and reasonable, it incorporates itself into the contract. But as this is a suit for a breach of an order, plain, positive, and free from ambiguity, I cannot understand what the usage of those cities has to do with the matter in controversy. If the plaintiff failed to prove a breach of orders, there was an end of his case. If he succeeded in proving instructions binding on the defendants, and the breach of them, it admits not of control by reason of any custom whatever. The agreement of the parties constitutes the law of the contract."

In *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 519; 9 Am. Dec. 720, which was an action against the defendants

**4. REMITTANCES TO PRINCIPAL.**—The established usages of business in relation to the collection of negotiable paper, or the remittance of funds, will be the guide for the conduct of the agent in such matters; and no negligence can be imputed to him if he follows such usage.<sup>1</sup>

to recover the proceeds of certain rice consigned to them, as factors, for sale, it appeared that the plaintiff's instructions to the defendants were to sell for cash; but that they sold and delivered the rice to another party without his paying for it, and that he afterward absconded. The defendants set up a usage which had existed among factors in the place of the sale for forty years, where they sold for cash, to give indulgence of a week or a fortnight before calling for the money. The judges were of the opinion that it could not on any account excuse the departure from the instructions given. "That usage does, in many instances, constitute the law, and that contracts must be construed with reference to the usages of the trade or business to which they relate, are principles too well established to be questioned now. Numerous examples are to be found among the cases arising on policies of insurance; and perhaps no stronger case can be found than that of three days' grace allowed in cases of bills of exchange. But, to entitle a usage to that high respect, it must be a reasonable one. It must be for the benefit of trade generally, and not for the convenience and benefit of a particular class of individuals. And I can conceive of no usage that will authorize a departure from positive instructions. The instructions of a principal to his agent make the law by which he is to be governed, and to authorize him to depart from them would be depriving the parties of the privilege of making their own terms."

For other cases upon this subject see *Strong v. Bliss*, 6 Met. (Mass.) 393; *Bliss v. Arnold*, 8 Vt. 252; 30 Am. Dec. 467; *Catlin v. Smith*, 24 Vt. 85; *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Hutchings v. Ladd*, 16 Mich. 493; *Day v. Holmes*, 103 Mass. 306.

**1. Remittances to Principal.**—In *Jackson v. Union Bank*, 6 Har. & J. (Md.) 146, it was held that an agent was not answerable for negligence or inattention, where a bill of exchange was

placed in his hands for collection, and he undertook to collect it, according to the usages and customs of merchants and banks, by sending it to a bank for collection, and owing to the bill having been demanded and protested for non-payment on the fourth day after it fell due, the indorser was discharged, and the amount of the bill thereby lost.

In *Potter v. Morland*, 3 Cush. (Mass.) 384, it was held that goods being consigned to an agent for sale, with general instructions to remit the proceeds, it is a sufficient compliance with such instructions, if the agent remit by a bill of exchange, without indorsing or guaranteeing it; provided such is the usage at the agent's place of business and the agent use proper diligence and discretion in the purchase of the bill. In an action against the agent, to recover the proceeds of such sale, proof of the usage and of a remittance accordingly is a sufficient *prima facie* defense; and if it is established by the agent, the burden of proof is then on the principal to show that bills remitted in pursuance of the usage ought to be indorsed or guaranteed by the agent.

In *Chandler v. Hogle*, 58 Ill. 46, it was held that where parties in *Illinois* shipped a carload of hogs to a commission merchant at Buffalo, *New York*, with instructions to sell and remit proceeds to them, the bailee having sold the hogs, and with the proceeds thereof purchased a draft from a banker of Buffalo on a house in *New York City*, in favor of the shippers, and remitted it to them on the day of sale, but when presented it was protested; it was held, that as it was the custom of commission merchants at Buffalo to remit to their correspondents in that manner, and as the banker of whom the draft was purchased was in good credit when it was obtained, the commission merchant acted with due diligence and was not liable for the loss.

In *Haven v. Wentworth*, 2 N. H. 93, it was said that the invariable usage of an agent in respect to the funds with



i. **THE AGENT'S COMPENSATION.**—In the absence of an express contract, the proper compensation of an agent may be determined by general usage in the particular trade; and when a course of dealing has grown up between a principal and agent in respect to the latter's compensation, it will be binding in controversies between them.<sup>1</sup>

8. **Usages of the Stock Exchange.**—The usages of stock exchanges are numerous and technical. The general rule to be extracted from the cases is, that as between members of a stock exchange every usage of the exchange is adopted as a part of their contracts; and this whether the usage is reasonable or the reverse, according to law or contrary to law. The members have the right to make their contracts as they please and to insert in their contracts any unreasonable or peculiar provisions they desire; and it would be to abridge that freedom of contract which all men enjoy, to hold that any usage which members of the exchange incorporate into their contracts can be forcibly excluded by the courts.<sup>2</sup>

which he is intrusted binds his employers, if that usage is known and recognized by them. And see generally *AGENCY*, vol. 1, p. 397; *BROKERS*, vol. 2, p. 578.

1. **Compensation of Agent.**—In *Baring v. Stanton*, 3 Ch. Div. 502, a shipowner had for several years had an account with merchants who effected for him insurances on his ships. In their accounts they charged him with the full premiums, but they had been allowed by the underwriters, and retained out of the premiums, five per cent. brokerage and a further ten per cent. discount for ready money, as usual on insurances. On taking the accounts in a suit respecting a mortgage on some ships, the shipowner objected to allowing the merchants to retain the ten per cent. It was held that as these allowances were usual, and as the shipowner had never inquired on what terms the merchants effected the insurances, and appeared to have accepted their terms, he could not now raise the objection.

The similar case of *Great Western Ins. R. Co. v. Cunliffe*, L. R., 9 Ch. 525, appeared to the court to govern the above case. In that case Lord Justice Mellish observed: "It is quite obvious that they must have known, and they do not deny that they did know, that the agents were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was

the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another, whom he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging."

2. See *STOCK EXCHANGE*, vol. 23, p. 748; *Duncan v. Hill*, L. R., 2 Exch. 255; L. R., 8 Exch. 242; *Coles v. Bristowe*, L. R., 4 Ch. 3; *Grissell v. Bristowe*, L. R., 4 C. P. 36; *Bowring v. Shepherd*, L. R., 6 Q. B. 309; *Beeston v. Beeston*, 1 Exch. Div. 13; *Knight v. Cambers*, 15 C. B. 562; 80 E. C. L. 561; *Jessopp v. Lutwyche*, 10 Exch. 614; *Rosewarne v. Billing*, 15 C. B. N. S. 316; 109 E. C. L. 316; *Pidgeon v. Burslem*, 3 Exch. 465; *Smith v. Lindo*, 5 C. B. N. S. 587; 94 E. C. L. 586; *Taylor v. Stray*, 2 C. B. N. S. 175, 89 E. C. L. 174; *Maxted v. Paine*, L. R., 4 Exch. 210; *Robinson v. Mollett*, L. R., 7 H. L. 802; *Evans on Agency*, ch. 2, § 2; *Nickalls v. Merry*, 7 H. L. 543. See also *Irwin v. Williar*, 110 U. S. 499; *Robinson v. Mollett*, L. R., 7 H. L. 818.

In *Grissell v. Bristowe*, L. R., 4 C. P. 36, it appeared that the usage of the

But in respect to the effect of the usages of the stock exchange upon outside parties, the rule is different. Third persons who are ignorant of such usages, and who make contracts through members of a stock exchange, are only bound by the reasonable and legal usages of the exchange. Any unreasonable or illegal usage is of no validity, as against them, unless they had knowledge and assented to it.<sup>1</sup>

stock exchange was, that in transactions between members of it there is an implied understanding that, on the purchase of stock or shares, the buying jobber shall be at liberty by a given day, called the "name day," to substitute another person as buyer, and so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller cannot reasonably expect, and that such person accept a transfer of the stock or shares, and pay to the original seller the price. It was held, reversing the judgment of the court of common pleas, that this was a reasonable usage; as a usage founded on the general convenience of all persons engaged in a particular department of business, cannot, as regards such persons, be said to be unreasonable.

In *Colket v. Ellis*, 10 Phila. (Pa.) 375, it was held that a custom among brokers to sell stocks deposited as collateral security for a call loan, at the board, on failure of the borrower to pay on the day on which demand is made, is not illegal as to parties familiar with, and dealing on the basis of, such custom. "It was strenuously argued by plaintiff's counsel that this was not a valid usage, as it was in contravention of the rule of law which requires a sale of collaterals to be public, and to be made after due notice. Without intimating what would be the effect if such a usage as the present were set up against an outside party, I am of opinion that, as between plaintiffs and defendants, both members of the board of brokers, familiar with, and dealing on the basis of it, it is a valid and lawful custom and controls the rights of these parties."

1. In *Hamilton v. Young*, L. R., 7 Ir. 289, an alleged usage of the stock exchange, relied upon as authorizing stock brokers who are entitled to sell stock or shares of a customer, for the realization and payment of money due to them by such customer, to take over

to themselves, at the price of the day, stock or shares of the customer, for which there is an inadequate demand, where a forced sale would lower the selling price, was held unreasonable, and incapable of being supported against a customer who was not proved to be acquainted with the existence of such alleged usage. "I have shown that this court has refused to recognize the validity of sales by persons, in a fiduciary position, to themselves, and that it makes no difference that in particular instances no injury has been sustained, or wrong done. The conflict between duty and interest is sufficient to invalidate such transactions."

In *Maxted v. Paine*, L. R., 4 Exch. 210, Cleasby, B., said: "I do not wish to be understood as expressing an opinion that the plaintiff would be bound by any usage which a court of law would consider unreasonable. I think, on the contrary, that he would not, unless he had actual notice when he authorized the contract to be made of the particular usage. A man may, of course, if he thinks proper, make a contract with any stipulations in it which are not unlawful, as, for instance, that he will not enforce it without the authority of some particular officer or committee; but such a usage on the stock exchange would not, I think, bind a person having no connection with the stock exchange, and no actual knowledge of its usages, simply because he employed a stock-broker to contract for him, even though it was within the authority of the broker to make the contract on the stock exchange."

In *Davis v. Howard*, 24 Q. B. Div. 691, the court said: "At first sight, no doubt it appears unreasonable that it should be within the province of a stock-broker to close all the transactions of his principal, because two days after the broker has made contracts on the principal's behalf on the stock exchange, the principal fails to supply the broker with, it may be, a very small balance

**9. Usages Between Vendor and Purchaser.**—In the relation of vendor and purchaser, the usages of importance include those to determine the mode of measurement of the quantity of goods, as by measuring one barrel in ten;<sup>1</sup> or similarly to ascertain the

due on the previous account; but, on closer examination, and having regard to the peculiar nature of the business which a stock-broker does for his principal, I can see nothing unreasonable in this usage. It is admittedly reasonable where the principal is insolvent, or, if not actually insolvent, is in circumstances which give good reason for thinking that it may be difficult for him to meet his engagements. Its root and foundation is the peculiar position of the broker, who has to pay all his principal's differences out of his own pocket before three o'clock on pay-day, and who, if he does not do this by eleven o'clock on the following morning, is liable to be declared a defaulter on the stock exchange. In such circumstances it is, in my opinion, very reasonable that the broker should have this right to protect himself."

In *Neilson v. James*, 9 Q. B. Div. 546, the court said: "It is said that the contract was void because it did not set forth the name of the person in whose name the shares were registered, as required by 30 and 31 Vict., ch. 29, and that it is the custom of the Bristol stock exchange to disregard the provision of that act. If that be the practice on that exchange, the sooner it is altered the better; but, in my opinion, the plaintiff is not bound by such a custom, as it is neither reasonable nor legal."

In *Perry v. Barnett*, 15 Q. B. Div. 388, the court said: "The proposition that a person who directs another to deal upon a particular market is to be treated as if he knew the rules of that market, has been adopted in the law to some extent, but certainly not to this extent, that however unreasonable or illegal they may be, he is still to be treated as if he knew them. There is a line of demarcation between rules by which such person is bound and rules by which he is not bound, and the rules of the stock exchange applicable upon this occasion would seem to come within the latter of these. If the custom is unreasonable, the courts have said they will not recognize it as binding on people who do not know it and who have not consented to act upon it.

It seems to me that the rule of the London stock exchange by which every contract made there, whatever its terms, must be fulfilled by its members, unless there has been fraud, is, as a custom, unreasonable and one which cannot be supported. Such a usage, when applied, not to brokers, but to strangers who are ignorant of it, is inconsistent with the contract of employment. To bind outsiders by it would be unreasonable; and it is as regards such outsiders and such outsiders only, that such a usage can be called unreasonable, for it would not be unreasonable as regards those who know of it and desire to be bound by it. On this point I think we are bound by the decision in *Neilson v. James*, 9 Q. B. Div. 546. So, also, the language of the present master of the rolls and of Lord Chelmsford in *Robinson v. Mollett*, L. R., 7 H. L. 836, is identical as to this, viz.: if a person employs a broker to buy or sell on a market of the usage of which such person is ignorant, he authorizes him to make contracts upon the footing of such usages as are reasonable and as do not alter the character of such contracts. To go further would be inconsistent with the hypothesis that the agent is employed to make a valid contract." See generally *STOCK EXCHANGE*, vol. 23, p. 748.

**1. Usages Between Buyer and Seller.**

—In *Dalton v. Daniels*, 2 Hilt. (N. Y.) 472, a usage was alleged in the liquor trade, in the sale of liquor, to measure but one barrel in ten. The action was to recover for a deficiency in quantity upon a sale; and the deficiency was shown by a measurement, made in this manner. The court sustained a judgment for the plaintiff, holding the usage to be a reasonable one, and said that the usage "related simply to the mode of ascertaining a fact upon which a rule of law might be declared. The contract between the parties, enlarged or fully expressed by reference to the custom mentioned, would be: 'I sell you a number of barrels of liquor, which I say contain a certain number of gallons, stated on this bill; but the exact quantity may be

weight of articles by a known method of estimating it.<sup>1</sup> Upon a sale of goods, usage may be introduced to show when the delivery is unconditional,<sup>2</sup> and, if the goods are in store and are sold

ascertained by measuring ten out of every one hundred of the barrels, or in like proportion for any number, and making a general estimate founded upon such measurement.' This mode of ascertaining the quantity is reasonable and convenient. It is equally open to both parties, and must result often in a saving of labor, time and expense. It does not contravene any policy or principle of the law, and is, in fact, an agreement that as to quantity both seller and buyer may, by a system of average, determine the number of gallons contained in a number of barrels, without gaging or measuring each one. As a commercial usage it seems to be one of great utility, as, so far as the evidence given in this case illustrates its operation, it subserves the ends of justice, inasmuch as no testimony was offered by the defendant to controvert the result of the examination by the plaintiff's witnesses."

1. In *Conner v. Robinson*, 2 Hill (S. Car.) 354. A purchased of B a number of bales of cotton, at a certain price per pound. Several months prior to the sale the cotton had been weighed by the wharfinger, and marked on the bags and in the books at 63,043 pounds. When the cotton was delivered it was re-weighed by A, and found to amount to only 61,205 pounds. A thereupon paid B for the cotton as of the latter weight, but refused to pay for more than he had actually received. In a suit by B against A for the difference, it was provided that, according to the custom of the trade, cotton was weighed by the wharfinger before it was put in store, and the weight marked on the bags and entered in books kept for that purpose, and that where a sale was made without any stipulation to the contrary, it was understood as being made upon the basis of the weights thus ascertained. It was held that A was bound by the custom, and that B was entitled to recover. "We must suppose that the defendant knew at the time he made the contract that cotton, when put in store, would generally lose in weight, depending for the *quantum* of the loss upon the part of the house in which it was stored, the season of

the year in which it was picked and packed, and the time that it was in store; and that the general usage was to sell by the weight ascertained when it was stored, and from these data, which he might ascertain, he would be able to form a pretty correct estimate of the amount of the loss in weight. This would necessarily enter into the estimate of his offer to purchase. . . . This mode of ascertaining the quantity of an article of commerce is not peculiar to cotton. Flour, for instance, is habitually sold by the barrel, without stipulating that it shall contain a given number of pounds, and yet everyone understands that it must contain one hundred and ninety-six pounds, because it is the usage to put that quantity in each barrel. The quantity of cloth, or other goods sold by the piece or package, is generally, nay—almost universally—ascertained by the quantity stamped upon them, and it rarely occurs that the precise quantity is marked; and it never yet occurred to any one that if there should happen to be a fraction over, that the buyer should pay for it, or if a fraction under, the seller should make it good. And so of very many other articles which might be enumerated."

2. In *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437, goods were sold at auction in the city of New York, to be paid for in approved indorsed notes at four and six months; it was the usage in that city, where goods were so sold, to deliver them to the buyer when called for, and for the vendors afterward to send for the notes. The vendee, after he had received the goods, before he was called on for the notes, according to the terms of the sale, stopped payment, and assigned over the goods, with other property, in trust, to pay certain favored creditors. In considering the question whether the usage could determine the question of passing of title *vel non*, Kent, Ch., said: "In a case like the present, when the purchaser knew of the usage, and that the delivery of the goods before the delivery of the notes was a deposit in trust, and well understood to be upon condition of a delivery of the notes, it would be very productive of fraud, to give the same force and

by transfer tickets, or warehouse receipts, usage is received to determine when the title passes to the purchaser.<sup>1</sup> And so the proper manner of remitting money to a vendor,<sup>2</sup> or goods to a purchaser, may be shown by a usage of the trade.<sup>3</sup>

effect to a voluntary assignment, made for partial purposes, and to the exclusion of the real owner." The usage was allowed.

In *Furniss v. Hone*, 8 Wend. (N. Y.) 247, it was questioned whether a delivery of goods under a usage or custom in the city of New York, where goods are sold at auction, to be paid for in approved indorsed notes, to deliver the goods to the buyer when called for, and afterward to send for the notes, is an absolute delivery so as to pass the title, or only a conditional delivery.

1. In *Merchants' Banking Co. v. Phoenix Bessimer Steel Co.*, 5 Ch. Div. 205; 46 L. J. Ch. 418, a custom was upheld whereby in the iron trade, where warrants were given, stating on the face of them that they were deliverable to the purchasers or their assigns, by indorsement thereon, it was understood that they were to be free from any vendor's lien for unpaid purchase-money; that they passed from hand to hand by indorsement, and conveyed to the holder a title to the goods represented by them.

In *Newhall v. Langdon*, 39 Ohio St. 87; 48 Am. Rep. 426, it appeared that it was the usage of the business with reference to which the parties contracted, that flour so received by rail and stored, was not removed by the consignee to his possession, but remained in the custody of the railroad company until sold, and that the owner sold in lots to such purchasers, and gave to each purchaser an order on the company for the amount purchased, and upon presentation of such an order the agent would point out the lot from which the order was to be filled, and the purchaser would remove and receipt for the amount taken. Nothing remained to be done by the seller in contemplation of the parties to complete the sale. Upon these facts it was held that, by such usage, the flour called for by the order, after its acceptance by the railroad company, was the property of the purchaser, and he was liable to the seller for the price, though part of it was destroyed before being removed to his actual possession.

In *Stanton v. Small*, 3 Sandf. (N. Y.) 230, it was held that where, in an action upon a contract for the sale and purchase of flour, brought by the vendor against the purchaser, it is proved that it is the usage for flour, in a storehouse or vessel, to be sold by accepted delivery orders, and to pass by the transfer of the orders from hand to hand, without actual delivery of the flour, such usage will be held to have entered into the contemplation of the parties, and to have constituted a part of the contract.

In *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; 18 Am. Dec. 726, the custom found was, that flour in store is sold by order, and passes by the transfer of the order, from hand to hand, without actual delivery of the flour to any, and the custom was sustained by the court.

2. In *Warwicke v. Noakes*, Peake's Ad. Cas. N. P. 67, it was held that if a debtor is directed by his creditor to remit money by the post, and it is lost, the creditor must bear the loss. Lord Kenyon said: "Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received as agent."

In *Morton v. Morris*, 31 Ga. 378, it was held that for a debtor to protect himself against loss, by remitting money to his creditor by mail, he must show either the express authority of the creditor to send in that mode, or a usage to that effect in business, from which the creditor's authority may be inferred.

3. In *Putnam v. Tillotson*, 13 Met. (Mass.) 517, which was an action for shoes sold and delivered, brought by a manufacturer in *Massachusetts* against a distant purchaser, evidence was held admissible to show that where shoes are ordered, it is the usage and course of the shoe business, when no special mode of conveyance is mentioned by the purchaser, for the manufacturer to take the shoes to Boston, at his own risk and cost, there to deliver them to some regular line of packets running to the

**XIII. MISCELLANEOUS POINTS—1. Usage as Determining Negligence.**—As a general rule it may be said, that whenever the law condemns an act as negligent, evidence of a usage to do such act is not admissible to show that the act was not negligent.<sup>1</sup> Thus, when an employee of a railroad commits an act of contributory negligence, it is no excuse to say that he acted in accordance with

purchaser's place of business, to take duplicate bills of lading, and forward one of them to the purchaser by mail, and that from that time the delivery is complete, and the purchaser takes the risk of loss.

In *Seavy v. Dearborn*, 19 N. H. 351, it was said that if one who has purchased a stock of goods in a shop occupied by the vendor, permit the sign of the vendor to remain over the door, that fact is evidence that the vendor remained in possession after the sale, and is so far evidence of fraud; but it is one which admits of explanation, and evidence that there was a custom or usage to permit signs to remain after such sales, is admissible.

1. In *Bailey v. New Haven, etc., R. Co.*, 107 Mass. 496, which was an action against a railroad corporation for running a train over the plaintiff at a crossing where there was a single track and no flagman, a witness, called as an expert by the defendants, was asked what was the custom of railroads in maintaining a flagman at crossings similar to the one in question, or at crossings where there was one track. The court refused to allow the question. "The thing sought to be proved by these witnesses called expert was not properly a custom by which parties dealing together are bound, and which, when proved, tends to establish their rights as against each other. It was rather a practice of railroad companies as to using or omitting a certain precautionary measure at certain crossings. But the need of a flagman depends much upon the situation and circumstances of each particular crossing." See *NEGLIGENCE*, vol. 16, p. 462.

In *Henry v. Sioux City, etc., R. Co.*, 66 Iowa 52, the court held that the railroad rules and usages are mere evidence bearing upon the question of negligence of the defendant or its employees, and the care and diligence of the plaintiff. "And here we may say that the law as to custom, in its legal sense, has nothing to do with such questions as whether, when cars are left upon a side-track, they should be coupled together.

It is not a question of custom; it is merely a question as to how or in what manner a given act should be done, or what is proper to be done in accomplishing it."

In *Magee v. Troy*, 48 Hun (N. Y.) 383, which was an action for damages for injuries caused by the negligent placing of lumber in a street, whereby the plaintiff was thrown from his carriage and injured, an objection was made by the plaintiff to a question asked by the defendant of the carpenter, who was erecting the building, whether the building materials deposited in the street were not placed as they usually are in such cases. It was held that the trial court properly sustained the objection, for the reasons that if the question was allowed, the defendant might be permitted to substitute a bad custom for the performance of its duty.

In *Wright v. Boller*, 42 Hun (N. Y.) 77, which was an action for damages for an injury caused by a piece of lumber being blown from a pile of lumber, and striking the plaintiff on the head, the defense was that the lumber was piled in the customary manner. But the court said: "Evidence of a custom, as to the manner in which other persons conduct their business, is not admissible in favor of a defendant sued for negligently conducting his business. The right of the plaintiff to recover depends upon a rule of law, that is, whether the defendants were guilty of negligence that contributed to or caused the injury in question, and whether the plaintiff was free from negligence contributing thereto."

So in *Earl v. Crouch* (Supreme Ct.), 16 N. Y. Supp. 770, it was held that a person who piles lumber near a sidewalk in such a manner that a child's attempting to climb on it will cause it to fall, is guilty of such negligence as will render him liable for injuries caused to a child thereby, and that, in an action for such negligence, evidence that other lumber dealers were accustomed to pile lumber in the same manner was incompetent.

the usage of his fellow employees.<sup>1</sup> And so, also, when a railroad is in law negligent in respect to the transportation or care of

In *Reilly v. Rand*, 123 Mass. 215, which was an action for the use of a derrick, upon evidence being put in by the defendant that a block and chain on the derrick broke in using it, the plaintiff may, to rebut the charge of negligence, put in evidence that it is a usual thing for blocks and chains on any derrick to break when in use.

In *Merchants', etc., Transp. Co. v. Story*, 50 Md. 5, where a number of boxes of books and other property were stowed by a warehouseman on a wharf in close proximity to the water, and by reason of a sudden storm that portion of the wharf was submerged and the goods were injured, it was held that evidence that it was defendant's custom to store goods on the wharf was properly excluded, as such a usage could not free him from responsibility.

In *Hibler v. McCartney*, 31 Ala. 501, a lot of cotton was ignited by a torchlight on the boat on which it was being carried. "The result would not be changed by the existence of a custom to carry torches at night. A custom which would authorize a carrier to carry a torch in such a manner as to endanger the cargo would be violative of law and good faith, and could not receive judicial sanction. If a boat cannot be run at night without the aid of torches, carried in such a manner as to endanger the cotton or freight, to stop is the plain duty of the carrier. Custom cannot relieve from the obligation to bestow, even in guarding against the excepted danger from fire, reasonable care and diligence in taking care of the freight."

In *Champaign v. Patterson*, 50 Ill. 61, where an injury was caused to the plaintiff resulting from a defective crossing, the court rejected evidence that other cities of a similar character constructed their crossings, on the ground that the condition of like structures in other towns and cities is no criterion for the defendant. If other towns and cities choose to suffer such public necessities to be in an unsafe and dangerous condition, their negligence is no excuse or justification for the defendant. The city authorities of Champaign are to do their whole duty in the premises as prescribed by law, with no reference as to what may be done or left undone by the authorities

of other cities. See also *Lichtenhein v. Boston, etc., R. Co.*, 11 Cush. (Mass.) 70; *Loveland v. Burke*, 120 Mass. 140; 21 Am. Rep. 507; *Caswell v. Boston, etc., R. Co.*, 98 Mass. 194; 93 Am. Dec. 151; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Carson v. Leathers*, 11 Cent. L. J. 157.

1. In *Kroy v. Chicago, etc., R. Co.*, 32 Iowa 357, a brakeman was killed while uncoupling cars when in motion. The train men, of whom he was one, had established a custom of uncoupling the train while in motion, at this particular station where he was killed, for their own convenience. The court held that no recovery could be had for injuries received while performing such a duty, because the deceased must be regarded as having assumed the risk incident to such a customary, although hazardous, employment. "If," said Day, C. J., "the deceased had not himself contributed to the establishing of the custom, and remained in defendant's employ with knowledge of its existence, without complaint or protest, and voluntarily taken upon himself the particular act which occasioned his death, our conclusion would be different."

In *Sprong v. Boston, etc., R. Co.*, 60 Barb. (N. Y.) 30, where a brakeman was killed while riding on the locomotive, and the rules of the company prohibited brakemen from leaving their posts while the train was in motion, but the evidence showed that it was customary on the road for brakemen to ride on the engine, and it did not appear that the deceased was aware of the company's rules, it was held that his non-observance of them was not a violation of duty.

In *O'Neill v. Keokuk, etc., R. Co.*, 45 Iowa 546, it was held that evidence showing that the employees of a railroad company were accustomed to act in violation of a rule of the company is not admissible to establish a waiver of the rule, unless it be shown that a knowledge of the custom was known to the officer charged with the enforcement of the rule. It could not be so regarded by reason simply of a custom, on the part of those for whom it was made, to violate it.

In *Memphis, etc., R. Co. v. Graham*,

property, it cannot defend its act by proof that other railroads conduct their business in the same manner.<sup>1</sup>

94 Ala. 545, it was held that a rule of a railroad company forbidding employees from going between cars in motion to uncouple them is reasonable and wholesome. "Since this rule is clear and explicit, evidence that for many years it had been the custom of brakemen to go between cars in motion to make uncouplings was inadmissible to show that the rule, not having been insisted on, was not binding on deceased. Evidence of usage and custom of its violation by those it was intended to protect, either to exempt them from its obligations or to subject the company to damage because of its repeated violation, is inadmissible."

Other cases are Pennsylvania R. Co. v. Hankey, 10 Cent. L. J. 337; Dorsey v. Phillips, etc., Construction Co., 42 Wis. 583; Berg v. Chicago, etc., R. Co., 50 Wis. 419; Flannagan v. Chicago, etc., R. Co., 50 Wis. 462; Hughes v. Winona, etc., R. Co., 27 Minn. 137; Lake Shore, etc., R. Co. v. Knittal, 33 Ohio St. 468; Rumpel v. Oregon Short Line, etc., R. Co. (Idaho, 1894), 35 Pac. Rep. 700.

In Southern Kansas R. Co. v. Robins, 43 Kan. 145, it was held that evidence of the practice and usage of others in climbing the ladder of a box car when a train is in motion, such as deceased fell from, is not admissible to prove due care on his part at the time of the accident. See Chicago, etc., R. Co. v. Clark, 108 Ill. 113; Chicago, etc., R. Co. v. Moranda, 108 Ill. 576; Lawrence v. Hudson, 12 Heisk. (Tenn.) 671; Galveston, etc., R. Co. v. Evanisch, 61 Tex. 3; Bailey v. New Haven, etc., Co., 107 Mass. 496; Koons v. St. Louis, etc., R. Co., 65 Mo. 592; Crocker v. Schureman, 7 Mo. App. 358; Cleveland v. New Jersey Steamboat Co., 5 Hun (N. Y.) 523.

In Glass v. Memphis, etc., R. Co., 94 Ala. 581, which was an action against a railroad company for killing a person while walking on its tracks, evidence of a custom by neighboring people to walk on the track without objection by the company was held irrelevant and inadmissible. The court referred to Central Railroad v. Brinson, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42, and notes; Hoppe v. Chicago, etc., R. Co., 61 Wis. 357; 19 Am. & Eng. R. Cas. 74, and notes; Memphis, etc., R. Co. v. Womack, 84 Ala. 149; Mason v. Mis-

souri Pac. R. Co., 6 Am. & Eng. R. Cas. 1.

In Mayfield v. Savannah, etc., R. Co., 87 Ga. 374, it was said that a custom or usage, obviously dangerous, is not admissible to excuse contributory negligence by the plaintiff, more especially where it did not appear that such custom or usage had been adopted by the defendant railroad company, or that it prevailed at the place or on the particular railway concerned.

In Warden v. Louisville, etc., R. Co., 94 Ala. 277, which was an action against a railroad company by an employee, the court held that there was no error in rejecting evidence that it was the custom of the plaintiff and other head brakemen on that train to ride on the pilot. "Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent. Glover v. Scotten, 82 Mich. 369; Hickey v. Boston, etc., R. Co., 14 Allen (Mass.) 429; Judkins v. Maine Cent. R. Co., 80 Me. 417; Chicago, etc., R. Co. v. Clarke, 108 Ill. 113; Humphreys v. Newport News, etc., Co., 33 W. Va. 135; Hibler v. McCartney, 31 Ala. 501; Bryant v. Central Vt. R. Co., 56 Vt. 710."

In Ferguson v. Central Iowa R. Co., 58 Iowa 293, which was an action for damages against a railroad company by one of its employees, it was held that if the customary and usual way of doing the work of uncoupling cars in the yard was negligent and wrong, although permitted by the company, the plaintiff, being for the time in command of the train and in part responsible for the custom, cannot be heard to complain.

1. In Hill v. Portland, etc., R. Co., 55



But when the question is whether or not there was want of due care in any particular case, evidence of usage is admissible to show what constitutes due care as applied to that particular case. "Ordinary care" is not measured by a fixed rule, but by the usages of different places and trades.<sup>1</sup>

Me. 438; 92 Am. Dec. 601, which was an action for personal injury to the plaintiff, caused by being thrown from his carriage in consequence of his horse becoming frightened at the sound of a locomotive whistle at a railroad crossing near a station, a witness was asked whether it was not a custom on other railroads to blow two whistles upon starting the train. The court refused to allow the question, saying: "If such a general custom could be established, it would not be a legitimate defense in this case, or tend to establish it. If all the railroads in the country adopt any rule or custom, which is unreasonable or dangerous and productive of injury, the generality of the custom cannot, in a given case, in any degree excuse or justify the act."

In *Bailey v. New Haven, etc., R. Co.*, 107 Mass. 496, where negligence was alleged in a suit against a railroad company in not keeping a flagman at a crossing, the custom of other railroads not to maintain flagmen at similar crossings was rejected.

In *Allen v. Burlington, etc., R. Co.*, 64 Iowa 94, it was said that the usual custom or practice of railroad corporations in operating their roads, and constructing their machinery and buildings, cannot be the ground of relief from liability for injuries sustained, if the custom or practice disregards the safety of the employees, as required by the law. In that case, it would simply be nothing more than negligence practiced habitually by the corporations. Citing *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31.

In *Fisher v. Brig Norval*, 8 Martin N. S. (La.) 120, cotton was left exposed on a levee without any person to watch it, and was damaged. The court held that there was negligence in the defendants permitting the cotton to be exposed all night on the levee, to theft, fire, and other accidents, without some person to take care of it. "It is not a good excuse to say, that it is not customary to place a watch over property, such as this. If any such custom has been introduced in this city, by those who have had the property of others

transmitted to them for sale or transportation, the sooner they are informed that such custom cannot control the law, and will not be recognized by courts of justice, the better."

Other cases to the same effect are *Miller v. Pendleton*, 8 Gray (Mass.) 547; *Bliss v. Wilbraham*, 8 Allen (Mass.) 564; *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187; 79 Am. Dec. 724; *Bacon v. Boston*, 3 Cush. (Mass.) 174; *Hinckley v. Barnstable*, 109 Mass. 126; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Maury v. Talmadge*, 2 McLean (U. S.) 157; *Crocker v. Schureman*, 7 Mo. App. 358; *Stephens, etc., Transp. Co. v. Tuckerman*, 33 N. J. L. 543.

1. In *Whitsett v. Chicago, etc., R. Co.*, 67 Iowa 150, which was an action by a brakeman for a personal injury caused by the negligence of the defendant's engineer, it was competent for the plaintiff, in order to show that he was not guilty of contributory negligence, to prove that, in performing the duty in which he was engaged when he received the injury, he adopted the course usually pursued under the same circumstances by men in that calling, though in the employment of other companies. *Jeffrey v. Keokuk, etc., R. Co.*, 56 Iowa 546, was followed.

In *Jochem v. Robinson*, 72 Wis. 199, the defendant, in order to unload several barrels of sugar, weighing 300 pounds each, into his store, placed a skid across the sidewalk in front of the store, and the plaintiff, in attempting to pass over it, fell and was injured. There was an alley leading to the rear of the store, but the unloading could not have been there accomplished without great inconvenience, and the defendant followed the customary method of handling such goods. The court held that evidence as to the usual and customary method of handling goods in that vicinity was properly admitted.

In *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.) 448, the plaintiff sued to recover the value of certain articles stolen from the carrier's wharf before delivery to him, the defendant being charged with want of due care in the

**2. Usage in Respect to Trespasses.**—Usage has been received in various cases as material to the question whether or not a certain act is or is not a trespass; but if the law decides that a certain act is a trespass, usage is not admissible to show that such an act is not a trespass.<sup>1</sup>

custody of the property. The court admitted evidence on the part of the railroad company that they exercised the same care as was usual in Boston. The court said: "If the defendants exercised due and ordinary care in the custody of the property, they cannot be charged for its loss. What constituted such care was a question of fact, to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated. The standard of ordinary care varies, necessarily, in different localities. One degree of diligence would be required for the city and a less or greater for the country, depending on a great variety of circumstances. The defendants offered to prove that there was exercised by them in relation to this property that care which other railroad corporations in Boston usually exercised in relation to such property."

In *Johnson v. Lightsey*, 34 Ala. 169; 73 Am. Dec. 450, goods in the hands of a carrier were injured while he was descending a river with two flat-boats bound together. On the question of negligence in having them thus bound together, the court allowed evidence to show that this was a customary mode of navigating.

In *Fiore v. Ladd*, 22 Oregon 202, the action was to recover money deposited by one who could not write his name, which money had been paid by the bank to a third person on a forged indorsement. It was the general custom of banks, where a person unknown to a bank brought money for deposit, gave a name as his own, and asked for a certificate, there being no suspicious circumstances, to issue to him such certificate in the name given, on his signing the signature book, if he could write, without further inquiry, and pay the money on return of the certificate indorsed with the name written in the signature book; but that, where the depositor could not write his name, it was the custom to ask questions, the answers to which were entered in the

signature book as a means of identification. It was held, that it was error to refuse to instruct the jury that, if they found the custom so to be, the action on the part of defendant's bank in following it was not negligence.

In *Barber v. Brace*, 3 Conn. 9; 8 Am. Dec. 149, it was held that a charge of negligence and mismanagement in the stowage of certain goods shipped for transportation, may be repelled, by proof of a custom to stow goods of that description, for such a voyage, in that manner.

In *Waters v. Moss*, 12 Cal. 535; 73 Am. Dec. 561, which was an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the unclosed commons;" where the defense is negligence on the part of the plaintiff in thus allowing the horse to run at large.

In the following cases various questions have arisen in respect to usages in actions for negligence: *McKibben v. Bakers*, 1 B. Mon. (Ky.) 122; *Chenoweth v. Dickinson*, 8 B. Mon. (Ky.) 156; *Maxwell v. Eason*, 1 Stew. (Ala.) 514; *Brown v. Hitchcock*, 28 Vt. 452; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 420; *Bradford v. Drew*, 5 Met. (Mass.) 188; *Wright v. Central R., etc., Co.*, 16 Ga. 38; *Bailey v. New Haven, etc., Co.*, 107 Mass. 496; *Hill v. Portland, etc., R. Co.*, 55 Me. 438; 92 Am. Dec. 601; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 32; *Cleveland v. New Jersey Steamboat Co.*, 5 Hun (N. Y.) 523; *Miller v. Pendleton*, 8 Gray (Mass.) 547; *Kuhns v. Wisconsin, etc., R. Co.*, 70 Iowa 561; *Larson v. Tobin*, 43 Minn. 88; *Whitsett v. Chicago, etc., R. Co.*, 67 Iowa 150; *Central Railroad v. DeBray*, 71 Ga. 407, and cases cited in *Savannah, etc., R. Co. v. Flannagan*, 82 Ga. 589; 14 Am. St. Rep. 183.

**1. Usages in Respect to Trespasses.**—*O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; *Underwood v. Carney*, 1 Cush. (Mass.) 285; *Gerard v. Cook*, 2 B. & P. N. R. 109; *Philadelphia v.*

**3. Contract Incorporating Usage.**—Parties are at liberty to refer to and adopt any lawful usage as a part of their contract, and the courts will enforce such a contract in accordance with the usage. Such a contract incorporating a usage necessarily requires parol proof to show what the usage is, and evidence is therefore admissible for that purpose.<sup>1</sup>

Presbyterian Board, 29 Leg. Int. (Pa.) 53; *Com. v. Blaisdell*, 107 Mass. 234; *Hall v. Nottingham*, 24 W. R. 58; *Schierhold v. North Beach, etc.*, R. Co., 40 Cal. 447; *Evans v. Bidwell*, 20 Conn. 209; *Rivers v. Burbank*, 13 Nev. 398; *Knowles v. Dow*, 22 N. H. 387; 55 Am. Dec. 163; *Perley v. Langley*, 7 N. H. 233; *Nudd v. Hobbs*, 17 N. H. 525; *Bethum v. Turner*, 1 Me. 111; 10 Am. Dec. 36; *Heath v. Ricker*, 2 Me. 72; *Adams v. Morse*, 51 Me. 497; *Evans v. Hesler*, 1 Bibb (Ky.) 561; *Durham v. Musselman*, 2 Blackf. (Ind.) 96; 18 Am. Dec. 133; *Marsh v. Colby*, 39 Mich. 626; 33 Am. Rep. 439; *Lloyd v. Jones*, 6 C. B. 81; 60 E. C. L. 81; *Wheeler v. Rowell*, 7 N. H. 515.

In *Codman v. Evans*, 5 Allen (Mass.) 308; 82 Am. Dec. 258, it was said, in reference to a bay window erected over the land of an adjoining owner: "If there be a custom in Boston to erect bay windows, balconies, and other structures over the streets, provided they do not interfere with the rights of the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be the custom to erect them over the land of other people, such a custom is illegal, and the defendant cannot justify himself in occupying his neighbor's property as a part of his dwelling house on the ground that such trespasses are customary in Boston."

In *Winder v. Blake*, 4 Jones (N. Car.) 332, the court said in reference to an alleged usage to enter upon the land of other parties and fish there: "By the common law an imaginary line is thrown around the land of every one, which may not be entered without subjecting the wrongdoer to an action. No custom or usage can change this law. If the owner of land unreasonably refuses to allow his neighbors to fish in his mill-pond, or to gather strawberries in his old field, the only correction is to arraign him at the bar of public opinion for the violation of the rules of good neighborhood."

**1. Contract Incorporating Usage.**—In *Nordaas v. Hubbard*, 48 Fed.

Rep. 921, it was held that a custom of the port of Mobile by which vessels taking on additional cargo at a deeper anchorage bear the cost of lightering, though not so notorious, or so acquiesced in as to have the force of law, is binding on a vessel whose charter-party provides that the custom of the port is to be observed in all cases not especially provided for.

In *Dorsey v. Eagle*, 7 Gill & J. (Md.) 331, the lease, among other stipulations, contained this one. "In other respects, the said D. is to have and to hold the premises according to manor regulations." The parties "having thus, by their written agreement, made the manor regulations a part of their contract, we are at a loss to discover the force of the argument which would exclude the evidence when offered for this purpose."

In *Clem v. Martin*, 34 Ind. 341, the parties referred to, and incorporated into their contract, and made a part thereof, the usage that prevailed among farmers in that locality. "A plain and express contract cannot be contradicted, varied, explained, or modified by the custom prevailing in any particular locality; but this does not prevent parties from making the usage of a particular locality a part of their contract, and agreeing that they will be governed thereby, provided such usage is not in conflict with the settled rules of the law, and does not go to defeat the essential terms of the contract."

In *Hughes v. Stanley*, 45 Iowa 622, it was said that it is competent for parties to enter into a contract in accord with an established usage or custom recognized by both, and the contract will be binding upon them.

In *Vose v. Morton*, 5 Gray (Mass.) 594, the court said: "We should be sorry to weaken the rule of law, which provides that parol evidence shall not be admitted to contradict, vary, or alter the terms of a written contract; but the stability and value of the rule itself depends on its being applied with care and just discrimination. An undertaking to pay a certain rate of freight,

4. **Pleading.**—A general custom in the sense of a general rule of law need not be pleaded, as the court takes judicial knowledge of it.<sup>1</sup> The rules as to pleading usages of trade in the various states depend upon local practice.<sup>2</sup>

5. **Customs à Prendre.**—A right *à prendre*, that is, a right to take profit from the land of another, cannot be acquired by custom in its technical sense; much less by mere usage.<sup>3</sup>

'with primage and average accus-tomed,' in our opinion, means such primage and average as the custom of that trade warrants and requires; if it requires none, then none is payable by force of the obligation. The parties appeal to such custom, as the test and measure of the liability of the one to the other. The contract itself calls for evidence *aliunde* to give it effect; and if the fact to be proved is one which can be proved only by parol evidence, parol evidence is necessary and competent."

In *Union Bank v. Union Ins. Co. Dudley* (S. Car.) 171, it was held that a policy referring to the usages of London, as the standard by which its liabilities are to be fixed, will be construed according to those usages only.

See also to the same effect, *Bertelote v. Part of Cargo of Brimstone*, 3 Fed. Rep. 661; *Smith v. Lawrence*, 26 Conn. 468; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; 35 Am. Dec. 363.

In *Goldsmith v. Sawyer*, 46 Cal. 209, it was held that when a contract is entered into with reference to the rules of a board of brokers, not rules or usages of trade and commerce, such rules become in effect special terms of the contract, and must be pleaded by the party who claims that he has performed the contract in accordance with them, or that the other party has failed to comply with them.

1. **Pleading.**—*Paddock v. Forrester*, 3 M. & G. 903; *Peter v. Kendal*, 6 B. & C. 703; 13 E. C. L. 299; *Griffin v. Blandford*, Cowp. 62; *Morewood v. Wood*, 4 T. R. 157; *Tewkesbury v. Bricknell*, 1 Taunt. 142; *Hawkins v. Wallis*, 2 Wils. 173; *Stultz v. Dickey*, 5 Binn. (Pa.) 285; 6 Am. Dec. 411; *Templeman v. Biddle*, 1 Harr. (Del.) 522; *Goldsmith v. Sawyer*, 46 Cal. 209; *Coyle v. Gozzler*, 2 Cranch (C. C.) 625.

2. **Miller v. North America's Ins. Co.**, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 470; *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y. Super. Ct.) 142; *Hight v. Bacon*, 126 Mass. 10; 30 Am. Rep. 639; *Antomarchi v. Russell*, 63 Ala. 356;

35 Am. Rep. 40; *Colman v. Clements*, 23 Cal. 245; *Lowe v. Lehman*, 15 Ohio St. 179; *Wallace v. Morgan*, 23 Ind. 399; *Dutch, etc., Co. v. Mooney*, 12 Cal. 534; *Governor v. Withers*, 5 Gratt. (Va.) 24; 50 Am. Dec. 95; *Jackson v. Henderson*, 3 Leigh (Va.) 196; *Goldsmith v. Sawyer*, 46 Cal. 209; *Gano v. Palo Pinto Co.*, 71 Tex. 99; *Power v. Kane*, 5 Wis. 265, 268; *Hall v. Storrs*, 7 Wis. 253; *Lamb v. Klaus*, 30 Wis. 96; *Lee v. Merrick*, 8 Wis. 229; *Marshall v. American Express Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Keogh v. Daniell*, 12 Wis. 163; *Huebschmann v. McHenry*, 29 Wis. 655; *Hinton v. Locke*, 5 Hill (N. Y.) 437; *Scott v. Whitney*, 41 Wis. 504; *Moore v. Kennedy*, 81 Tex. 144. See PROFITS À PRENDRE, vol. 19, p. 262.

3. **Customs à Prendre.**—In *Cobb v. Davenport*, 32 N. J. L. 369, it was held that the right of fishing being a *profit à prendre* in another's soil, as distinguished from an easement, cannot be claimed by custom, but must be prescribed for in a *que estate*. *Blewett v. Tregonning*, 3 Ad. & El. 554; 30 E. C. L. 151; *Race v. Ward*, 4 El. & Bl. 702; 82 E. C. L. 700; *Bland v. Lipscomb*, 30 Eng. L. & Eq. 189, note; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; 22 Wend. (N. Y.) 425; *Ackerman v. Shelp*, 8 N. J. L. 125; *Wickham v. Hawker*, 7 M. & W. 63; *Grimstead v. Marlowe*, 4 I. R. 717; *Gateward's Case*, 6 Coke, 60 b.; *Perley v. Langley*, 7 N. H. 233. The defendant cannot justify under a custom, nor will proof of a custom sustain a plea of prescriptive right, because the two rights, though they may co-exist in the same land, are of a completely different nature. *Blewett v. Tregonning*, 3 Ad. & El. 554; 30 E. C. L. 151; *Kent v. Waite*, 10 Pick. (Mass.) 138.

In *Perley v. Langley*, 7 N. H. 233, the court held that the inhabitants of a town cannot claim a right to take sand to mix with lime, for the purpose of making mortar, from the land of another, as a custom. "A distinction has been taken, in all the authorities,

**6. English Bankruptcy Usages.**—Under the English Bankrupt Act, the courts have taken judicial notice of certain usages of hotel keepers, livery-stable keepers, and others, which in the *United States* have to be proved as facts. These cases are founded on the terms of the act and must not be relied upon as authorities in cases not dependent upon it.<sup>1</sup>

**7. Fraud.**—In numerous cases evidence of usage has been received to determine whether the acts of parties are with intent to defraud; especially in cases of transactions between husband and wife.<sup>2</sup>

betwixt a profit taken from the soil of another, and a mere easement upon the soil. Rights *à prendre*, as the right to taking the herbage of the soil by cattle, a right to take away turf, peat, coal, sand, or gravel, cannot be alleged as in the inhabitants of a town, and as a local custom. . . . Inhabitants may prescribe for an easement *in alieno solo*; as for a way, for liberty to play at rural sports, to draw nets on another's land, to pass free of toll for a public landing place, etc. . . . But there are no authorities that sustain the removal of the soil, or the taking of profits from the soil of another, as a custom."

Other American cases to the same effect are *Littlefield v. Maxwell*, 31 Me. 135; 50 Am. Dec. 653, in which the right of a custom to deposit wood upon another's land was held invalid; *Hill v. Lard*, 48 Me. 83, where a right to take seaweed from another's beach was claimed by custom; *Waters v. Lilley*, 4 Pick. (Mass.) 145; 16 Am. Dec. 333, where the right of fishing in an unnavigable stream was similarly claimed; *Nudd v. Hobbs*, 17 N. H. 525; *Atty. Gen'l v. Tarr*, 148 Mass. 309, in which it was held that a right to maintain a building, a permanent structure, upon the land of another cannot be acquired by custom. *Kenyon v. Nichols*, 1 R. I. 106; *Cobb v. Davenport*, 32 N. J. L. 369.

In *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457, the court said that it is well settled that a custom to take or have anything from another man's land, or for a profit *à prendre*, is bad. The question here was as to the validity of a custom of the inspectors of flour to take to their own use the draft flour, drawn out to be examined. Of this the court said: "No difference in principle is perceived between a custom *à prendre*, and one to appropriate part of the personal chattels of another, against his will and without his consent, and without any consideration whatever."

**1. English Bankruptcy Usages.**—In *Ex p. Wingfield*, 10 Ch. Div. 591, it was held that in order that goods of another person in the possession of a bankrupt should pass to his trustee under the latter words of sub-section 5 of section 15 of the Bankruptcy Act, 1869, as goods of which the bankrupt "has taken upon himself the sale or disposition as owner," it is necessary that the bankrupt should have been the reputed owner of the goods.

In *Ex p. Powell*, 1 Ch. Div. 501, it was held that where a custom of holding certain goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, the custom must be one which the ordinary creditors of the bankrupt may be reasonably presumed to have known. Such custom may be proved, either by reported cases, or by evidence of the custom as on a question of fact.

In *Ex p. Turquand*, 14 Q. B. Div. 636, it was held that the custom for hotel keepers to hire the furniture of their hotels is so notorious, and has been so often proved, that it need not now be proved, but the court will take judicial notice of it. And the custom extends not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of a hotel for the purpose of using it as a hotel. The effect of the custom is absolutely to exclude the reputation of ownership by the hotel keeper of all those articles in the hotel, at the time of his bankruptcy, which are within the scope of the custom, without regard to the question whether the particular articles are or are not in fact hired by him.

So, also, in *Crawcour v. Salter*, 18 Ch. Div. 30, it was held that the custom of hotel keepers holding their furniture on hire is now so well established that it ought to be taken judicial notice of.

**2. Fraud.**—In questions of fraud *vel non* evidence of usage has been ad-

**8. Officer's Powers, etc.**—In determining questions regarding the powers, rights, duties, compensation, and proper conduct of officers, usage has frequently been of service.<sup>1</sup>

**USE.**—See note 2.

mitted in the following cases: *Hills v. Hoitt*, 18 N. H. 603; *Cuck v. Quackenbush*, 13 Hun (N. Y.) 107; *Smith v. Kennedy*, 13 Hun (N. Y.) 9; *Whedon v. Champlin*, 59 Barb. (N. Y.) 61; *Nash v. Mitchell*, 3 Abb. N. Cas. (N. Y. Ct. of App.) 171; *Hart v. Young*, 1 Lans. (N. Y.) 417; *Peters v. Fowler*, 41 Barb. (N. Y.) 467; *Ashworth v. Outram*, 37 L. T. N. S. 85; *Patten v. Patten*, 75 Ill. 446; *Lyons v. Green Bay, etc.*, R. Co., 42 Wis. 548; *Hall v. Young*, 37 N. H. 134; *Southwick v. Southwick*, 9 Abb. Pr. N. S. (N. Y. Super. Ct.) 109; 49 N. Y. 510; *Huston v. Clark*, 50 N. H. 482; *Alston v. Rowles*, 13 Fla. 123; *Campbell v. Campbell*, 21 Mich. 438; *Moyer's Appeal*, 77 Pa. St. 486; *Mason v. Bowles*, 117 Mass. 86; *Jacobs v. Hesler*, 113 Mass. 57; *Kline's Appeal*, 39 Pa. St. 463; *Chamboret v. Cagney*, 35 N. Y. Super. Ct. 486; *Gerhard v. Neese*, 36 Tex. 635; *Millard v. Merritt*, 45 Barb. (N. Y.) 295.

**1. Officers' Powers, etc.**—In determining questions of the powers, rights, compensation, and proper conduct of officers, evidence of usages has been received in the following cases: *Fennings v. Lord Granville*, 1 Taunt. 241; *Woods v. Galbreath*, 2 Yeates (Pa.) 306; *Eddy v. Faulkner*, 3 Yeates (Pa.) 580; *Taylor v. Sotolingo*, 6 La. Ann. 154; *U. S. v. McDaniel*, 7 Pet. (U. S.) 1; *U. S. v. Filibrown*, 7 Pet. (U. S.) 28; *State v. Sorrels*, 15 Ark. 664; *Miller v. Eschbach*, 43 Md. 1; *Solomon v. Commissioners*, 41 Ga. 157; *Talbott v. Hooser*, 12 Bush (Ky.) 410; *Blythe v. Richards*, 10 S. & R. (Pa.) 265; 13 Am. Dec. 672; *Mayhew v. Soper*, 10 Gill & J. (Md.) 366; *Wyer v. Andrews*, 13 Me. 168; 29 Am. Dec. 497; *Munroe v. Woodruff*, 17 Md. 159; *Naylor v. Semmes*, 4 Gill & J. (Md.) 273; *Lynes v. State*, 46 Ga. 208.

In *U. S. v. MacDaniel*, 7 Pet. (U. S.) 1, it was said: "Of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law; but it is evidence

of the construction given to it, and must be considered binding on past transactions."

**2.** In *Michigan*, a chattel mortgage may cover after-acquired stock of a dealer "for use" in his business; but this does not cover the case of goods diverted to another purpose before reception by the dealer. *Curtis v. Wilcox*, 49 Mich. 427.

**Use of Building.**—In *Spicer v. Bonker*, 45 Mich. 630, it has been held that the word "use," in an assignment of "all the use" of certain premises, was too vague and uncertain to cover the rent of the buildings.

**"Used in Rivers or Inland Navigation."**—In an act of Congress limiting the liability of owners of vessels "used in rivers or inland navigation," the term "used" was said by Nelson, J., to mean, in this connection, "employed," and doubtless in the mind of Congress was intended to refer to vessels solely employed in rivers or inland navigation. *Moore v. American Transp. Co.*, 24 How. (U. S.) 37.

**Mechanic's Lien.**—Generally, the lien of material-men extends only to the materials, etc., "used" in construction. It has been held that, in the sense of the law, machinery furnished a contractor is not used in erecting the structure. *Basshor v. Baltimore, etc.*, R. Co., 65 Md. 99. On the other hand, powder furnished a contractor has been held to be "used" in the construction of a railway. *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. Rep. 475. In this case the court distinguishes *Basshor v. Baltimore, etc.*, R. Co. 65 Md. 99, in that the powder was expended, whereas the machinery remained after the construction was finished, saying that provisions furnished a contractor would be held to come within the statute. See generally *MECHANICS' LIENS*, vol. 15, p. 55.

**Used as a Beverage.**—A statute forbade the sale of liquor by a druggist "to be used as a beverage." It was held that an information charging the sale of liquor "as a beverage" was equivalent to charging that the liquor was sold "to be used as a beverage." *People v. Hinchman*, 75 Mich. 587.

**USE AND OCCUPATION.**—When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of *assumpsit* for use and occupation.<sup>1</sup>

**USEFUL.**—As to the word “useful” in patent law, see PATENT LAW, vol. 18, p. 67.

**USEFULNESS.**—The word “usefulness” implies capabilities for use, and appertains to the future as well as to the past.<sup>2</sup>

**USER.**—The term user may be defined as the actual exercise or enjoyment of any right or property. It is employed particularly in respect of franchises.<sup>3</sup> The acceptance of a corporate charter may be established by user of the rights and privileges conferred thereby.<sup>4</sup> The long-continued user by the public of a road or street will raise a presumption of dedication on the part of the owner.<sup>5</sup> And, generally speaking, in the *United States* the grant of any incorporeal hereditament will be presumed upon proof of an adverse user, which has been exclusive and uninterrupted for twenty years, or for the period of time fixed by the respective statutes of the several states for quieting titles to lands.<sup>6</sup> Opposed to the term user are the expressions non-user

**Exemption Law.**—An exemption of property “used” by a debtor in obtaining the support of his family, has been held to include a horse and wagon owned by the debtor and used by another party, who shared the profits with him. *Washburn v. Goodheart*, 88 Ill. 229.

**Used Distinguished from Resorted.**—A statute prohibited the keeping of a building “resorted” to for illegal gaming. It was held that an indictment for keeping a tenement “used” for illegal gaming was bad, the terms not being synonymous. *Comm v. Stahl*, 7 Allen (Mass.) 304.

1. Bouv. Law Dict., p. 773; LANDLORD AND TENANT, vol. 12, p. 756; VENDOR AND PURCHASER, vol. 28.

2. *Mills on Em. Dom.* 108, followed in *Chesapeake, etc., R. Co. v. Dyer County* (Tenn. 1889), 11 S. W. Rep. 943, which was a case construing a charter requiring a railroad to restore the highways it crossed to their former state of usefulness.

3. *Black's Law Dict.* See FRANCHISES, vol. 8, p. 584.

4. See CORPORATIONS (PRIVATE), vol. 4, p. 193; CHARTER, vol. 3, p. 141. See also *Bank v. Dandridge*, 12 Wheat. (U. S.) 71; *Demarest v. Flack*, 128 N. Y. 205; *Hammond v.*

*Straus*, 53 Md. 1; *Androscoggin Bridge v. Bragg*, 11 N. H. 102; *Bank of Manchester v. Allen*, 11 Vt. 302; *Com. v. Bakeman*, 105 Mass. 53; *Talladega Ins. Co. v. Landers*, 43 Ala. 136.

5. See DEDICATION, vol. 5, p. 414; HIGHWAY, vol. 9, p. 366; STREETS AND SIDEWALKS, vol. 24, p. 12; CROSSINGS, vol. 4, p. 915; PARKS AND PUBLIC SQUARES, vol. 17, p. 407; CEMETERIES, vol. 3, p. 51. See also *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41; 7 Am. and Eng. R. Cas. 593; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; *Kruger v. Le Blanc*, 70 Mich. 76; *People v. Loehfeldm*, 102 N. Y. 1; *Stewart v. Frink*, 94 N. Car. 487; 55 Am. Rep. 619.

6. See ADVERSE POSSESSION, vol. 1, p. 225; BRIDGES, vol. 2, p. 540; DAM, vol. 4, p. 971; DRAINS AND SEWERS, vol. 6, p. 19; EASEMENTS, vol. 6, p. 139; EVIDENCE, vol. 7, p. 98; FERRIES, vol. 7, p. 943; FISH AND FISHERIES, vol. 8, p. 23; LAKES AND PONDS, vol. 12, p. 610; LATERAL AND SUBJACENT SUPPORT, vol. 12, p. 935; LIMITATION OF ACTIONS, vol. 13, p. 667; NAVIGABLE WATERS, vol. 16, p. 260; PEWS, vol. 18, p. 417; PRESCRIPTION, vol. 19, p. 6; PRESUMPTIONS, vol. 19, p. 42; PRIVATE WAYS, vol. 19, p. 103; PROFITS A PRENDRE, vol. 19, p. 262; WATERS AND WATER COURSES.

and disuser, which signify the neglect or omission to exercise a right, privilege, or benefit, as the non-user or disuser of a corporate franchise or easement. A right acquired by user may be lost by non-user or disuser.<sup>1</sup> Misuser is the wrongful use or abuse of rights and benefits.<sup>2</sup> By adverse user is meant such a use of property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right.<sup>3</sup> Right of user has a two-fold meaning: first, it signifies the right to use, as distinguished from ownership; second, the presumptive right arising from continued user.<sup>4</sup>

**USES (STATUTE OF).**—(See also CHARITIES, vol. 3, p. 122; PERPETUITIES, vol. 18, p. 335; REMAINDERS AND EXECUTORY INTERESTS, vol. 20, p. 828; TRUST AND TRUSTEES, vol. 27, p. 1.)

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**I. DEFINITION AND ORIGIN OF USES.**—A use, as it existed prior to the Statute of Uses, was a mere confidence reposed in another, to whom the estate was conveyed without consideration, to dispose of it upon trusts specified at the time, or to be subsequently appointed by the real owner.<sup>5</sup>

The person to whom the estate was granted was called the feoffee or *terre-tenant*, and the one for whom it was granted was called the *cestui que use*.<sup>6</sup>

A modern use is defined as an estate of right, acquired through the operation of the Statute of Uses, and which, when it may take effect according to the rules of the common law, is called a legal estate; and when it cannot, is called a use, with a term descriptive of its modification.<sup>7</sup>

Uses were derived from the *fidei commissum* of the civil law, the latter being introduced by testators to evade the law which dis-

1. See the references in the preceding notes. See also ABANDONMENT, vol. 1, p. 1; FORFEITURE, vol. 8, p. 445; QUO WARRANTO, vol. 19, p. 660. "But constitutional privileges can never be lost by non-user. Neither individuals or aggregate bodies, nor the government itself, can prescribe against the rights of the citizen, with respect to any privilege secured by the constitution." Parker, C. J., in *Baker v. Fales*, 16 Mass. 488.

2. See the references given above.

See also ULTRA VIRES, vol. 27, p. 365; PUBLIC OFFICERS, vol. 19, p. 378; OFFICERS (PRIVATE CORPORATIONS), vol. 17, p. 39.

3. See the above references. See also *Blanchard v. Moulton*, 63 Me. 434; *Cox v. Forest*, 60 Md. 74.

4. *Century Dict.*

5. 4 Kent's Com. (13th ed.) \*290; *Gilbert, Uses*, 1.

6. 2 Bl. Com. 328.

7. *Martindale, Law of Conv.*, p. 104; *Cornish, Uses*, 35.



abled certain persons, as exiles and strangers, from being heirs or legatees. The execution of such trusts having, before the time of Augustus, been left to the honor of the trustee, that emperor, in view of some instances of gross unfaithfulness, instituted a particular magistrate, denominated the *prætor fidei commissarius*, to compel the observance of the confidence reposed.<sup>1</sup>

The notion was transplanted into *England* during the reign of Edward III. by the foreign ecclesiastics for the purpose of evading the Statutes of Mortmain, by obtaining grants of land to nominal feoffees to the use of their religious houses; and these, the courts of chancery (then under the direction of the ecclesiastics) held to be *fidei commissa* and binding in conscience, and accordingly enforced them.<sup>2</sup> But the clergy did not long enjoy the advantage of this new devise, as, during the reign of Richard II. a statute was passed embracing uses within the purview of the Statutes of Mortmain.<sup>3</sup>

But uses were continued by the laity as a means of securing estates against forfeitures in times of civil commotion, and at length they were applied to a number of civil purposes, and under the forming hand of courts of chancery assumed some regular system.<sup>4</sup>

**II. THE STATUTE OF USES.**—To avoid many inconveniences and difficulties growing out of the doctrine of uses, the statute 27, Henry VIII., ch. 10, commonly known as the Statute of Uses, or, more accurately, the statute for transferring uses into possession, was enacted. It provides that, "When any person shall be seised of lands, tenements, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or years, or otherwise, shall, from thenceforth, stand and be seised or possessed of the lands, tenements, etc., of and in the like estate as they have in the use, trust, or confidence; and that the estate of the person so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, or condition, as they had before in the use." The statute thus executes the use; that is, it conveys the possession to the use, and transfers the use into possession, thereby constituting the *cestui que use* the complete owner of the lands and tenements, etc., as well at law as in equity.<sup>5</sup>

The terms "use," "trust," and "confidence," are synonymous, so if an estate is conveyed to a person for the use of, or upon a trust

1. 2 Minor's Inst. (3d ed.) \*200; 2 Bl. Com. 327, 328; 1 Spence's Eq. Jur. 436, 437. the performance of it." 4 Kent's Com. (13th ed.) \*291; Inst. 2, 23, 12.

2. 2 Bl. Com. 271.

3. 15 Rich. II., ch. 5.

4. 2 Minor's Inst. (3d ed.) \*201, 202.

5. 2 Bl. Com. 333; Williams v. Waters, 14 M. & W. 166; Robinson v. Grey, 9 East 1; Broughton v. Langley, 2 Salk. 679. See Lord Bacon's Reading on the Statute of Uses, 334.

or confidence for another, without more, the statute immediately transfers the legal estate to the use, and there is no trust.<sup>1</sup>

The statute having thus not abolished the conveyance to uses, but simply destroyed the intervening estate of the feoffee, and turned the interest of the *cestui que use* into a legal instead of an equitable ownership, the courts of common law began to take cognizance of uses, and very many of the rules before established by equity were adopted with improvement.<sup>2</sup>

Three circumstances must concur in order that the statute may operate: *first*, there must be a person seised to a use; *second*, a *cestui que use in esse*; *third*, a use *in esse* in possession, remainder, or reversion. And when the use is transformed from an equitable to a legal interest, the same qualities, conditions, and limitations that were applicable to it as a use follow it in its new condition as a legal estate.<sup>3</sup>

**III. KINDS OF USES—1. Generally.**—The Statute of Uses worked many changes in the common law. Amongst the most radical and important, was the facility with which estates might be modified and future interests secured by means of springing, shifting, contingent, and resulting uses, and by the reservation of a power to revoke the uses of the estate and appoint others.

**2. Springing Uses.**—A springing use is one limited to arise on a future event, where no preceding estate is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the meantime.<sup>4</sup>

Springing uses may be raised by any form of conveyance, but in the case of those which operate by transmutation of possession, as a deed of lease and release, and feoffment, the estate must be conveyed and raised out of the seisin created in the grantee by the conveyance. But in conveyances by bargain and sale, and covenant to stand seised, the use is severed out of the grantor's seisin and executed by the statute.<sup>5</sup>

Uses of this class, like executory devises, must be so limited that they must take effect, if at all, within the period prescribed by law to avoid perpetuities.<sup>6</sup>

**3. Shifting Uses.**—A shifting use is one which takes effect in derogation of some other estate, and is either limited by the deed by which it is created, or authorized to be created by some one

1. *Right v. Smith*, 12 East 455; *Doe v. Collier*, 11 East 377; 1 *Perry on Trusts* (4th ed.), § 298. See also *Carr v. Richardson*, 157 Mass. 576; *Newhall v. Wheeler*, 7 Mass. 189; *Richardson v. Stodder*, 100 Mass. 528.

2. 2 Bl. Com. 333.

3. *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475; *Moore v. Shultz*, 13 Pa. St. 98.

4. *Martindale, Law of Conv.*, p. 105; *Gilbert, Uses*, 153, note.

A grant to A in fee, for the use of B in fee, after the first of January next, is an example of a springing use, and no use arises until the limited period. *Bouv. Inst.*, vol. 1, No. 1893. The use in the meanwhile results to the grantor who has a determinable fee. 4 *Kent's Com.* (13th ed.) \*298, citing *Woodliffe v. Drury*, Cro. Eliz. 439; *Mutton's Case*, Dyer 274b.

5. 4 *Kent's Com.* (13th ed.) \*298.

6. 2 *Minor's Inst.* (3d ed.) \*216. See

named in the deed. These are, also, denominated secondary uses.<sup>1</sup>

The rule in regard to perpetuities applies to uses of this class, as well as to springing uses.<sup>2</sup> If the object of the power is to create a perpetuity, it is void.<sup>3</sup>

**4. Contingent Uses.**—Contingent or future uses are limited to take effect as remainders, and are governed by the same rules which prevail in respect to remainders.<sup>4</sup>

**5. Resulting Uses.**—Whenever the use limited by the deed expires, or cannot vest, it returns to him who raised it, after such expiration, or during such impossibility, and is called a resulting use.<sup>5</sup>

**6. Revocable Uses.**—The revocability of uses is one of their most notable qualities. By the common law, a power residing in the grantor to revoke a common-law conveyance was deemed repugnant thereto, and never allowed. The utmost that was permitted was a deed of defeasance coeval with the grant itself, and, therefore considered a part thereof, upon events specially designated. But upon the introduction of uses, it was adjudged that the uses originally declared might be revoked at any future time, and new ones declared, provided always that the grantor reserved to himself such a power upon the creation of the estate. And this doctrine having become firmly established before the Statute of Uses, and the statute declaring that he should have the lands as before he had the use, the estate created thus under the statute has always been considered revocable in like manner as the use had been before.<sup>6</sup>

**IV. USES UNEXECUTED BY THE STATUTE—TRUSTS.**—The purpose of the Statute of Uses was to abolish chancery jurisdiction over landed property, by converting the use into the legal estate; but by a rigid literal construction of the statute, this jurisdiction was increased instead of diminished. Thus, it was decided that "no use could be limited on a use." It was not intended by this that the second and subsequent uses were void, but that they were not executed by the statute, and could take effect only as trusts to be enforced in equity.<sup>7</sup>

Again, terms for years, and other chattel interests in real estate and personal property, were held not to be within the statute. And this, upon the ground that the word "seised" used in the

generally PERPETUITIES, vol. 18, p. 335.

1. 1 Bouv. Inst., No. 1894; Gilbert, Uses, 152, note.

2. 2 Minor's Inst. (3d ed.) \*816. See PERPETUITIES, vol. 18, p. 335; also *supra*, this title, *Springing Uses*.

3. Spencer v. Duke of Marlborough, 3 Bro. P. C. 232.

4. 2 Minor's Inst. (3d ed.) \*817; Gilbert, Uses, 164, note. See REMAIN-

DERS AND EXECUTORY INTERESTS, vol. 20, p. 828; ESTATES, vol. 6, p. 899.

5. 2 Bl. Com. 335.

6. 2 Bl. Com. 335; 2 Minor's Inst. (3d ed.) \*817; Gilbert, Uses, 158, note 5; 313. See also DEFEASANCE, vol. 5, p. 510.

7. Tyrrell's Case, Dyer 155; Hopkins v. Hopkins, 1 Atk. 591; Whetstone v. Bury, 2 P. Wms. 146; Doe v.

statute, was applicable to freeholds only; that one could not be said to be seised of chattel interests in land, or of personalty, but only possessed. In such cases, the use was unexecuted, and the trustee took the legal title in trust which was cognizable only in equity.<sup>1</sup>

And later, it was held that the statute did not execute a use where there was some act or duty to be performed by the donee to uses, which could not be performed by him if the legal estate passed from him under the operation of the statute. Here, also, the party beneficially interested had only an equitable interest to be administered in a court of chancery.<sup>2</sup>

At length courts of equity determined that, though these estates were not uses which could be executed by the statute, yet they were trusts which in conscience ought to be enforced. In this wise, uses were partially revived under the name of trusts. So, a trust may be said to be a use unexecuted by the Statute of Uses in the *cestui que use*, but the legal estate is vested in the grantee or trustee.<sup>3</sup>

In regard to this revival of equity jurisdiction in respect to trusts, Lord Mansfield said: "It has not only remedied the mischiefs of uses so much complained of, but has given occasion to raise up a system of equity, noble, rational, and uniform, in place of a system unjust and inconvenient. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud or mischief which the statute of Henry VIII. meant to avoid."<sup>4</sup>

Thus, the results would seem to justify the now celebrated observation of Lord Hardwicke that, "A statute introduced in a solemn and pompous manner has had no other effect than to add, at most, three words to a conveyance."<sup>5</sup>

**V. USES IN THE UNITED STATES.**—The English doctrine of uses, and the modes of conveyance founded thereon, have been very largely introduced into the jurisprudence of the states. In some, the Statute of Uses has been considered to constitute a part of the common law; in others, the main features of the statute have been

Passingham, 6 B. & C. 305; 13 E. C. L. 180; Croxall v. Sherard, 5 Wall. (U. S.) 268. But the statute will execute any number of uses, one after another, as they arise. Calvert v. Eden, 2 Har. & M. (Md.) 279.

1. Doe v. Routledge, Cowp. 709; Anonymous, Dyer 369a.

2. Saye v. Sele, 1 Eq. Cas. Abr. 383; Doe v. Homfray, 6 Ad. & El. 206; 33 E. C. L. 55; Garth v. Baldwin, 2 Ves. 646; Barker v. Greenwood, 4 M. & W. 429; Doe v. Edlin, 4 Ad. & El. 582; 31 E. C. L. 143; Shapland v. Smith, 1 Bro. C. C. 75; Stanley v. Lennard, 1 Eden 87; Upham v. Varney, 15 N. H. 462; Exeter v. Odiorne, 1 N. H. 236;

Sprague v. Sprague, 13 R. I. 701; Ashhurst v. Given, 5 W. & S. (Pa.) 328.

3. Ware v. Richardson, 3 Md. 547; 56 Am. Dec. 762.

4. Burgess v. Wheate, 1 W. Bl. 123.

5. Hopkins v. Hopkins, 1 Atk. 591.

That is, if prior to the statute A had desired to raise a use in B cognizable only in equity, he would have said: "A bargains for a valuable consideration to stand seised to the use of B;" whereas, since the statute, the words, in order to create a use in B, would be: "A bargains for a valuable consideration to stand seised to use of Z to the use of B." 2 Minor's Inst. (3d ed.) \*213. See also Kent's Com. (13th ed.) \*301.

re-enacted.<sup>1</sup> In *Massachusetts* and *Rhode Island* the statute has been partially adopted, and if, for any reason, it is necessary, in order to give effect to the conveyance, the statute will be construed as operative.<sup>2</sup> In *Ohio*, *Vermont*, and *Tennessee* it has never been in

1. *Virginia*.—The English Statute of Uses was deemed to be a part of the colonial law of *Virginia*, but was repealed in 1792. Subsequently (In 1819, and in the Revised Code of 1849, p. 502), a partial substitute was adopted, the provisions of which only execute the possession to the use in cases of deeds of bargain and sale, of lease and release, and of covenants to stand seised; so if a use is raised by any other form of conveyance, as by devise, it remains, as before the Statutes of 27 Henry VIII., a mere equitable interest not cognizable at law. 1 Lomax Dig. 188; Bass v. Scott, 2 Leigh (Va.) 359; Rowletts v. Daniel, 4 Munf. (Va.) 473; Jones v. Tatum, 19 Gratt. (Va.) 733.

*North Carolina*.—In this state there exists a statute similar to the present *Virginia* statute. Den v. Hanks, 5 Ired. (N. Car.) 30.

*Alabama*.—In this state the statute constitutes a part of the common law, except so far as repealed by the Act of 1812. Horton v. Sledge, 29 Ala. 478; Carter v. Balfour, 19 Ala. 829; Simmons v. Augustin, 3 Port. (Ala.) 69.

*New Hampshire*.—It is a part of the common law of this state. French v. French, 3 N. H. 234; Chamberlain v. Crane, 1 N. H. 64; Rollins v. Riley, 44 N. H. 11; Hutchins v. Heywood, 50 N. H. 491; Wilcox v. Wheeler, 47 N. H. 490; Hayes v. Tabor, 41 N. H. 526; Dennett v. Dennett, 40 N. H. 498; Pritchard v. Brown, 4 N. H. 397; 17 Am. Dec. 431.

*Connecticut*.—The statute is held to constitute a part of the common law of this state. Bryan v. Bradley, 16 Conn. 483; Barrett v. French, 1 Conn. 354; 6 Am. Dec. 241; Bacon v. Taylor, Kirby (Conn.) 368.

*Maine*.—Here the statute is considered a part of the common law. Shapleigh v. Pillsbury, 1 Me. 271; Emery v. Chase, 5 Me. 232; Marden v. Chase, 32 Me. 329; Blake v. Collins, 69 Me. 156.

*Missouri*.—Here also it is a part of the common law. Guest v. Farley, 19 Mo. 149.

*New Jersey*.—The statute of this state is substantially the same as the original Statute of Uses. Den v. Crawford, 8 N. J. L. 90.

*Pennsylvania*.—In this state only §§ 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, of the Statute of Uses are in force. Report of the Judges, 3 Binn. (Pa.) 618; O'Kison v. Patterson, 1 W. & S. (Pa.) 395; Wilt v. Franklin, 1 Binn. (Pa.) 502; 2 Am. Dec. 474; Ashhurst v. Given, 5 W. & S. (Pa.) 323.

*Illinois*.—Here the statute is substantially a re-enactment of 27 Henry VIII. Whitham v. Brooner, 63 Ill. 344.

*Iowa*.—Uses are recognized in *Iowa*. Pierson v. Armstrong, 1 Iowa 282; 63 Am. Dec. 440.

*Kansas*.—Also in this state. Bayer v. Cockerill, 3 Kan. 292.

*Indiana*.—Here the Statute of Uses has been re-enacted in substance. Linville v. Golding, 11 Ind. 374; Nelson v. Davis, 35 Ind. 474.

*South Carolina*.—Here the statute was re-enacted in terms. Jenney v. Laurens, 1 Spear (S. Car.) 356; McNish v. Guerard, 4 Strobb. Eq. (S. Car.) 74; Williman v. Holmes, 4 Rich. Eq. (S. Car.) 475; Howard v. Henderson, 18 S. Car. 184; Ramsay v. Marsh, 2 McCord (S. Car.) 252; 13 Am. Dec. 717.

*Georgia*.—The statute is in force in this state. Adams v. Guerard, 29 Ga. 651; 76 Am. Dec. 624.

*Maryland*.—The Statute of Uses is in full force in this state. Calvert v. Eden, 2 Har. & M. (Md.) 279; Reid v. Gordon, 35 Md. 183; Brown v. Renshaw, 57 Md. 77; Matthews v. Ward, 10 Gill & J. (Md.) 449; Leonard v. Diamond, 31 Md. 541; Ware v. Richardson, 3 Md. 505; 56 Am. Dec. 762; Waters v. Tazewell, 9 Md. 301; Cheney v. Watkins, 1 Har. & J. (Md.) 527; 2 Am. Dec. 530; West v. Biscoe, 6 Har. & J. (Md.) 465.

2. *Massachusetts*.—Cox v. Edwards, 14 Mass. 492; Chenery v. Stevens, 97 Mass. 85; Richardson v. Stodder, 100 Mass. 528; Marshall v. Fisk, 6 Mass. 24; 4 Am. Dec. 76; Wallis v. Wallis, 4 Mass. 135; 3 Am. Dec. 210; Johnson v. Johnson, 7 Allen (Mass.) 197; 83 Am. Dec. 676; Parker v. Nichols, 7 Pick. (Mass.) 111; Thatcher v. Omans, 3 Pick. (Mass.) 522; Newhall v. Wheeler, 7 Mass. 189. See also 4 Lawson's Rights and Remedies, § 1974.

force.<sup>1</sup> In *New York*, *Wisconsin*, and *Michigan* all uses and trusts have been abolished, except such as are expressly authorized by the statute.<sup>2</sup>

**USUAL.**—See note 3.

*Rhode Island.*—*Nightingale v. Hidden*, 7 R. I. 115; *Sprague v. Sprague*, 13 R. I. 701.

1. *Ohio.*—In *Doe v. Gibson*, 2 Ohio 339, the court was divided in opinion, upon the point whether the Statute of Uses had ever been in force in that state. Two judges held that the statute was in force from 1795 to 1806. The other two judges held differently. The question, however, has been decided in the negative by later cases. *Helfenstein v. Garrard*, 7 Ohio 275; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 495.

*Vermont.*—In *Society, etc., v. Hartland*, 2 Paine (U. S.) 536, *Thompson, J.*, of the circuit court for the district, held the statute to be a part of the common law of the state and in force. But in the later cases of *Gorham v. Daniels*, 23 Vt. 602, and *Sherman v. Dodge*, 28 Vt. 26, it was held that the statute did not form a part of the common law of the state, and was never in force.

*Tennessee.*—*Hooberry v. Harding*, 10 Lea (Tenn.) 392.

2. *New York.*—In this state, prior to the year 1827, the Statute of Uses was in full force. See *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Jackson v. Myers*, 3 Johns. (N. Y.) 388; 3 Am. Dec. 504; *Jackson v. Fish*, 10 Johns. (N. Y.) 456. But in that year all uses and trusts were declared abolished, except such as were expressly authorized by the statute. *New York Rev. Stat.*, vol. 2, p. 1105, §§ 45, 46.

*Wisconsin.*—A statute similar to the *New York* one exists in this state. *Riehl v. Bingenheimer*, 28 Wis. 84.

*Michigan.*—If the Statute of Uses was ever in force in this state, it was repealed by the Act of Sept. 10th, 1810, repealing the acts of Parliament, etc., from which date and until March 1st, 1847, when the Revised Statutes took effect, no statute involving the principles of the Statute of Uses was in force. But by section 3 of the Revised Statutes of 1846, the principles of the English Statute of Uses were adopted. *Trask v. Green*, 9 Mich. 358; *Ready v. Kearsley*, 14 Mich. 216. But now by a statute similar to the one in *New York*, uses and trusts are abolished, except as

authorized by the statute. *Loring v. Palmer*, 118 U. S. 343.

3. **Usual Course of Business.**—The phrase "in the usual course of business," signifies "according to the usages and customs of commercial transactions," and its application to the purchase of a mercantile note is not confined to persons engaged habitually in banking or purchasing notes. One who in good faith purchases a negotiable note before maturity for value, or who takes it in payment of an antecedent debt, is not out of the usual course of business. *Tescher v. Merea*, 118 Ind. 586, citing *Baily v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385; *Kellogg v. Curtis*, 69 Me. 212; 31 Am. Dec. 273; *Roberts v. Hall*, 37 Conn. 205; 9 Am. Rep. 308.

A deposit with an inn-keeper "in the usual course of business," means a deposit of goods with him by a guest for safe keeping. *Harris v. Boggs*, 5 Blackf. (Ind.) 489. See also **COURSE**, vol. 4, p. 445.

**Usual Place of Business—Usual Place of Abode.**—See, as used in provision for service of process, **DOMICILE**, vol. 5, p. 857; **FOREIGN CORPORATIONS**, vol. 8, p. 346; **PLACE**, vol. 18, p. 464; **SERVICE OF PROCESS**, vol. 22, p. 107.

**Usual High-Water Mark.**—The term "usual high-water mark," signifies the limit reached by neap tide. *Techemacher v. Thompson*, 18 Cal. 11; 79 Am. Dec. 151.

**Usual and Customary.**—The words "usual and customary," when used with respect to the method of selling coal by agents, import a fixed and established usage which has become general in a particular trade; not something casual or exceptional. *Carter v. Philadelphia Coal Co.*, 77 Pa. St. 286.

**Usual Medical Attendant.**—As to the facts held sufficient to constitute a physician a "usual medical attendant," within the meaning of a question to an applicant for insurance, see *Cushman v. U. S. L. Ins. Co.*, 70 N. Y. 77.

**Usual Stopping Place.**—The term "usual stopping place," in a statute relating to the expulsion of passengers, means a regular station for passengers to get on and off the train, and not a water tank. *Chicago, etc., R. Co. v.*

**USUANCE.**—When bills of exchange were drawn in one country of *Europe* on another, it was customary to make them payable at one or two or more usances, instead of at so many days or months. "Usance" is a French term, and signifies the time which, according to the usage of the countries between which the bills are drawn, is appointed for the payment of them. The length of time differs in different countries, and it seems none is fixed between the *United States* and European nations. The custom is falling into disuse in *Europe*.<sup>1</sup>

**USUFRUCTUARY.**—A usufructuary right is the right of using and enjoying the profits of a thing belonging to another, without impairing the substance.<sup>2</sup>

**USURPED POWER.**—See note 3.

**USURPER.**—(See also DE FACTO OFFICERS, vol. 5, p. 93).—A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever. His acts are void in every respect, and he must, therefore, be distinguished from an officer *de facto*.<sup>4</sup>

Flagg, 43 Ill. 368, citing Chicago, etc., R. Co. v. Parks, 18 Ill. 468; 68 Am., Dec. 562; Terre Haute, etc., R. Co. v. Anatta, 21 Ill. 188; 74 Am. Dec. 96. See also RAILROADS, vol. 19, p. 908; TICKETS AND FARES, vol. 25, p. 1074; STATIONS, vol. 23, p. 114.

**Usual Demurrage.**—See DEMURRAGE, vol. 5, p. 544.

**Usual Despatch.**—See DESPATCH, vol. 5, p. 644.

**Usual Projections.**—See OTHER, vol. 17, p. 284.

1. Daniel on Neg. Inst. 631.

2. Webster's Dict., followed in Heintzen v. Binninger, 79 Cal. 5. In that case it was held that an allegation of ten years, "undisputed usufructuary right to the use of all waters" of a creek did not show adverse possession.

Blackstone speaks of the *usus fructus* of the civil law as the temporary right of using a thing, without having the ultimate property, or full dominion of the substance. 2 Bl. Com. 327. And see And. L. Dict.

The usufruct is the right of enjoying a thing, the property of which is in another, while the usufructuary is the one who possesses such right of enjoyment. See Black's L. Dict.; Civil Code Louisiana, art. 533.

In Cartwright v. Cartwright, 18 Tex. 628, it is said that "Usufruct is defined by Escriche, as the right of using and enjoying, and receiving the profits of, property which belongs to another; and

a usufructuary is one who has the usufruct or right of enjoying anything in which he has no property. The usufructuary has a right to all the fruits produced by the subject of usufruct, whether they be natural, that is, produced spontaneously by the earth or animals, as timber, herbs, fruits, wool, milk, and the young of cattle; or industrial, that is, produced by cultivation, as crops of grain, etc.; or civil, viz.: rents, as the hire of rents of houses, freights, revenues from annuities, etc., and from other effects or rights. But notwithstanding these enlarged rights of the usufructuary owner, to the produce or fruits of the subject of usufruct, yet there is one exception, viz.: the child born of a slave of whom one has the usufruct, shall belong to the master of the slave and not to the usufructuary."

3. In Fire-Insurance Policies.—As to the term "usurped power," in fire-insurance policies, see FIRE INSURANCE, vol. 7, p. 1043.

4. McCraw v. Williams, 33 Gratt. (Va.) 513.

In Hooper v. Goodwin, 48 Me. 80, it is said that "an officer *de facto* is one who executes the duties of an officer under some color of right and some pretense of title, either by election or appointment. A mere usurper is one who acts without color of title and whose acts are utterly void." And see Tucker v. Aiken, 7 N. H. 130.

**USURY.**—(See also **INTEREST**, vol. 11, p. 379; **NATIONAL BANKS**, vol. 16, p. 143.)

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**I. DEFINITION.**—Usury is the act of intentionally taking or reserving a greater compensation for the loan of money or its equivalent, or for the forbearance of a debt, than the highest rate of interest allowed by law.<sup>1</sup>

The term was formerly employed to denote the taking of any interest or compensation for the use of money; usury and interest being then synonymous terms. But in more recent times, when the rate of interest on money began to be regulated and restricted by law, "usury" was the distinctive term employed in legal phraseology to indicate an excessive and illegal exaction

**1. Definition.**—An excessive or inordinate premium paid, or stipulated to be paid, for the use of money borrowed; any such premium in excess of the rate established or permitted by law, which varies locally. Century Dict.

"Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." *Georgia Code* (1882), § 2051.

Usury is "an unlawful contract, upon a loan of money, to receive the same again with exorbitant increase." 4 Bl. Com. 156.

"Usury is the illegal profit which is required by the lender of a sum of money, from the borrower, for its use." 1 Bouv. Inst. 299.

"Usury is commonly defined to be the taking of more for the use of money than the law allows." *Woolsey v. Jones*, 84 Ala. 88.

of interest.<sup>1</sup> In the latter sense only, will it be used in this article.

**II. HISTORY—1. Under Roman Law.**—From a very early period in the history of Rome the rate of interest was regulated by law, changes being frequently made, the authorized rate varying from one-half of one per cent. to twelve per cent.; and at one time all interest was prohibited, to relieve the common people from the oppression of the rich.<sup>2</sup>

**2. At Common Law.**—The question whether, prior to the English statutes hereafter referred to, it was lawful in *England*, to take any interest whatever, and if so how much, for the use of money, is veiled in obscurity, and conflicting opinions have been given by writers in regard to it. It is certain, however, that the practice was severely condemned by the church, by whose laws the taking of interest was branded as a heinous offense, and punished accordingly; and it is also certain that the church was aided in its efforts by the temporal authorities, so that the usurer not only fell under the ban of the church's displeasure, but suffered the forfeiture of his property as well.<sup>3</sup>

**3. English Statutes.**—The first enactment regulating the rate of interest was the St. 37 Henry VIII., ch. 9, by which interest "for forbearance or giving day of payment" was limited to ten pounds per cent. per annum, and it was made a penal offense to take

1. 2 Bl. Com. 454.

2. In ancient Rome, according to Tacitus Ann., lib. 6, ch. 16, usury was discouraged in the early period of the republic by the twelve tables which reduced interest to one per cent. per annum. It was subsequently reduced to one-half of one per cent., and was finally prohibited altogether, to satisfy the clamors of the people. In the age of commerce and wealth it was again revived, but placed under wise and necessary restrictions. From four to six per cent. was allowed in ordinary commercial transactions, and even twelve per cent. might be taken for maritime hazards, by the law of Justinian; but severe restraints were imposed upon the exaction of more exorbitant interest. "The Romans, through the greater part of their history, had the deepest abhorrence of usury. They did not derive their objections to usury from the prohibitions in the Mosaic law, nor did they hold it sinful, as the learned fathers of the early and middle ages of the church have done; for they knew nothing of that law. The Roman law-givers and jurists acted from views of public policy. They found, by their own experience, that unlimited usury led to unlimited oppression, and that the ex-

tortion of the creditor and the resistance of the debtor were constantly agitating and disturbing the public peace. But it is not only the civilized and commercial nations of modern Europe, and the sage law-givers of ancient Rome, that have regulated the interest of money. It will be deemed a little singular that the same voice against usury should have been raised in the laws of China, in the Hindoo Institutes of Menu, in the Koran of Mahomet, and, perhaps we may say, in the laws of all nations that we know of, whether Greek or barbarian." Kent, Ch., in *Dunham v. Gould*, 16 Johns. (N. Y.) 367; 8 Am. Dec. 323.

3. 5 Bac. Abr., "Usury at Com. Law," 2 Inst. 89; 3 Inst. 151; Hume, Hist. Eng., ch. 33; Tyler, Usury, p. 35; 2 Bl. Com. 455; Comyn, Usury.

Hubbard, J., in *Gray v. Bennett*, 3 Met. (Mass.) 522, said: "Usury was an offense at common law, and the usurer was not only punished by the censures of the church in his lifetime, but was denied a Christian burial; and by the laws of Alfred the Great and Edward the Confessor, if, after death even, a man was found to have been a usurer, his goods were forfeited to the crown, and his lands to the lord of the

more. In the following reign, to correct a state of affairs for which it was thought the statute of Henry VIII. was responsible, that statute was repealed by the St. 5 & 6 Edw. VI., ch. 20, which absolutely prohibited the taking of any interest whatever, on pain of forfeiting the entire debt. But public opinion soon proved too enlightened for such legislation, and it was repealed by St. 13 Eliz., ch. 8, and the rate of interest authorized by the statute of Henry VIII. again made lawful. This high rate, however, gave rise to many complaints, and it was reduced to eight pounds per cent. by St. 21 James I., ch. 17, and later to six pounds per cent. by St. 12 Charles II., ch. 13. Finally, by St. 12 Anne, ch. 16, commonly known as the "Statute of Usury," the rate of interest was established at five pounds per cent. per annum.<sup>1</sup>

There are a number of subsequent statutes modifying the rate of interest in respect to particular classes of cases, but for all ordinary transactions the statute of Anne, fixing the rate at 5 per cent., continued to be the law of *England* until the present reign, when, in compliance with what was deemed to be public sentiment, the Statute of Usury was repealed, by St. 17 & 18 Vict., ch. 90, and the parties left to make whatever contract they choose in respect to interest.

**III. ESSENTIAL ELEMENTS OF USURY**—1. *Loan or Forbearance*.—It is a principle universally recognized by the courts, that there can be no violation of the statute, unless the transaction is in substance and effect a loan or agreement for forbearance of payment of money, or its equivalent.<sup>2</sup>

fee. The Statute of 37 Henry VIII., ch. 9, entitled 'A Bill Against Usury,' revised the former acts and laws, and is the foundation of all the statutes prohibiting usury, from that day to this."

1. *Statute of Usury*.—Inasmuch as all the important English decisions are based upon the Statute 12 Anne, ch. 16, a brief outline of its provisions will not be out of place here. The act declared that no person should thereafter take, directly or indirectly, for the loan of money, wares, merchandise, or other commodities whatsoever, above the value of £5 for the forbearance of £100 for one year, and so after that rate for a greater or less sum, or for a longer or shorter time. Also that all loans, contracts and assurances, made for the payment of any principal or money to be lent, whereby there should be reserved or taken above the said rate of £5 in £100, should be utterly void. Also that any person who should take, accept and receive, by way or reason of any corrupt bargain, loan, exchange, chevisance, shift, or interest of any wares, merchandise or other thing or things whatsoever, or by any deceitful

way or means, or by any covin, engine or deceitful conveyance, for the forbearing or giving day of payment for one whole year, or for their money or other thing of value, above the said sum of £5 for the forbearing of £100 for a year, and so after that rate, etc., should forfeit and lose for every such offense the total value of the moneys, wares, merchandise or other things so lent, bargained, exchanged or shifted. It also provided that scrivener, brokers, solicitors and drivers of bargains might take not to exceed five shillings brokerage for procuring the loan or forbearance of £100 for a year, and so ratably.

2. *Spurrier v. Mayoss*, 4 Bro. C. C. 28; *Lamego v. Gould*, 2 Burr. 715; *Struthers v. Drexel*, 122 U. S. 487; *Lloyd v. Scott*, 4 Pet. (U. S.) 205; *Lesley v. Johnson*, 41 Barb. (N. Y.) 359; *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Foote v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205; *Balfour v. Davis*, 14 Oregon 47.

*Statements of the Rule*.—In *Farmers' L. & T. Co. v. Smith, Clarke, Ch.* (N. Y.) 540, *Whittlesey, V. C.*, said: "The

An extension of time given to sureties on a note, in consideration of their executing a new note, is a "loan of money," within the meaning of the statute.<sup>1</sup> The statute applies not only to

elements of usury are a loan or forbearance at a greater rate of interest than the law tolerates, in pursuance of a corrupt agreement and with a corrupt intent. It implies a lending and borrowing upon terms which the law will not allow. A debt due, or about to become due, is, perhaps, as much a subject of lending and borrowing as money, goods, or choses in action; and in such case, the creditor may be the lender, and the debtor the borrower."

In Tyler, Usury, p. 96, it is said: "The doctrine has long been recognized by the courts, and appears now to be the settled and established law of the land, that to constitute usury, it is requisite that there must be either a direct loan, or there must be some device for the purpose of concealing or evading the appearance of a loan, when in truth there was one. The component parts of a loan are a voucher or contract, specifying the nature of the transaction, the time of payment or redemption, the rate of interest for the use of the money loaned, and the intention of one to loan and the other to borrow; and the real substance of the transaction, and not the color and form of it, will always be examined for the purpose of determining whether it be a loan, or something else."

**Transactions Other than Loans.**—Thus, a *bona fide* contract to perform work for a corporation, to be paid for in its bonds, is not usurious, though the contract price greatly exceeds the previous cash estimates. *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414.

The purchase by a third person and for his own benefit, of claims against a debtor, is not a loan within the meaning of the statute, though such purchase was made at the debtor's request and to avert a forced sale of his property. *Crane v. Price*, 35 N. Y. 494.

The payment to the mortgagee of a sum of money as consideration for his consent to change the mortgage security by taking in lieu thereof a number of new mortgages upon separate tracts for the same aggregate sum, and payable at the same time as the original mortgage, does not constitute usury, because there is neither a loan nor forbearance. *Neefus v. Vanderveer*, 3 Sandf. Ch. (N. Y.) 268.

So, where a mortgagor whose debt was payable in small annual installments at a future time, paid to the mortgagee in advance the sum of \$1,400, under an agreement that the mortgagee would apply and indorse as a payment \$2,100 on the mortgage, which was accordingly done, it was held that the agreement was not usurious, there being no loan or forbearance by the mortgagor. *Righter v. Stall*, 3 Sandf. Ch. (N. Y.) 608.

A banker may lawfully charge a correspondent five per cent. for accepting and paying bills with money furnished the latter, for here there is neither a loan nor forbearance. And even if, on such an agreement, a temporary advance of money were contemplated, it would be a question for a jury whether the charge was a device to obtain more than legal interest, or a compensation for the trouble and expense incurred in accepting and paying the bills. *Masterman v. Cowrie*, 3 Camp. 488; *Caliot v. Walker*, 2 Anstr. 495.

Where the agreement for excessive interest on advances already made is merely a part of the consideration of the sale of a party's interest in a business venture, it is not a "contract or assurance for the loan or forbearance of money." *Eddy v. Northup* (Ky. 1894) 23 So. W. Rep. 353.

**Wagers.**—An action was brought upon the following memorandum: "In consideration of two guineas received of Aaron Lamego, I promise to pay him twenty guineas, upon the decease of my present wife, Annie Gould." The question was whether this was usury, the wife being at the time of the agreement seventy years old. Lord Mansfield stopped the counsel for the plaintiff, under a doubt how it was possible to come at this question about usury, for there was nothing at all stated about a loan. And Wilmot, J., added that the true distinction was laid down in *Button v. Downham*, Cro. Eliz. 643, between a real, *bona fide* wager, not at all intended as a loan, and a transaction which is really an usurious loan, but disguised as a wager, *Lamego v. Gould*, Burr. 715.

1. *Kendig v. Linn*, 47 Iowa 62. See also *Morton v. Legrand*, 3 Litt. (Ky.) 327; *Gray v. Belden*, 3 Fla. 110.

loans, but also to agreements to extend the time of, or to forbear the enforcement of payment of an existing indebtedness; and it is usury to stipulate for more than legal interest for the period of extension or forbearance.<sup>1</sup>

In ascertaining whether there was a loan or agreement to forbear, the form of the contract adopted by the parties is of little consequence, because the courts always look beyond the form, and search diligently for the substance and intent.<sup>2</sup>

**2. Agreement for Repayment; Contingency.**—It is also essential, to bring a contract within the Statute of Usury, that the principal sum loaned is to be repaid absolutely, and at all events, without depending upon any real hazard or contingency.<sup>3</sup>

The contingency affecting the principal must be *bona fide* and substantial, for if it appears to the court to be remote and unlikely to arise, it will be disregarded, or treated as a device to evade the statute.<sup>4</sup> But it is not necessary that there should be an ex-

1. *Carlis v. McLaughlin*, 1 D. Chip. (Vt.) 111; *Willie v. Green*, 2 N. H. 333; *Rosebrough v. Ansley*, 35 Ohio St. 107; *Shirley v. Welty*, 19 Ill. 623; *Crawford v. Johnson*, 11 Ind. 258; *M'Allister v. Jerman*, 32 Miss. 142; *Mitchell v. Doggett*, 1 Fla. 400; *Gray v. Belden*, 3 Fla. 110; *Carter v. Brand*, Cam. & N. (N. Car.) 28; *Patterson v. Clark*, 28 Ga. 526; *Hopkins v. Koonce*, 6 Gratt. (Va.) 387; *Barnes v. Pilgrim*, 24 Tex. 385.

An agreement in consideration of forbearing to enforce the execution pending appeal, to pay more than lawful interest on the judgment in case it should be affirmed, is usurious. *Matlock v. Mallory*, 19 Ala. 694.

"Forbearance," as used by the statute, means the giving of further time for payment after the maturity of the debt. *Graeme v. Adams*, 23 Gratt. (Va.) 225; 14 Am. Rep. 130.

2. *Brown v. Waters*, 2 Md. Ch. 201; *Wetter v. Hardesty*, 16 Md. 11; *Smith v. Cross*, 90 N. Y. 549; *Hathway v. Hagan*, 59 Vt. 75; *Fitzsimons v. Baum*, 44 Pa. St. 32; *Buttrick v. Harris*, 1 Biss. (U. S.) 442; *Pope v. Marshall*, 78 Ga. 635; *Glisson v. Newton*, 1 Hayw. (N. Car.) 336; 1 Am. Dec. 559.

**Exchange of Securities.**—An exchange of negotiable paper to enable one of the parties to raise money, is a loan within the meaning of the statute. *Schermerhorn v. Talman*, 14 N. Y. 93.

3. *Phillip v. Kirkpatrick*, Add. 124; *Roberts v. Tremayne*, Cro. Jac. 308; *Grigg v. Stoker*, Forrest 4; *Lloyd v. Scott*, 4 Pet. (U. S.) 205; *Spain v. Hamilton*, 1 Wall. (U. S.) 604; *Leavitt*

*v. De Launy*, 4 N. Y. 363; *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267; *Colton v. Dunham*, 2 Paige (N. Y.) 267; *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Tyson v. Rickard*, 3 Har. & J. (Md.) 109; 5 Am. Dec. 424; *Craig v. McMullin*, 9 Dana (Ky.) 311; *Railroad Co. v. Stichter*, 11 W. N. C. (Pa.) 325.

**Contingencies.**—In *Long v. Wharton*, 3 Keb. 304, pl. 44, an agreement, upon a loan of £30, to pay £100 on the marriage of the plaintiff's daughter, and if either the plaintiff or the defendant should die before that time, then to pay nothing, was held not usury, being compared to a contract of botto-try.

In *Beddingfield v. Ashley*, Cro. Eliz. 741, the question was whether there was usury in an agreement, upon a loan of £100, to pay to each of the lender's five daughters then living, who should be alive at the end of ten years, the sum of £80. All the justices held that it was not usurious, "for it is a mere casual bargain, and a great hazard, but that in ten years all the daughters or some of them will be dead; and if any of them be not alive, he shall save thereby £80. But if it were that he should pay £400 at the end of ten years, if any were then alive, it were a greater doubt."

4. *Chesterfield v. Janssen*, 1 Atk. 341; 2 Ves. 125; 1 Wils. 286; *Mason v. Fulwood*, Luter 467; *Beddingfield v. Ashley*, Cro. Eliz. 741; *Richards v. Brown*, Cowp. 770; *Comyn, Usury*, p. 39.

**Insufficient Contingencies.**—Instances of contingencies held insufficient are

press agreement to repay, if the court can see that repayment was evidently contemplated by the parties.<sup>1</sup> Nor is it necessary that

found in the following English cases: In *Burton's Case*, 5 Rep. 70, Papham, C. J., said: "If A comes to borrow £100 of B, and B lends it to him, upon an agreement that he will give him for the loan of it for a year £20, if the son of A be then alive, this is usury within the statute; for if it should be out of the statute for the uncertainty of the life of the son of A, the statute would be of little effect; and by the same reason that he may add one life, he may add many; and so like a mathematical line, which is *divisibilis in semper divisibilia*."

In *Reynolds v. Clayton*, 2 And. 15, pl. 8, it was said: "Reynolds brought an action of debt against Clayton for £60 upon a bond, the condition of which was, that if the defendant should pay £33 to the plaintiff on the 1st of June, if Christopher, the son of the plaintiff, were then alive, or if he died before that day, £26, then the obligation should be void. The defendant pleaded the Statutes 13 Eliz. and 27 Hen. VIII., and that it was agreed as above stated upon a loan of £30 by the plaintiff to the defendant. And all the court held this usury under the statutes; for it was the intention of the makers of those instruments that such subtleties should not be practised. And here the condition might well have been, if twenty persons, or any one of them, be alive at one day; which opinion was confirmed by Papham, Chief Justice, and Periam, Chief Baron." Moore 397; 5 Rep. 70, *sub. nom.* Clayton's Case.

In *Mason v. Abdy*, Comb. 125; 3 Salk. 390; 1 Show. 8, the obligor was bound in a bond of £300 to pay £22, 10s. premium at the end of the first three months, and sixpence in the pound at the end of six months as a further premium, together with the principal, in case the obligor should then be living; but in case he died within that time, then the principal was to be lost. Holt, C. J., held that the bond was "manifestly usurious, for dying within half a year is no hazard; and if it should not be so, the statute would be easily evaded, and signify nothing."

In another case it was held that an agreement to pay £10 for the forbearance of £20 for one year, if the lender's son were then alive, would be usury.

*Button v. Downham*, Cro. Eliz. 643; Moore 398; Noy 73.

The case of *Pike v. Ledwell*, 5 Esp. N. P. Cas. 164, carries the doctrine of contingency very far. The defendant owned £400 in 3 per cent. consols, and it was agreed in consideration that the plaintiff would lend him £160 from May 5th, 1801 to Feb. 11th, 1804, that the defendant would, within seven days after the latter date, transfer to the plaintiff the sum of £400 in the consols, or pay such sum as they would produce in the market on that date. It was proved that the value of the consols when the agreement was made, was £240, and at the time of the action £225. It was argued that this was usury, for, as the consols were worth £240, and the plaintiff had paid but £160, he had gained £80 by his bargain, and the dividends in the mean time; that the contingency, that the consols might fall to 20 or 30 per cent. was an impossible supposition. But Lord Ellenborough held that, whatever remedy the defendant might have in equity, on the ground of this being a "catching bargain," he had none at law; that contingency in the thing purchased was incompatible with the idea of usury, in which the principal must always be certain. It was admitted that if the stocks, when transferred to the plaintiff, would be worth but £160, it would not be usury; and though it was very improbable that they would suffer that most extraordinary depreciation, still it was within the reach of possibility. He could not therefore say that there was not some contingency in the transaction, and he was consequently of the opinion that the contract was not usurious.

**Future Price of Oil.**—An agreement to pay an unlawful rate of interest upon a debt which, by its terms, is payable only at such time as the price of petroleum oil shall reach \$1.15 per barrel, depends upon a contingency as to the payment of the principal, and is good. *Truby v. Mosgrove*, 118 Pa. St. 89; 4 Am. St. Rep. 575. In this case it appeared that between the time of the agreement and the time of bringing suit, the market price of oil exceeded \$1.15, and it was not shown that that price was unprecedented or even unusual.

1. In *Tyson v. Rickard*, 3 Har. & J.

the agreement be to repay in money. A contract to pay both principal and unlawful interest in services or property is equally usurious.<sup>1</sup>

The ordinary risk of loss by death, or insolvency of the borrower, is not such a hazard or contingency as justifies an excess of interest.<sup>2</sup>

If the principal and lawful interest, or the principal alone, is to be repaid at all events, no contingency in respect to the excess of interest, or to the entire interest, will be sufficient to remove the contract from the operation of the statute. A stipulation for even a chance of a profit beyond lawful interest is illegal.<sup>3</sup>

Upon the principle of hazard or uncertainty of repayment, advances of money on contracts of bottomry, *post obit*, and annuity, are held to be not within the operation of the statute.<sup>4</sup>

**3. Unlawful Interest Must Be Agreed Upon.**—The very essence of a usurious contract is that, for the loan or forbearance, a greater rate of interest than that allowed by the statute shall be paid or

(Md.) 109; 5 Am. Dec. 424, the court, by Buchanan, J., said: "A stipulation to repay the principal in money is not necessary to constitute a loan. It is enough if the principal is secured, and not *bona fide* put in hazard; and it matters not what the nature of the security is, if it is sufficient. As if a man borrows twenty pounds upon an agreement to pay ten pounds for interest for one year, and pawns goods to the lender of the value of one hundred pounds, on a stipulation in writing by the lender to return the goods on payment by the borrower of thirty pounds with interest thereon—this is an usurious lending, though there is no undertaking by the borrower to repay the principal."

1. Woodard v. Fitzpatrick, 9 Dana (Ky.) 121; Richardson v. Brown, 3 Bibb (Ky.) 207; McGinnis v. Hart, 4 Bibb (Ky.) 327; Lindley v. Sharp, 7 Mon. (Ky.) 248; Thorpe v. Ricks, 1 Dev. & B. Eq. (N. Car.) 613; Hamer v. Hanell, 2 Stew. & P. (Ala.) 323.

2. Colton v. Dunham, 2 Paige (N. Y.) 267.

3. Barnard v. Young, 17 Ves. 44; White v. Wright, 3 B. & C. 273; 10 E. C. L. 76; Cleveland v. Loder, 7 Paige (N. Y.) 557; Leavitt v. De Launy, 4 N. Y. 363; Browne v. Vredenburgh, 43 N. Y. 195.

In the case of Roberts v. Tremayne, Cro. Jac. 507, this distinction is clearly laid down by Doderidge, J.: "If I lend one £100 to have £120 at the year's end upon a casualty, if the casualty goes

to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again, come what will come; but if the interest and principal are both in hazard, it is not then usury." But see Grant v. Gordon, Comyn 583, which seems to hold that where the uncertainty goes only to the interest, the contract is not usurious.

An agreement that unless the debt and legal interest is collected upon a certain contingency, the debt shall bear unlawful interest from the outset, is usurious. Cooper v. Tappan, 9 Wis. 361.

An agreement to allow one's name to be used in a banking business, without sharing in the profits and losses, but that he shall receive as "his share of the profits" 10 per cent. per annum on all deposits made by him with the bank, is not usurious, because his right to receive anything depends upon the contingency of there being profits. Clift v. Barrow, 108 N. Y. 187.

Where the amount loaned is to be repaid with legal interest, at all events, and the lender has the privilege of taking certain stock at a specified and unfair price in payment of the loan at any time before maturity, the transaction is usurious. Cleveland v. Loder, 7 Paige (N. Y.) 557.

So, a usurious contract cannot be saved by an agreement that the debtor may forfeit the security given, and thus avoid payment in cash. Chapman v. Clark, 5 Mackey (U. S.) 527.

4. See *infra*, this title, *Bottomry—Post Obits—Annuities*.

agreed to be paid.<sup>1</sup> Thus, where by the terms of the contract, the payment of an excess of interest is entirely at the option of the borrower, there is no usury.<sup>2</sup>

But, as already seen, it is not necessary that the agreement to pay unlawful interest should be absolute. If the principal and lawful interest, or even the principal alone, is to be paid at all events, an agreement for more than lawful interest upon the happening of some contingency other than non-payment of the debt at maturity, is sufficient to taint the transaction with usury.<sup>3</sup> Neither is it at all necessary that the parties shall have designated the usurious compensation as interest, *eo nomine*. If the money, property, or other thing of value agreed upon, is intended as compensation for the use of the principal sum, it is, as a matter of law, interest.<sup>4</sup>

An agreement for unlawful interest may, it seems, be inferred from an unexplained retention by the lender of a portion of the loan, the whole amount of which bears interest at the highest rate.<sup>5</sup>

#### 4. Corrupt Intent.—(See also, *infra*, this title, *Mistake*.)

Lastly, to constitute usury, it must, in all cases, be clearly proven that the contract was entered into with a corrupt usurious

1. Lloyd v. Scott, 4 Pet. (U. S.) 205; Leavitt v. De Launy, 4 N. Y. 363; Balfour v. Davis, 14 Oregon 47.

The test as to whether a contract is usurious, is whether, if performed, it will result in securing to the lender a greater rate of interest than is permitted by law. Smith v. Parsons (Minn. 1894), 57 N. W. Rep. 311.

Promissory notes given when there was no statute on the subject of usury and no limit as to the amount of interest, are not usurious, no matter how much past interest or usury was embraced in them as a part of the principal. Neal v. Reynolds (Ga. 1894), 18 S. E. Rep. 530.

**Indemnity.**—In *New York*, where the highest lawful rate is six per cent., it is held that an instrument bearing eight per cent., of which two per cent. was intended by the parties as indemnity to the obligee for loss of interest in withdrawing deposits from a savings bank, is usurious, if the time for which interest is payable extends beyond the period necessary for such indemnity. *In re Valentine's Estate*, 63 Hun (N. Y.) 633.

2. Campbell v. Shields, 6 Leigh (Va.) 517.

3. White v. Wright, 3 B. & C. 273; 10 E. C. L. 76; Barnard v. Young, 17 Ves. 44; Leavitt v. De Launy, 4 N. Y.

363; Browne v. Vredenburg, 43 N. Y. 195.

4. Cummins v. Wire, 6 N. J. Eq. 73; Andrews v. Poe, 30 Md. 485; MacKenzie v. Garnett, 78 Ga. 251; Uhlfelder v. Carter, 64 Ala. 527; Tyler, Usury, p. 102.

**Manure on Mortgaged Land.**—An agreement, as a condition of a loan on a mortgage at the highest legal rate, to give the lender all the manure made on the mortgaged property, estimated at \$100 per year, renders the mortgage usurious. In this case the mortgagee claimed and appropriated the manure for several years. *Vilas v. McBride* (N. Y. Sup. Ct.), 17 N. Y. Supp. 171.

5. Egbert v. Peters, 35 Minn. 312. In this case, the only evidence was that of the debtor, to the effect that the creditors, at the time the note sued on was given, and which called for \$200 at 10 per cent., gave him but \$190, and told him that when he paid the note he would get the remaining \$10. It was held that on this evidence the question of usury should have been submitted to the jury.

In the recent case of *Barr v. African M. E. Church* (N. J. 1887), 10 Atl. Rep. 287, it was held that the retention, by the lender's agent, of the money loaned, for several months after the



intent.<sup>1</sup> But this means no more than that the parties must be shown to have knowingly agreed upon a rate of interest greater than that allowed by law. It is not necessary that they, either of them, actually intended to violate, or knew that they were violating the statute. If they have agreed upon a rate which, though unknown to them, exceeds the statutory limit, their contract is, notwithstanding their honesty of purpose, usurious.<sup>2</sup>

There are numerous *dicta*, and some decisions, to the effect that the usurious intent must be mutual, *i. e.*, shared by both lender and borrower.<sup>3</sup> On the other hand, recent and well-considered cases have repudiated the doctrine that the borrower's deliberate

execution and delivery of the note and mortgage, and the collection of interest thereon from this date, constituted usury.

1. U. S. Bank v. Waggener, 9 Pet. (U. S.) 378; Shoop v. Clark, 4 Abb. App. Dec. (N. Y.) 235; Matthews v. Coe, 70 N. Y. 239; 26 Am. Rep. 583; Smith v. Beach, 3 Day (Conn.) 268; Howell v. Auten, 2 N. J. Eq. 44; Daniels v. Mowry, 1 R. I. 151; Gale v. Grannis, 9 Ind. 140; McGill v. Ware, 5 Ill. 21; Cooper v. Nock, 27 Ill. 301; Duncan v. Maryland, etc., Inst., 10 Gill & J. (Md.) 299; Duvall v. Farmers' Bank, 7 Gill & J. (Md.) 44; Fay v. Lovejoy, 20 Wis. 407; Grant v. Merrill, 36 Wis. 390; Doak v. Snapp, 1 Coldw. (Tenn.) 180; Mitchell v. Napier, 22 Tex. 120; Gregory v. Bewly, 9 Ark. 22; Jordan v. Mitchell, 25 Ark. 258; Ely v. McClung, 4 Port. (Ala.) 128.

**What Constitutes Intent.**—It is no defense to a loan at legal interest, that the lender knew the borrower obtained it for the purpose of paying a usurious debt. Mason v. Searles, 56 Iowa 532; Trimble v. Thorson, 80 Iowa 246.

After a loan has been agreed upon at lawful interest and the securities executed, a refusal by the lender to pay the borrower the whole amount of the loan, and his retention of a part of it as a bonus, is not usury, because in violation of the contract. Howell v. Auten, 2 N. J. Eq. 44; Auble v. Trimmer, 17 N. J. Eq. 242.

Though a security be in an amount greater than the debt, yet if the intention of the creditor is clear not to assert or enforce the security except for the sum actually payable, there is no usury. Bardwell v. Howe, Clark Ch. (N. Y.) 281.

A verdict finding facts amounting to usury is good, though it does not find

the corrupt agreement in technical words. Gibson v. Fristoe, 1 Call (Va.) 62; 1 Am. Dec. 502.

Where a loan was coupled with the sale of bonds to the borrower at a price claimed to be excessive, the lender should be allowed to testify that he believed the bonds were worth the agreed price, and that he had no intention of violating the usury law. More v. Degoe, 22 Hun (N. Y.) 208.

2. Levy v. Gadsby, 3 Cranch (U. S.) 180; Maine Bank v. Butts, 9 Mass. 55; Bank of Salina v. Alvord, 31 N. Y. 473; Flieder v. Davin, 50 N. Y. 437; Childers v. Dean, 4 Rand. (Va.) 406; Reed v. Coale, 4 Ind. 283; Drury v. Wolfe (Ill. 1890), 25 N. E. Rep. 626, *affirming* 34 Ill. App. 23; Kelley v. Lewis, 4 W. Va. 456.

A sum added to a note as a consideration for forbearance, must be treated as so much interest agreed upon, though the parties did not so understand it. Reed v. Helm, 15 Ind. 428.

In Burwell v. Burgwyn, 100 N. Car. 389, the court, by Smith, C. J., said: "The nature and terms of the contract determine its character and purpose; and, if usurious in itself, it must be understood to have been so intended by the parties, and they cannot be heard to the contrary."

**Mistake of Law.**—But where both parties honestly believed that the stipulated rate of interest was recoverable under the law, in which belief they were mistaken, it was held that the note was not void for usury. Thompson v. Jones, 1 Stew. (Ala.) 556.

3. Murray v. Harding, 2 W. Bl. 865; Omaha Hotel Co. v. Wade, 97 U. S. 13; Smith v. Paton, 31 N. Y. 66; New England, etc., Security Co. v. Sandford, 16 Neb. 689; Hayward v. Le Baron, 4 Fla. 404; Planters' Bank v.

assent is a necessary ingredient, and hold that there may be usury of which the borrower may avail himself, though he was ignorant of it at the time. These cases refuse to furnish the usurer with the means of escape from the law by permitting him to show that he deceived the borrower with false pretenses.<sup>1</sup>

Snodgrass, 4 How. (Miss.) 573; Fay v. Lovejoy, 20 Wis. 407.

**Mutual Intent.**—Tyler, Usury, p. 103, gives the rule that, "It is not enough that the borrower intended to make a usurious agreement, but the intention to take the usury must have been in full contemplation of the parties, not of one party, but of both, to the transaction. There must be an *aggregation* of intent."

In Price v. Campbell, 2 Call (Va.) 110, 1 Am. Dec. 535, the court says, that usury "presupposes the consent of both borrower and lender to this effect; and without it there is no usurious contract, whatever may be the hopes, wishes, or expectations of either party."

In Smith v. Beach, 3 Day (Conn.) 268, it was held that where more than legal interest was reserved, with the knowledge of the creditor, but unknown to the debtor, the defense of usury could not be raised.

In the recent case of Smyth v. Allen, 67 Miss. 146, where the defense of usury was interposed in an action on a note, the trial court charged the jury that, "No express contract to pay usury is necessary to forfeit all interest; if the effect is that one realizes more than ten per cent. per annum, the law says that all the interest charged is forfeited and cannot be recovered." In reviewing this instruction the supreme court, by Woods, C. J., said: "The statute against usury is penal in its character, and no one should be made to suffer its forfeitures until first clearly shown to have fallen under its condemnation. Everything must be proven which is necessary to constitute the offense of usury before subjecting the supposed offender to the penalty of absolute forfeiture of all interest. Now, as was said by this court in Planters' Bank v. Snodgrass, 4 How. (Miss.) 573, 'there must be an agreement between the lender and the borrower of money by which the latter knowingly gives or promises, and the former knowingly takes or receives, a higher rate of interest than the statute allows, and with an intention to violate the statute,' in order to constitute usury. In the very nature

of the case, in every usurious contract there must exist these two elements of knowingly taking or receiving a greater rate of interest than that fixed by statute, and of doing so intentionally. It follows, therefore, that when, by mistake of fact, by error in calculation, or by inadvertence in insertion of date, the effect of an engagement to pay money may be to receive a greater rate of interest than the statutory rate, yet such mistake, error or inadvertence will not stamp the taint of usury on such engagement, nor cause to be visited upon one who did not knowingly and intentionally disregard the law in this behalf the highly penal consequences of an usurious offense. In the light of the appellants' testimony, this was a case in which the excessive interest, if any there was, found its way into the notes of Houston by inadvertence in the insertion of an erroneous date of maturity." The instruction was held erroneous, and the judgment reversed.

In New York, the mutual assent of both parties is regarded as essential, and accordingly it has been held that where the creditor falsely caused the debtor to believe that a usurious bonus deducted from the amount of the loan was to pay for certain expenses claimed to have been incurred, there was no usury in the loan. Morton v. Thurber, 85 N. Y. 550. See also Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 43; Woodruff v. Hurson, 32 Barb. (N. Y.) 557; Powell v. Jones, 44 Barb. (N. Y.) 521; Guggenheimer v. Geisler, 81 N. Y. 293.

In Madison University v. White, 25 Hun (N. Y.) 490, it was held that where the borrower received the full amount of the loan, the fact that, without his knowledge or consent, a third person paid the lender a bonus to induce him to make the loan, did not render it usurious.

1. Wright v. Elliott, 1 Stew. (Ala.) 391; Craig v. Pleiss, 26 Pa. St. 271.

**Knowledge of Borrower Not Essential.**—The doctrine that there can be no usury without the concurrence of both borrower and lender, was repudiated by the supreme court of Minnesota in the

recent case of *Lukens v. Hazlitt*, 37 Minn. 441. The facts were that the plaintiff had given a usurious note to the defendant, which had become payable, and the defendant pretended that he would not consent to a renewal, but referred the plaintiff to one Kelly, from whom, he said, he thought the plaintiff could borrow the money with which to pay the note. The plaintiff accordingly applied to Kelly, and borrowed from him a sum sufficient to cover the amount due on the defendant's note, giving a new note for that amount to Kelly as payee, secured by a chattel mortgage. With this money he paid off the defendant's note. The fact was, as the jury found, that Kelly was acting secretly as the agent of the defendant, and that the transaction was merely a scheme to evade the appearance of receiving a renewal note. The plaintiff, however, had no suspicion but that he was actually borrowing the money from Kelly. In an action to recover the value of the property taken by virtue of the chattel mortgage, on the ground that the new note was merely a renewal of, and tainted with the usury in, the original note, the court held that the fact that the plaintiff was not a party to the arrangement described, did not prevent him from asserting the usury. Mitchell, J., in delivering the opinion, said: "There are some loose statements in the text-books, and perhaps some judicial authority to the effect, that to render a contract usurious both parties must be cognizant of the fact constituting usury, and must have a common purpose to evade the law. But it seems to us that it would be contrary, both to the language and policy of the usury law, to hold any such doctrine, as thus broadly stated. These laws are enacted to protect the weak and necessitous from oppression. The borrower is not *particeps criminis* with the lender, whatever his knowledge or intention may be. The lender alone is the violator of the law, and against him alone, are its penalties enacted. It would be indeed strange if the only party who could violate the law had intentionally done so, and could escape its penalty because by some devise or deception he had so deceived the borrower as to conceal from him the fact that he was taking usury."

In *Otto v. Durege*, 14 Wis. 574, Dixon, C. J., made use of the expression that, "To render a contract usurious,

both parties must be cognizant of the facts constituting the usury, and have a common purpose of evading the law." The facts of that case, however, were that the lender was ignorant of his agent's act in taking usury, which was known to the borrower.

In the later case of *First Nat. Bank v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 453, the court denied that the language quoted above was intended to apply as well to the borrower as to the lender. Dixon, C. J., speaking for the court, referring to the former case, said: "It was intended to assert no more than that in a case of that kind both parties must know the facts and intend the usury, or that the lender as well as the borrower must know them and intend it. And it was not intended to assert the opposite proposition, that if the lender knew and intended usury, but the borrower did not, the usurious nature of the transaction would not be established. No such proposition as this was involved in the case, or could have been adjudicated, and it was not intended to be. And it seems to us that it would be contrary to the language, spirit, policy, and intent of all our usury laws, and to the construction they have uniformly received, were it to be held that such proposition is in all cases true, or that it is true in a case like the present. It is a familiar doctrine or rule of construction with respect to these laws, supposed to be enacted to protect the weak and necessitous from being overreached and oppressed by the powerful and the rich, that both parties are not *particeps criminis*, but only the lender can be regarded as the oppressor, and he alone is within the pale of the law. All the penalties of the law are enacted against him, and he alone can be guilty of a violation of it. From the advantages of his position it is supposed he may dictate such terms and conditions as he chooses, while the borrower, from the necessities of his, is bound to submit to his demands. Hence the borrower, whatever his knowledge or intention may be, is always regarded as innocent. . . . And it would be very strange, we think, in view of this settled doctrine and policy of the law, it clearly appearing that the only party who could commit the offense had in fact intended to commit, and had committed it, were it to be held that he was innocent and had incurred no penalty,

Where a corrupt agreement for usury has been made, it is not purged by the fact that the lender, through mistake, actually paid the borrower more than the sum expressed in the contract.<sup>1</sup>

**IV. USURY STATUTES AND THEIR CONSTRUCTION—1. Statutory Provisions.**—The existing statutory provisions in the various states relating to the rate of interest, and the consequences of usury, are outlined and summarized below.<sup>2</sup>

merely because the other party to the contract, whom the law regards as blameless, and who could not commit the offense, did not know such unlawful intent, or the fact that the contract was usurious, at the time of entering into it. To illustrate, we might suppose the parties, in a proper case, to be contracting with reference to the laws of some other state or country, which are taken notice of as facts, and that the borrower, being ignorant of or mistaken as to the true and lawful rate of interest fixed and allowed by such laws, should pay or agree to pay a greater rate, and one which was unlawful and usurious by those laws, believing it to be lawful; and that the lender, well knowing it to be unlawful and usurious, should bargain for and accept the same; would not the promise or obligation of the borrower be usurious and void in the hands of the lender? It seems to us very clearly it would; and just so we would say of any other fact constituting usury, known to the lender and showing his actual and intended violation of the law, no matter whether the same fact was known to the borrower at the time or not. And we believe there is nothing in the case of *Otto v. Durege*, either in the point decided or in the language of the opinion, in conflict with this view."

1. *Cantey v. Blair*, 1 Rich. Eq. (S. Car.) 41.

2. *Alabama*.—In this state the maximum rate of interest is eight per cent. Usurious contracts cannot be enforced, except as to the principal, "and if any interest has been paid, the same must be deducted from the principal, and judgment rendered for the balance only." If usury be proved, the defendant is entitled to full costs. See *Alabama Civil Code* (1886), §§ 1750, 1754, 2839.

It is held that the provisions of the statute are not applicable to an action to recover specific property in which the usurious contract is material only as evidence of title. *Bradford v. Dan-*

iel, 65 Ala. 133. But see *Gardner v. Matteson*, 38 Mich. 200.

*Arizona*.—Here there is no usury law. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due, and the judgment on such contract shall bear the agreed rate. See *Arizona Rev. Stat.* (1887), § 2162.

*Arkansas*.—"All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the general assembly shall prohibit the same by law." *Arkansas Const.*, art. 19, § 13. All bonds, bills, notes and all other contracts or securities whatever, at more than ten per cent., are declared void. *Mansf. Arkansas Digest* (1884), § 4735.

In *California*, there is no usury law. "Parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment." *California Civil Code* (1876), § 1918.

*Colorado*.—"Parties to any bond, bill or promissory note, or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than eight per cent. per annum." *Mills Anno. Colorado Stat.* (1891), § 2253.

*Connecticut*.—The legal rate, in the absence of agreement, is six per cent. 360 days may be computed as a year. "Interest at the rate of six per cent. a year, and no more, may be recovered in civil actions including actions to recover money loaned at a greater rate as damages for the detention of money after it becomes payable." No borrower shall be permitted to set off or recover back any sum paid as interest, discount, or damages, in excess of six per cent. *Connecticut Gen. Stat.* (1888), §§ 2941, 2942, 2943.

Under a statute allowing a certain rate of interest to be contracted for "in writing," a note, the principal of which includes interest computed at such rate, but not designated in the note as

interest, does not constitute an agreement in writing for such rate of interest, and is not within the protection of the statute. *Rosenbluth v. Dunn*, 41 Conn. 619.

In *Delaware*, if any person directly or indirectly takes more than at the rate of six per cent. per annum, he shall forfeit and pay to anyone who will sue for the same, a sum equal to the money lent—one-half for the use of the person so suing, the other half for the use of the state. *Delaware Rev. Code* (1874), ch. 63, § 1.

*District of Columbia*.—Here parties may agree in writing for ten per cent. Usury forfeits all interest, but does not affect the debt. All payments of interest under a usurious contract may be recovered back by suit within one year from the time of payment. *District of Columbia Rev. Stat.*, §§ 713-716.

The defendant in a suit to recover a debt upon which he had paid usurious interest more than a year before the suit, is not entitled to have such payments deducted from the debt, either under the statute or at common law. *Carter v. Carusi*, 112 U. S. 478. See also *Kleindienst v. Johnson*, 7 Mackey (D. C.) 356.

*Florida*.—Here the legal rate is eight per cent., but "It shall not be usury to loan or to borrow money, etc., at rates beyond those now allowed by law." McClellan's *Florida Dig.* (1881), ch. 123, §§ 1, 2.

*Georgia*.—The legal rate is seven per cent., and any higher rate must be specified in writing, but in no event to exceed eight per cent. Any person taking or agreeing to take more than eight per cent. forfeits the excess of interest, and the amount of such forfeit may be pleaded as a set-off. All titles to property made as a part of an usurious contract or to evade the laws against usury, are void. See *Georgia Code* (1882), §§ 2050, 2057(b), 2057(c), 2057(f).

It is held that where the contract sued on calls for more than seven per cent., but the plaintiff fails to show what rate of interest was actually taken, no interest whatever can be recovered, and payments of interest must be applied on the principal. *Lilly v. De Laperiere*, 76 Ga. 348; *Crane v. Goodwin*, 77 Ga. 362.

*Mortgages*.—Though the statute declares all "titles" void for usury, a mortgage to secure a usurious debt is not absolutely void, because a mort-

gage does not pass title; but to the extent that usury affects the debt, the mortgage security is also impaired and can be enforced only as to the residue. *Hodge v. Brown*, 81 Ga. 276.

But an absolute deed, though intended as an equitable mortgage, is utterly void under the statute, and cannot be treated as a mortgage. *McLaren v. Clark*, 80 Ga. 423.

Under the *Georgia Act* of Feb. 24th, 1875, a parol contract for twelve per cent. interest, secured by an absolute deed of land, does not render the deed void; and the debtor must offer to pay the amount actually due with seven per cent. interest. *Evans v. Dial*, 88 Ga. 209.

*Idaho*.—The legal rate is ten per cent. Parties may agree in writing for any rate not to exceed one and one half per cent. per month. Compound interest is not allowed, but a debtor may agree in writing to pay interest upon interest overdue at the date of such agreement. Usury works a forfeiture at the rate of ten per cent. per annum upon the amount of the contract, in favor of the school funds. The creditor cannot recover any interest or costs. *Bona fide* indorsees of negotiable paper are protected. See *Idaho Rev. Stat.* (1887), §§ 1264, 1265, 1266.

*Illinois*.—The parties may agree in writing for eight per cent. The penalty for usury is the forfeiture of all interest. Twelve months of thirty days each may be treated as a year. No corporation shall hereafter interpose the defense of usury in any action. All contracts providing for a greater rate than eight per cent. as penalty for non-payment at maturity are usurious. *Starr & C. Illinois Annot. Stat.* (1885), ch. 74, §§ 4-11.

An agreement to pay two per cent. damages for non-payment of a note within three days after maturity is within the statute. *McNail v. Welch*, 26 Ill. App. 482.

*Agreement Essential to Forfeiture*.—In order to work a forfeiture under the statute, there must have been an agreement for usury. A payment of excessive interest without any agreement therefor will simply be applied on the principal. *Hawke v. Snyder*, 86 Ill. 197.

In *Indiana*, the parties may agree in writing for eight per cent. Usury works a forfeiture of the excess reserved beyond six per cent. *Indiana Rev. Stat.* (1888), §§ 5198, 5201.

In *Iowa*, the parties may agree in writing for ten per cent. Usury works a forfeiture in favor of the school fund, at the rate of ten per cent. per annum. The assignee in good faith of any usurious contract may recover from the usurer the full amount paid by him for the assignment. *McClain's Iowa Annot. Code* (1888), §§ 3253, 3257.

**Forfeiture to School Fund.**—The court in an action on the contract may determine the amount of the forfeiture in favor of the school fund. *Seekel v. Norman*, 71 *Iowa* 264.

The right of forfeiture to the state cannot be affected by any settlement or stipulation between the parties pending a suit on the debt. *Reynolds v. Babcock*, 60 *Iowa* 289.

Where part payments have been made upon a usurious debt, in rendering judgment in favor of the school fund, interest should be computed upon the unpaid balance of the debt. *Sheldon v. Mickel*, 40 *Iowa* 19; *Lombard v. Gregory*, 81 *Iowa* 569.

**Contract Necessary.**—The statutory forfeiture is incurred only where unlawful interest has been received in pursuance of the contract of loan. *Sexton v. Murdock*, 36 *Iowa* 516.

**Kansas.**—Here parties may agree in writing for ten per cent. Usury forfeits the excess over that rate, and also a sum of money, to be deducted from the amount due for principal and lawful interest, equal to the amount of interest contracted for in excess of ten per cent. *Bona fide* indorsees of negotiable paper before maturity are protected. *Kansas Gen. Stat.* (1889), §§ 3498, 3499.

In *Kentucky*, all contracts and assurances, made directly or indirectly, for the loan or forbearance of money, or other thing of value, at a greater rate than six per cent. are void as to the excess. Such excess may be recovered from the lender or forbearer, although the payment thereof was made to his assignee. *Kentucky Gen. Stat.* (1888), ch. 60, §§ 1-4. Usury paid must be sued for within a year after payment. *Kentucky Gen. Stat.*, ch. 71, art. 3, § 4.

Where the defendant paid a judgment on a usurious debt, and eighteen months later appealed and obtained a reversal, it was held that the statute did not begin to run against his right to recover back until the reversal of the judgment. *Kendall v. Crouch*, 88 *Ky.* 199.

It is held that the statute does not bar a debtor from setting up usury as a defense when sued on the debt, and re-

covering an affirmative judgment for the amount of payments of interest in excess of the principal and legal interest. *Rudd v. Anderson* (*Ky.* 1890), 14 *S. W. Rep.* 340.

In *Louisiana*, the parties may agree in writing for eight per cent. If any person pays more, he may sue for it within a year from the time of payment. Interest upon interest cannot be recovered, unless it be added to the principal and by another contract made a new debt. No stipulation to that effect in the original contract is valid. *Louisiana Rev. Civ. Code* (1882), arts. 2923, 1939.

A negotiable promissory note including more than eight per cent. interest or discount, is enforceable, but it shall not bear more than eight per cent. after maturity. *Louisiana Rev. Civ. Code*, (1882), art. 2924.

Under this statute, one who discounts a note for the maker at a discount of nine per cent. is entitled to recover the whole amount of the note, where by its terms it bears only eight per cent. interest after maturity. *Mutual Nat. Bank v. Regan*, 40 *La. Ann.* 17.

In *Maine*, the only provision in regard to interest seems to be the following: "In the absence of an agreement in writing, the legal rate of interest is six per cent. a year." *Maine Rev. Stat.* (1883), ch. 45, § 1.

In *Maryland*, interest may be charged or deducted at the rate of six per centum per annum, and the same may be calculated according to the standard laid down in Rowlett's Tables. Usury forfeits the excess above legal interest. After the debt has been paid, the debtor has no cause of action on account of the usury. Innocent purchasers of negotiable paper are protected. *Maryland Pub. Gen. Laws* (Rev. 1888), art. 49, §§ 1-6.

The word payment, as used in the statute denying the right to recover back usury paid, means an actual *bona fide* payment, and not merely a new security without any change in the debt. *Border State, etc., Bldg. Assoc. v. Hayes*, 61 *Md.* 597; *Border State, etc., Bldg. Assoc. v. Hilleary*, 68 *Md.* 52.

In *Massachusetts*, the legal rate, in the absence of agreement, is six per cent., "but it shall be lawful to pay, reserve, or contract for any rate of interest or of discount," if contracted for in writing. Bonds of corporations must not bear interest at a greater rate

than seven per cent. *Massachusetts* Pub. Stat. (1882), ch. 77, § 3.

By a recent act, it is provided that all loans for less than \$1,000 shall be dischargeable upon the payment of principal with interest at eighteen per cent. All payments made in excess of that rate shall be applied on the principal. Act of May 22d, 1888. (Supp. to *Massachusetts* Pub. Stat., ch. 388, § 1.)

In *Michigan*, the parties may agree in writing for ten per cent. Contracts for usurious interest are not void, but the excess cannot be recovered. Innocent purchasers of negotiable paper are protected. *Howell's Michigan Annot. Stat.* (1882), §§ 1594-1596.

The language of the statute being that usury does not avoid the contract, but that "in an action on the contract" the amount of usury shall be excluded, it is held that the question of usury may be raised in an action of replevin for goods seized by a creditor under a chattel mortgage given to secure an existing usurious debt. *Gardner v. Matteson*, 38 Mich. 200.

*Minnesota*.—Here the parties may agree in writing for ten per cent. Interest cannot be compounded except by agreement after due. An agreement for a greater rate of interest after maturity than before works a forfeiture of the entire interest. Usurious contracts and securities are absolutely void, but innocent purchasers of negotiable paper are protected. A debtor may sue to have a usurious contract canceled. Interest may be computed according to Rowlett's Tables. *Kelly's Minnesota Stat.* (1891), §§ 2089, 2092.

In *Mississippi*, the parties may agree in writing for ten per cent. An agreement for more works a forfeiture of all interest. *Mississippi Rev. Code* (1880), § 1141.

It is held that where usurious interest has been paid under a contract fully executed, only the excess over ten per cent. can be recovered back. *Dickerson v. Thomas*, 67 Miss. 777.

In *Missouri*, the parties may agree in writing for eight per cent. Usury forfeits all interest. Interest may be compounded annually, by agreement in writing. *Missouri Rev. Stat.* (1889), §§ 5972-5977, as amended by Act of April 23d, 1891, reducing the rate from ten to eight per cent. Proof of usury renders void all mortgages and pledges of personal property, and all liens whatsoever thereon. *Missouri Act* of April 21st, 1891 (Laws 1891, p. 170).

In *Montana*, the legal rate is ten per cent., but parties may agree in writing for the payment of any greater rate. *Montana Comp. Stat.* (1888), §§ 1236-1238.

In *Nebraska*, ten per cent. may be contracted for. Usury does not render the contract void, but forfeits all interest, and entitles the defendant to costs. If the interest has been paid, it must be deducted from the principal. "The acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is illegal interest by the transaction of the agent, the principal will be held thereby as if he had done the same in person. Where the same person acts as agent for the borrower, who obtains the money from the lender, he shall be deemed to be the agent of the loaner also." *Nebraska Consol. Stat.* (1891), §§ 2021-2025.

In *Nevada*, the legal rate is ten per cent., but parties may agree in writing for any greater rate. *Nevada Gen. Stat.* (1885), §§ 4900-4904.

In *New Hampshire*, the legal rate is six per cent., and if any person receives more, he shall forfeit three times the sum so received in excess of six per cent. to the person aggrieved, who will sue therefor. Usury does not invalidate the contract, but the amount actually due may be recovered, with six per cent., after deducting as payments any excess of interest received. *New Hampshire Pub. Stat.* (1891), ch. 203.

In *New Jersey*, the highest legal rate is six per cent. *New Jersey Act* of March 27th, 1874, as amended by act of Feb. 26th, 1878.

Usury forfeits all interest and costs of suit, and if any premium or illegal interest has been paid, such payment must be deducted from the principal. All usurious contracts made in *Monmouth County* are utterly void. *New Jersey Revision* (1877), pp. 519, 520.

In *New Mexico*, the parties may agree in writing for twelve per cent. To charge or receive more is a misdemeanor, punishable by fine, and also by forfeiture to the debtor of double the amount collected or received, if sued for within three years. *New Mexico Comp. Laws* (1884), §§ 1736-1739.

In *New York*, the highest legal rate is six per cent. Usury renders the contract void. A party paying usury may sue to recover it within one year from the time of payment. A borrower is entitled to be relieved from contract,

and to have discovery without offering to pay principal or interest. The use of Rowlett's Tables is allowed. "No corporation shall hereafter interpose the defense of usury in any action." *New York Rev. Stat.* (8th ed.), vol. 4, pp. 2512-2515. In the by-laws of 1882, ch. 237, it is provided that advances payable on demand to an amount not less than \$5,000, on warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds, or other negotiable instruments pledged as security, may bear any rate of interest agreed on in writing. Under this act it is held that a loan of certificates of stock in the hands of third persons as trustees comes within the protection of the act, since the possession of the certificates by the trustees does not affect their negotiability. *Frost v. Stokes*, 55 N. Y. Super. Ct. 76.

**Bank Act.**—By *New York Laws* (1882), ch. 409, § 68, it is provided in substance that every banking association and every private and individual banker doing business in *New York*, may charge six per cent. interest; and that if they knowingly charge a greater rate, the entire interest shall be forfeited, and, if it has been paid, double the amount may be recovered "from the association or private or individual banker receiving the same." By § 69, it is declared that the true intent and meaning of the preceding section is to place and continue such banking concerns on an equality with national banks in the particulars referred to.

It is held that a partnership engaged in the business of banking is within the meaning of this act, and exempt from the general usury law. *Perkins v. Smith*, 116 N. Y. 441, *affirming* 41 Hun (N. Y.) 47.

In *North Carolina*, the legal rate is six per cent., but parties may agree in writing under signature, for as high as eight per cent. Usury forfeits the entire interest, and the debtor may recover back, within two years from the time the usurious transaction occurred, twice the amount of interest paid. *North Carolina Code*, (1883), §§ 3835, 3836.

**Running of Statute.**—The expression "from the time the usurious transaction occurred," has reference to the time when the usury was paid. *Pritchard v. Meekins*, 98 N. Car. 244.

**Assurances.**—An absolute deed of land given as security for a usurious loan, is an "assurance for the payment

of money," within the meaning of a statute declaring such assurances void. *Shober v. Hauser*, 4 Dev. & B. (N. Car.) 91.

In *North Dakota*, the legal rate is seven per cent., but parties may agree in writing for twelve per cent. Usury renders all contracts void *ab initio*, except as to negotiable paper in the hands of a *bona fide* purchaser for value before maturity. In all written contracts for the loan of money, the exact amount agreed upon to be received for the use, by the borrower, shall be stated, and, separately therefrom, the rate per cent. thereon of interest contracted to be charged; and if in any contract, either verbal or written, for the loan of money, the borrower receives a less sum than the principal sum so agreed upon and contracted to be loaned to and received by the borrower, the said contract shall be deemed to be usurious, except as otherwise herein provided. It is then provided that any broker, loan agent, or other person may receive a compensation for obtaining a loan, or forbearance, where such compensation, added to the interest expressed, does not exceed twelve per cent. per annum. If such compensation and interest exceed that rate, the whole contract is usurious and void. *North Dakota Laws* (1890), ch. 184.

**Compensation Added to Interest.**—Where a loan was made without the assistance of an agent, the borrower received from the lender \$500, and gave his note for \$575, payable in five years with interest at seven per cent. The \$75 was by agreement retained by the lender as a bonus for making the loan. The defense of usury being set up in an action on the note, the court held that although the bonus added to the seven per cent. rate of interest would not exceed twelve per cent. per annum for the five years, yet the lender could not avail himself of the statutory provision in regard to adding the compensation and interest. *Vermont L. & T. Co. v. Whithed*, 2 N. Dak. 82.

By a later act, usury is defined as "the taking, receiving or accepting" of a greater rate of interest than allowed by law. It is made a misdemeanor, punishable by fine or imprisonment, or both, for any person, company, or corporation to take, receive, or accept usury or to sell or assign any usurious contract without first notifying the purchaser of its usurious character. *North Dakota Laws* (1891), ch. 124.



In *Ohio*, the parties may agree in writing for eight per cent. The payments of usurious interest may be deducted from the principal. *Bona fide* indorsees of negotiable paper before maturity are protected. *Ohio Rev. Stat.* (Smith & B. 1890), §§ 3179-3183.

In *Oregon*, the highest legal rate is ten per cent. Usury works a forfeiture of the entire debt to the school fund, and judgment may be rendered therefor against the defendant without interest, and against the plaintiff for costs. The *bona fide* assignee of any usurious contract without notice of the usury, may recover against his assignor or against the usurer the full amount paid by him. Agreements for payment of taxes on the debt, credit, or mortgage are valid. *Hill's Oregon Annot. Laws* (1892), §§ 3587-3594.

**Forfeiture to School Fund.**—It is held that the state is not authorized to intervene in a suit on the debt, for the purpose of having the same forfeited to the school fund on the ground of usury. *Holladay v. Holladay*, 13 *Oregon* 523.

In *Pennsylvania*, the highest legal rate is six per cent. Usury forfeits the excess merely. If the debt and excessive interest have been paid, the borrower may sue to recover back the excess within six months of the time of payment. *Bona fide* purchasers of negotiable paper are protected. *Bright. Purd. Pennsylvania Dig.*, vol. 1, p. 926.

In *Rhode Island*, there is no usury law. The interest, in the absence of an agreement, is six per cent. *Rhode Island Pub. Stat.* (1882), ch. 141.

In *South Carolina*, the legal rate is seven per cent., but parties may agree in writing for ten per cent. Usury forfeits all interest and costs of suit, and where the illegal interest has been paid, the debtor may recover double the amount paid, either by separate suit or by counterclaim in an action on the debt. *South Carolina Acts* of 1882, p. 36.

**Discounting.**—Under this statute, where a note drawing ten per cent. per annum is discounted by a bank at ten per cent. on the principal and interest not yet due, the excessive charge of discount (three per cent.) on the interest, is usury. It is not necessary that the taking of excessive interest should be willfully or knowingly corrupt. *Carolina Sav. Bank v. Parrott*, 30 *S. Car.* 61.

**Agreement in Writing.**—An agreement in writing between the maker and payee of a note bearing seven per

cent., made eight months after maturity in consideration of an extension of time, to pay ten per cent. interest from maturity, is valid, under the statute. *Utley v. Cavender*, 31 *S. Car.* 282.

**Double Recovery.**—It is held that the borrower can recover, under the statute, double the amount of the excess only, not double the whole amount of interest paid. *Hardin v. Trimmier*, 30 *S. Car.* 391.

In *South Dakota*, the territorial law is still in force. The highest legal rate is twelve per cent. Usury forfeits all interest, but does not affect the debt. Payments of usury may be recovered back. One year's interest may be taken in advance. *Dakota Comp. Laws* (1887), §§ 3715-3725.

By a later act, it is declared that, "Every person who directly or indirectly receives any interest, discount, or consideration upon the loan or forbearance of any money, goods, or things in action, greater than is allowed by law, is guilty of a misdemeanor." *South Dakota Laws* (1889), ch. 133.

**National Banks.**—The penal provisions of this act are held applicable to national banks. *State v. First Nat. Bank* (*S. Dak.* 1892), 51 *N. W. Rep.* 587.

In *Tennessee*, the highest legal rate is six per cent., and every excess over that rate is usury. A defendant may avoid the excess over legal interest by a plea setting forth the amount of usury. Payments of usury may be recovered back by the debtor or his representatives, or they may be subjected by any judgment creditor of such party to the satisfaction of his debt. *Tennessee Code* (1884), ch. 17.

**Chartered Banks.**—*Tennessee Pub. Acts.* (1859-60), ch. 129, entitled, "An Act to Encourage the Use of Private Capital," and which provides that, "All persons, partnerships, and associations of persons paying taxes for use of money as money dealers," shall be allowed to receive deposits, issue drafts, make discounts, etc., but shall not be allowed to take more than lawful interest on discounts, under a prescribed penalty, does not apply to chartered banks. *State v. Lookout Bank*, 89 *Tenn.* 278.

In *Texas*, the parties may agree in writing for twelve per cent. Usury avoids all interest, but does not affect the debt. The defense of usury must be specially pleaded and verified. *Sayles Texas Stat.*, arts. 2972-2981.

**2. Statutory Construction—*a.* IN GENERAL.**—The word "void," in statutes relating to usurious contracts, is ordinarily used in the sense of voidable at the option of the debtor.<sup>1</sup>

Usury statutes are not to be regarded as impairing the validity of the principal debt, unless such intention is expressed. The interest alone is deemed forfeited.<sup>2</sup>

The true construction of statutes regulating interest upon the loan or forbearance of money, goods, or things in action, is that no greater rate of compensation than that prescribed shall be taken upon a loan or forbearance of money, directly or indirectly, by way of loan of property or in any other manner, no matter how disguised.<sup>3</sup>

***b.* EFFECT OF CONSTITUTIONAL PROVISIONS.**—In some of the

In *Utah*, there is no usury law. The lawful rate, in the absence of an agreement, is ten per cent. *Utah Comp. Laws* (1888), § 2119.

In *Vermont*, the highest legal rate is six per cent. Overdue installments of interest bear interest from maturity. Payments of excess over lawful rate may be recovered back by action of *assumpsit*. Savings banks may receive six per cent. payable semi-annually. *Vermont Rev. Laws* (1880), §§ 1996–2001, 3590.

In *Virginia*, the highest legal rate is six per cent. Usury forfeits all interest, but does not affect the debt. Banks may compute interest according to Rowlett's Tables, and receive the same in advance. Payment of excess over legal interest may be recovered back, by suit brought within one year. Any judgment creditor may compel by bill in equity, another creditor to pay over all excessive interest received from a common debtor. No corporation shall plead usury, by way of defense or otherwise, to defeat its contracts for interest. *Virginia Code* (1887), §§ 2814–2826.

In *Washington*, the legal rate is ten per cent., but "any rate of interest agreed upon by the parties to a contract, specifying the same in writing, shall be valid and legal." Hill's *Washington Annot. Stat.* (1891), §§ 2397, 2398.

In *West Virginia*, the highest legal rate is six per cent. Usury avoids the excess of interest only. In actions on the debt, payments of excess must be credited thereon. *West Virginia Code* (1891), ch. 96.

No corporation shall interpose the defense of usury in any suit or proceeding, nor shall any of its debts or obligations be set aside, impaired, or adjudged invalid under the usury laws. *West Virginia Code* (1891), p. 500, § 22.

In *Wisconsin*, the legal rate is seven per cent., but parties may agree in writing for ten per cent. Interest cannot be compounded, unless agreed on in writing. Usury forfeits all interest, but does not affect the debt. No corporation shall interpose the defense of usury. Any person paying or delivering usury may recover treble the excess over the lawful rate, by suit brought within a year from time of payment. *Sanb. & B. Wisconsin Annot. Stat.*, §§ 1688–1692.

**Treble Recovery.**—The delivery of possession of land by the debtor, under an agreement to convey in payment of usury, but not accompanied by any conveyance, is not a "delivery" sufficient to sustain the action. *Howe v. Carpenter*, 49 Wis. 697.

The provision in regard to treble recovery does not preclude the debtor from recovering back the excess paid as at common law. *Schriber v. Le Clair*, 66 Wis. 579.

In *Wyoming*, any rate of interest may be agreed upon; but if above twelve per cent. must be in writing. In the absence of an agreement, twelve per cent. is the legal rate. *Wyoming Rev. Stat.* (1887), §§ 1310, 1311.

1. *Ewell v. Daggs*, 108 U. S. 143; *Masterson v. Grubbs*, 70 Ala. 406.

2. *Dawson v. Burrus*, 73 Ala. 111.

Recovery upon a usurious note is not defeated by a statute making usury a misdemeanor, where a civil statute provides that a person taking a higher interest than a specified rate shall forfeit all interest so taken, without forfeiting any of the principal, and that the excess paid may be recovered from the person taking it. *Waite v. Bartlett*, 53 Mo. App. 378.

3. *Dry Dock Bank v. American L. Ins., etc., Co.*, 3 N. Y. 344, a case of a loan under the form of a sale or exchange.

states there are constitutional provisions limiting the rate of interest and directing the legislature to enact the proper penalties and forfeitures for usury. The tendency of the courts is to hold that such provisions are self-executing, requiring no legislative action to make them operative, and that all contracts for more than the constitutional rate are unlawful and void.<sup>1</sup>

c. "BORROWER."—In some of the states, notably in *New York*,<sup>2</sup> the right is given to the "borrower" to have a usurious contract annulled and the securities restored without offering to pay the amount actually due. The question who are included within the term "borrower," has frequently been considered by the courts, and the rule is now well established that the statutory privilege is strictly personal to the original debtor, and does not pass to his assignee for the benefit of creditors, nor to a creditor,<sup>3</sup> nor to the debtor's heirs, devisees, or personal representatives,<sup>4</sup> nor to mere accommodation parties to negotiable paper,<sup>5</sup> nor to the grantee of property covered by a usurious mortgage.<sup>6</sup>

It is even held that where the original borrower parts with his title to the property mortgaged as security for the usurious debt, either by conveyance or by assignment in bankruptcy, and subsequently reacquires the title by purchase, he thereby becomes a purchaser and not a "borrower," within the meaning of the statute.<sup>7</sup> But parties jointly liable with the principal debtor, as sureties, are held to be "borrowers."<sup>8</sup>

d. PENALTIES NOT ENFORCIBLE ELSEWHERE.—The general rule that the penal provisions of a statute have no extra-territorial operation and will not be enforced outside of the state where enacted, applies to penalties imposed by usury laws. Unless the

1. *Dill v. Ellicott*, Taney Dec. (U. S.) 233; *Hemphill v. Watson*, 60 Tex. 679; *Watson v. Aiken*, 55 Tex. 536.

In *Maryland*, the constitutional provision was that no higher rate of interest than six per cent. should be taken or demanded, and that the legislature should provide suitable penalties. It was held that such provision did not, in the absence of legislative enactment, render a contract void under which a higher rate had been taken or reserved. *Bandel v. Isaac*, 13 Md. 202.

2. 2 *New York Rev. Stat.* (6th ed.), p. 1164.

3. *Richards v. Ludington* (Supreme Ct.), 14 N. Y. Supp. 510; *Kelley v. Sprague*, 58 Hun (N. Y.) 611; *Wright v. Clapp*, 28 Hun (N. Y.) 7.

In *Minnesota*, however, it is held that the assignee may make the defense. *Stein v. Swensen*, 44 Minn. 218.

4. *Buckingham v. Corning*, 91 N. Y. 525; 64 How. Pr. (N. Y.) 503.

5. *Allerton v. Belden*, 49 N. Y. 373; *Toole v. Cook*, 16 How. Pr. (N. Y.) 142.

6. *Mortgagor's Grantee*.—The word "borrower" was extended to the grantee of a mortgagor, in the case of *Cole v. Savage*, 10 Paige (N. Y.) 583; but such construction was overruled by the court of errors in *Post v. Bank of Utica*, 7 Hill (N. Y.) 391. Also by the court of appeals in *Rexford v. Widger*, 2 N. Y. 131; *Schermerhorn v. Talman*, 14 N. Y. 93; *Allerton v. Belden*, 49 N. Y. 373. See also *Beecher v. Ackerman*, 1 Abb. Pr. N. S. (N. Y.) 141.

7. So held where a bankrupt purchased the mortgaged property at an assignee's sale. *Schermerhorn v. Talman*, 14 N. Y. 93. Also where the owner of land, for the purpose of raising money, conveyed it to B, and took a mortgage back, which he assigned to C, at usurious discount, and subsequently re-acquired the title. *O'Brien v. Ferguson*, 37 Hun (N. Y.) 368. See also *Buckingham v. Corning*, 91 N. Y. 525; *Post v. Utica Bank*, 7 Hill (N. Y.) 391.

8. *Post v. Boardman, Clarke Ch.* (N. Y.) 523.

nature of the penalty is such as to avoid the contract itself, courts of other states will decline to enforce it.<sup>1</sup> Thus, a statutory provision forfeiting three times the amount of usurious interest paid, cannot be enforced outside the state;<sup>2</sup> nor can a forfeiture in favor of the public-school fund<sup>3</sup> be enforced.

*c. EFFECT OF REPEAL OR AMENDMENTS.*—It is clear that the legislature cannot constitutionally, by any new enactment, render usurious an existing contract valid under the law in force at the time it was made, because such an act would impair the obligation of contracts.<sup>4</sup> But such new act may properly govern a subsequent agreement for an extension of time upon the original terms, that being in effect a new contract.<sup>5</sup>

Where an amendment was to take effect "on and after" a day named, a contract made on that day has been held to be subject to its provisions.<sup>6</sup>

It would seem clear, also, that a contract declared to be void by the law in force at the time of making it, cannot be rendered valid or enforceable by the subsequent repeal of the law; and some courts so hold.<sup>7</sup> But, on the other hand, it has been held that the repeal of a statute forfeiting a debt for usury precludes

1. *Western Transp., etc., Co. v. Kilderhouse*, 87 N. Y. 430; *Willis v. Cameron*, 12 Abb. Pr. (N. Y.) 245; *Watriss v. Pierce*, 32 N. H. 560; *Wright v. Bartlett*, 43 N. H. 548; *Suffolk Bank v. Kidder*, 12 Vt. 464; 36 Am. Dec. 354; *Blaine v. Curtis*, 59 Vt. 120; 59 Am. Rep. 702; *Sherman v. Gassett*, 9 Ill. 521.

A statute of *New Brunswick*, where the contract was made, provided that the receipt of excessive interest for forbearance of payment after maturity should render the contract void. It was held that such statute did not enter into the original contract, and would not be enforced. *Lindsay v. Hill*, 66 Me. 212; 22 Am. Rep. 564.

2. *Blaine v. Curtis*, 59 Vt. 120; 59 Am. Rep. 702; *Sherman v. Gassett*, 9 Ill. 521; *Barnes v. Whitaker*, 22 Ill. 606.

3. *McFadin v. Burns*, 5 Gray (Mass.) 599; *Barnes v. Whitaker*, 22 Ill. 606.

4. *Grant v. Morris*, 81 N. Car. 150; *Taylor v. Meek*, 4 Blackf. (Ind.) 389; *Hubbard v. Callahan*, 42 Conn. 524; *Simpson v. Hall*, 47 Conn. 417; *Newton v. Wilson*, 31 Ark. 484.

If a contract for interest was valid when made, it will be enforced, notwithstanding a change in the statute reducing the rate of interest below the rate agreed upon. *Richardson v. Campbell*, 27 Neb. 644.

5. *Story v. Kimbrough*, 33 Ga. 21.

Under a provision that the act should

not apply to existing contracts, a usurious bond subsequently given in place of a note executed before the enactment of the statute, cannot be enforced, but a recovery may be had on the note, under the law in force at its date. *Webb v. Bishop*, 101 N. Car. 99.

Where the interest reserved in a note was lawful at the date of its execution, but afterward a statute was passed fixing a lower rate, a new note subsequently given for the unpaid balance, with interest reserved at the original rate, is usurious. *Watson v. Mims*, 56 Tex. 451.

Where, on the execution and delivery of a note bearing legal interest, a check is given for the amount loaned, the enactment, subsequent to such delivery but before the payment of the check, of a law reducing the rate of interest, cannot operate to invalidate such note. *Jump v. Johnson* (Ky. 1890), 13 S. W. Rep. 843.

*Agreement for Future Transactions.*

—An agreement for a certain rate of interest on future transactions cannot prevail over the terms of a statute enacted subsequently to the making of the agreement, but before closing the transactions. *Norcum v. Lum*, 33 Miss. 299.

6. *Turner v. Odum*, 3 Coldw. (Tenn.) 455.

7. *Pond v. Horne*, 65 N. Car. 84; *Williams v. Smith*, 65 N. Car. 87;

the defense and entitles the creditor to recover the usurious debt.<sup>1</sup> Also, that an act validating and confirming contracts for the payment of a rate of interest illegal at the time of contracting, is constitutional.<sup>2</sup> And where at the time a usurious contract was made the statute in force declared it null and void, but at the time of entering a decree in an action thereon the statute had been changed so as to avoid such contracts only as to the interest, it was held that the decree should be for the principal of the debt.<sup>3</sup>

Securities given after the repeal of the usury laws, in renewal of others which were usurious, and given while such laws were in force, are held to be valid, the original receipt of the money being a sufficient consideration for the new promise to pay it.<sup>4</sup>

In respect to matters affecting merely the remedy and procedure, the statute in force at the time of suit governs.<sup>5</sup> Thus, a forfeiture for usury cannot be enforced after the repeal of the law under which it was incurred,<sup>6</sup> and a statute changing the penalty applies to suits thereafter brought, though based upon contracts made before such enactment.<sup>7</sup>

*Root v. Pinney*, 11 Wis. 84; *Morton v. Rutherford*, 18 Wis. 298; *Hughes v. Boone*, 102 N. Car. 137; *Magwood v. Duggan*, 1 Hill (S. Car.) 182.

1. *Johnson v. Utley*, 79 Ky. 72; *Nichols v. Gee*, 30 Ark. 136; *Woodruff v. Scruggs*, 27 Ark. 26; 11 Am. Rep. 777.

2. *Hinman v. Goodyear*, 56 Conn. 210; *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 576.

3. *Bain v. Savage*, 76 Va. 904; *Mosby v. St. Louis Mut. Ins. Co.*, 31 Gratt. (Va.) 629.

4. *Flight v. Reed*, 32 L. J. Exch. 265.

After the repeal of the usury law, a stipulation by which interest at a higher rate than allowed under that law was computed from a date prior to such repeal, was held valid, in *Taylor v. Thomas*, 61 Ga. 472.

#### Voluntary Payment After Repeal.—

After the repeal of a law authorizing the recovery of three times the amount of usury paid, a voluntary payment of usury, according to the terms of a contract entered into prior to such repeal, cannot be recovered back, even though the repealing act declared that it should not affect "any existing contract, or action pending, or existing right of action." *Seavey v. Moors*, 103 Mass. 317.

**Accrued Rights.**—But the repeal of the usury law does not destroy a right of action for the recovery of usury paid while the law was in force. *Whitaker v. Pope*, 2 Woods (U. S.) 463; *Hunter v. Hatch*, 45 Ill. 178.

At the time a note bearing more than

six per cent. interest was given, a statute allowed the maker to file a plea that it was not given for money loaned, and thus escape liability for the excess over six per cent. It was held that the repeal of the statute did not deprive the maker of the benefit of such plea. *Seegar v. Seegar*, 19 Ill. 121.

5. *Root v. Pinney*, 11 Wis. 84; *Simonton v. Vail*, 11 Wis. 90.

6. *Magill v. Mercantile Trust Co.*, 81 Ky. 129.

7. *Perrin v. Lyman*, 32 Ind. 16.

But see *Maynard v. Marshall* (Ga. 1894), 18 S. E. Rep. 403, where it was held that the *Georgia* Act, Sept. 27th, 1881, amending *Georgia* Act, Oct. 14th, 1879, by making the forfeiture for usury merely the excess of interest, instead of the whole interest charged, does not, in view of the rule that amendatory statutes are to be construed as prospective and not retroactive in their operation, unless the intent that they shall apply to past transactions is plainly expressed, operate upon contracts entered into before its passage.

**New Penalties.**—By the law in force at the time a usurious loan was made and a note given therefor, the only penalty incurred by the lender for charging more than lawful interest was a forfeiture of all interest and costs in a suit to recover the debt. Three days after the loan was made, a law was passed providing that anyone "who shall receive as interest, any greater amount than is herein pro-

A statute reducing the penalty prescribed by a law in force at the time of making a contract, and permitting its enforcement to the extent of its validity under the prior law, does not impair the obligation of the contract.<sup>1</sup> And it has been held that where the rate of interest contracted for is unlawful at the time, but when suit is brought the law allows such rate to be contracted for, the latter law governs.<sup>2</sup>

The law in force at the time of suit governs as to the recoupment of usurious interest paid.<sup>3</sup>

An act declaring that an earlier act shall not be construed to apply to suits pending at the time of its passage, is not unconstitutional as interfering with vested rights or as an encroachment upon the judiciary.<sup>4</sup>

**V. USURY AS A CRIMINAL OFFENSE.**—The question whether the taking of usury was an indictable offense at common law, after the enactment of the statute prescribing a penalty, is not well settled. Some early cases expressly hold that if judgment cannot be given under the statute, it shall be given at common law, as where there has been a taking of usurious interest without a previous express contract; and the proper punishment is said to be fine and imprisonment.<sup>5</sup>

vided for, shall, in addition to the forfeiture herein provided for, forfeit also double the sum so received." After the passage of that act the lender received payment in full of his debt, together with interest and a usurious sum included in the note. In an action against the lender to recover the penalty provided by the new law, it was contended that, inasmuch as there was no such penalty at the time the contract was made, that contract could not be affected by the subsequent statute, nor any penalty imposed upon the defendant for acts done in carrying it out; that a different construction would give the act a retrospective operation, and impair the obligation of the contract. But the court held that the only valid contract made by the parties was one for the repayment of the principal sum loaned, without interest, for the reason that as to the interest, the law then in force made it void, and that the subsequent act, imposing a penalty for receiving the usurious interest, did not interfere with the said valid part of the contract; also that the act was not retrospective because its only operation was to punish the defendant for the commission of an act since its passage, viz., the receiving of interest at a rate which was unlawful at the time the contract was made. *Hardin v. Trim-mer*, 27 S. Car. 110.

1. *Parmelee v. Lawrence*, 48 Ill. 331; *Drake v. Latham*, 50 Ill. 270.

2. *Klingensmith v. Reed*, 31 Ind. 389.

An agreement for twelve per cent. on a loan was made at a time when the law limited interest to six per cent. and forfeited all interest for usury. Subsequently the law was amended so as to allow a recovery of six per cent. if more was reserved. While that law was in force, a new note was given for the debt, with compound interest at twelve per cent. included. Thereafter the law was again amended so as to make ten per cent. the maximum rate. Subsequent to that amendment, two renewal notes were given in which compound interest at twelve per cent. was also included. In an action on the last note, it was held that only the original debt with interest at ten per cent. to maturity of the last note, could be recovered. *Colehour v. State Sav. Inst.*, 90 Ill. 152.

3. *Sager v. Schnewind*, 83 Ind. 204; *Bowen v. Phillips*, 55 Ind. 226.

4. *Parmelee v. Lawrence*, 48 Ill. 331; *Drake v. Latham*, 50 Ill. 270.

5. *Rex v. Walker*, 1 Sid. 421; Anonymous, 3 Salk. 391; *Rex v. Evans*, 1 Keble 242; *Rex v. Gast*, 1 Keble 629; *Rex v. Upton*, Strange 816; *Rex v. Drury*, 2 Lev. 7; *Reg. v. Sewel*, 7 Mod. 118.

On the other hand, an indictment

In some of the American statutes the taking of usury is declared to be a misdemeanor and indictable, but the reported cases of such method of punishment are not numerous. The gist of the offense consists in actually taking unlawful interest, not merely in stipulating for it.<sup>1</sup>

The indictment must set forth the time of making the usurious agreement,<sup>2</sup> the place where it was made,<sup>3</sup> the amount and character of the money taken,<sup>4</sup> and must aver that the taking was with a corrupt and usurious intent.<sup>5</sup>

The evidence must strictly agree with the indictment as to the terms of the contract, the time of taking, the sum taken, and the character of the money.<sup>6</sup>

for usury was quashed in one case on the ground that the statute had prescribed a method of punishment which was exclusive of all others. *Reg. v. Dy*, 11 Mod. 174. And in another case, on a motion for an information against a pawnbroker for taking sixpence in the pound per month as interest, the court thought the offense was not serious enough to warrant an information, especially as the statute had marked out a particular course of proceeding; and it was added, generally, that the party could not be indicted. *Rex v. Cawket*, 1 Barnard 209.

**Opinion of Comyn.**—"The truth seems to be, that considering the odium in which usury was held at the time of the first statute's enactment, the courts were either unable or unwilling to suppose that a crime of equal magnitude with murder should be expiated by pecuniary forfeiture, without corporal punishment; and, therefore, they allowed the course of indictment to be proceeded in, as if no statute had been passed, and no penal action established. No indictment, as far as appears from the reports, has been prosecuted since the seventh year of the reign of Queen Anne (*Reg. v. Dy*, 11 Mod. 174), and as that occurred five years before the passing of the statute now in force, and was then quashed as bad, it is hardly to be expected that the courts will ever again be called upon to speak as to the validity of an indictment for usury." Comyn, *Usury*, p. 221.

1. *Murphy v. State*, 3 Head (Tenn.) 249; *Henry v. Bank of Salina*, 5 Hill (N. Y.) 523; *Sumner v. People*, 29 N. Y. 337; *Livingston v. Indianapolis Ins. Co.*, 6 Blackf. (Ind.) 134; *State v. Security Bank* (S. Dak. 1892), 51 N. W. Rep. 337.

But the amount of the loan with

legal interest is not forfeited by usury under a statute which does not declare that the contract shall be void, although it makes the usurious transaction a misdemeanor, punishable by fine, and also by forfeiture of double the amount of illegal interest received. *McBroom v. Scottish Mortg., etc., Co.*, 153 U. S. 318.

The *Tennessee Code*, § 1944a, authorizes contracts in writing for interest not exceeding ten per cent. per annum. Section 1944a declares that a violation of section 1944a is usury and indictable. It was held that a verbal agreement to pay more than six per cent. (the ordinary legal rate) and less than ten per cent., is not indictable. *Exchange, etc., Bank v. Swepson*, 1 Lea (Tenn.) 355.

2. *Com. v. Harrington*, 3 Pick. (Mass.) 26.

3. *State v. Williams*, 4 Ind. 234; 58 Am. Dec. 627.

4. *M'Auley v. State*, 7 Yerg. (Tenn.) 526; *Merriman v. State*, 6 Blackf. (Ind.) 449.

5. *Block v. State*, 14 Ind. 425; *Marble v. State*, 13 Ind. 362; *Crawford v. State*, 2 Ind. 112.

**Duplicity.**—An indictment under *South Dakota Laws* (1889), ch. 133, § 1, making it a misdemeanor to receive unlawful interest for the "loan or forbearance of any money," etc., is not bad as charging two offenses, by reason of an allegation that the unlawful interest was received for the "use and forbearance" of money; since it may have been that the taking was a single act, covering both the period of the loan and forbearance. *State v. Security Bank* (S. Dak. 1892), 51 N. W. Rep. 337.

6. *M'Auley v. State*, 7 Yerg. (Tenn.) 526; *Merriman v. State*, 6 Blackf. (Ind.) 449; *Groves v. State*, 6 Blackf. (Ind.) 489.

**VI. STATUTORY ACTIONS FOR PENALTY.**—Under the English statutes of usury, and also under many of the American statutes, the usurer is subjected to pecuniary penalties, recoverable either at the suit of the debtor, of a common informer, or of public officials, for the benefit of some public fund. The amount of such penalty differs in the various states, and the course of procedure in each is usually regulated by the statute. These penal provisions are not intended to affect the debtor's right of recovering back payments of excessive interest.<sup>1</sup>

Contrary to the holding of some of the old English cases, it is universally held by the American courts that the right of the debtor or any other person to sue for the statutory penalty does not accrue until the usury has actually been paid, taken, or received.<sup>2</sup>

**Kind of Money Taken.**—An indictment charging a loan of "money" has been held to be supported by evidence of a loan of bank notes. *Graham v. State*, 5 Humph. (Tenn.) 40.

But where the indictment charged the defendant with usuriously receiving and reserving four dollars for the loan and forbearance of twenty dollars for sixty days, and the evidence was that he received "*United States* bank notes," it was held a fatal variance. *M'Auley v. State*, 7 Yerg. (Tenn.) 526.

1. But in *Alabama* it has been held that the statute authorizing an action to recover a penalty for usury, the amount so recovered to be paid into the state treasury, impliedly abolishes the common-law right to recover in *assumpsit* all excess of interest paid. *Carlisle v. Gray*, 10 Ala. 302.

2. *Simpson v. Warren*, 15 Mass. 460; *Stevens v. Lincoln*, 7 Met. (Mass.) 525; *Gardner v. Daniel*, 2 Houst. (Del.) 300; *Upson v. Austin*, 4 Ala. 124; *Stedman v. Bland*, 4 Ired. (N. Car.) 296; *Henry v. Bank of Salina*, 5 Hill (N. Y.) 523; *Livingston v. Indianapolis Ins. Co.*, 6 Blackf. (Ind.) 134.

In *Hallenbeck v. Getz* (Conn. 1894), 28 Atl. Rep. 519, it was held that to render a pawnbroker liable to the penalty for taking unlawful interest, he must have actually taken and received such interest, and the pawner must have parted therewith, it being insufficient that the pawnbroker demanded such interest and upon its being refused, declined to deliver up the property pawned.

**What Constitutes Payment.**—The payment need not be in money. The giving a note against a third person is

sufficient to support an action for the penalty. *Cavaness v. Troy*, 10 Ired. (N. Car.) 315; *Jackson v. Garner*, 79 Ga. 415.

The indorsement of such a note to the creditor without recourse is a sufficient payment. *Pritchard v. Meekins*, 98 N. Car. 244.

In an action under *Wisconsin* Rev. Stat. (1878), § 1691, authorizing a recovery by the debtor of "treble the amount of money so paid, or value delivered, above the rate aforesaid," the evidence showed that the creditor agreed to cancel a certain usurious note against the debtor, and assume all existing incumbrances against a farm owned by the debtor, in consideration that the debtor would convey the farm to him. Accordingly the debtor delivered possession of the farm to the creditor, and the notes were surrendered, but no deed was ever executed. The court held that the plaintiff had not proved a payment or delivery within the meaning of the statute, and was not entitled to recover the penalty. *Howe v. Carpenter*, 49 Wis. 697.

**English Rule.**—It was at one time held in *England* that the very act of making a usurious contract subjected the creditor to the penalties of the statute, although he had never received anything under it. *Whinton v. Marine*, Dyer 95 b; *Hedgeborrow v. Rosenden*, 1 Ventr. 254.

In *Mallory v. Bird*, Cro. Eliz. 20, it was said by the court that if one contracted to have £20 upon a loan of £100, if he took nothing of the £20 he could not be punishable under the statute; but that if he took anything, even one shilling, this was an affirm-



The right to penalties and forfeitures for usury is not a vested right within the meaning of the constitution, and may be taken away by subsequent legislation.<sup>1</sup>

The rules of pleading and evidence applicable to actions for the penalty are very strict, the complainant being required to set out the facts constituting the offense with great precision, and to prove them strictly as he has pleaded them.<sup>2</sup>

It is held to be no defense to a proceeding to recover the statutory penalty, that the defendant acted merely as the agent of another.<sup>3</sup>

**VII. EFFECT OF USURY—1. As to Interest.**—While executory contracts for the payment of illegal interest cannot be enforced,<sup>4</sup> yet the disposition of courts at the present time is to discard the old doctrine that all usurious contracts are essentially iniquitous and void, and to treat them as illegal only to the extent of the excessive interest, unless the statute otherwise directs.<sup>5</sup>

ance of the contract and rendered him liable. But the severity of this doctrine was considerably softened by the interpretation of Mr. Justice Aston that by "one shilling" is to be understood one shilling beyond the legal interest. *Fisher v. Beasley*, Dougl. 362.

Other cases seem to establish the rule that the penalty is not incurred until the excessive interest has actually been received. *Brown v. Fulsbye*, 4 Leon. 43; *Martin Van Henbeck's Case*, 2 Leon. 38; *Fisher v. Beasley*, Dougl. 235; *Wade v. Wilson*, 1 East 195; *Scurry v. Freeman*, 2 Bas. & Pul. 381; *Maddock v. Hammet*, 7 Tr. 184; *Brooke v. Middleton*, 1 Camp. 445; *Borrodalle v. Middleton*, 2 Camp. 53. 1. *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 239; *Parmelee v. Lawrence*, 44 Ill. 405; *Wood v. Kennedy*, 19 Ind. 68; *Pollock v. Glazier*, 20 Ind. 262.

2. *Evart v. Barr*, 4 Yeates (Pa.) 99; *Taylor v. Cobb*, 3 Jones (N. Car.) 138; *Wilmot v. Monson*, 4 Day (Conn.) 114; *Drake v. Watson*, 4 Day (Conn.) 37; *Hutchinson v. Hosmer*, 2 Conn. 341.

3. *Com. v. Frost*, 5 Mass. 53.

An attorney who, without the authority of his client, takes usurious security for the client's debt, is subject to prosecution under the statute. *Wells v. Garland*, 2 Va. Cas. 471.

4. *Brown v. Nagel*, 21 Minn. 415; *Goodrich v. Buzzell*, 40 Me. 500. Thus, a note bearing no interest, but given solely for usurious interest on another debt, is entirely void. In *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86, the court, by Parker, C. J., said: "The

whole sum secured by this last-mentioned note was the interest beyond six per cent. upon a contract or loan previously subsisting between *Blanchard & Ford* and *Eaton*. That note, we all agree, was usurious and void, notwithstanding the objection that there was no promise in it, or reservation of unlawful interest upon the capital thus secured. For within the equity, if not the words, of the statute, a note or other instrument given to secure the unlawful interest, itself must be void. Otherwise, by giving one note for the principal, and another for the unlawful interest, they would both be good; the first as containing no reservation of interest, and the second as not containing any promise to pay any interest on the sum secured by it. Whereas, both notes, given under such circumstances, would be void, being evidence of one contract, and that an unlawful one. And if it were not so, the Statute of Usury would be effectually repealed by the court, which is bound to execute it."

**Offer to Restore.**—Where part of a usurious loan was in the shape of notes drawn by third persons, which the lender transferred to the borrower, it was held in an action on a note given for the loan, that the borrower was entitled to defend on the ground of usury, without offering to restore the notes he had received in lieu of money. *Train v. Collins*, 2 Pick. (Mass.) 145.

5. *Farmers', etc., Bank v. Harrison*, 57 Mo. 503; *Bedle v. Wardell*, 25 N. J. Eq. 349; *Turner v. Calvert*, 12 S. & R. (Pa.) 46; *Kupfert v. Guttenberg Bldg.*

In some of the states, however, the effect of the statute is to forfeit all interest, legal as well as illegal.<sup>1</sup> And in a few states, the statute operates to render the entire debt, principal and interest, void.<sup>2</sup>

**2. As to Securities.**—The rule is established that mortgages, trust deeds, and all other forms of securities, are mere incidents of the debt, and that if the debt be infected with usury, all securities connected with it are thereby vitiated and rendered unenforceable.<sup>3</sup>

Assoc., 30 Pa. St. 465; Philadelphia, etc., R. Co. v. Lewis, 33 Pa. St. 33; 75 Am. Dec. 574; Farmers' Bank v. Burchard, 33 Vt. 346; M'Lean v. Lafayette Bank, 3 McLean (U. S.) 587; Claypool v. Sturges, 10 Ohio St. 440; Richards v. Marshman, 2 Greene (Iowa) 217; Shuck v. Wight, 1 Greene (Iowa) 128; Haggard v. Atlee, 1 Greene (Iowa) 44.

In *Josey v. Davis* (Ark. 1892), 18 S. W. Rep. 185, Hemingway, J., said: "The common law prohibited the collecting of only excessive interest, and contained no rule against the collecting of the principal and lawful interest, even upon a usurious contract. On the contrary, it recognized the existence of the moral obligation resting upon the debtor, and courts of equity, in view of such obligation, refused relief against the usurious contract, except upon the condition that the principal and lawful interest be paid."

1. *Mitchell v. Doggett*, 1 Fla. 400; *Alston v. Brashears*, 4 Ark. 422; *Saltmarsh v. Planters'*, etc., Bank, 17 Ala. 761; *Reid v. Duncan*, 1 La. Ann. 265; *Hynes v. Cobb*, 2 La. Ann. 363; *Anderson v. Cox*, 11 La. Ann. 638; *Payne v. Waterston*, 16 La. Ann. 239; *Lucas v. Spencer*, 27 Ill. 15; *Mapps v. Sharpe*, 32 Ill. 13; *Snyder v. Griswold*, 37 Ill. 216; *Driscoll v. Tannock*, 76 Ill. 154; *Reinback v. Crabtree*, 77 Ill. 182; *Mitchell v. Lyman*, 77 Ill. 525; *Bressler v. Harris*, 19 Ill. App. 430; *Dill v. Ellicott*, Taney Dec. (U. S.) 233.

Where a national bank loans money at a usurious rate of interest, which is included in the note, in an action to enforce the contract the interest is forfeited. *McGhee v. Tobias First Nat. Bank* (Neb. 1894), 58 N. W. Rep. 537.

In *Illinois*, where the defense of usury is set up in an action on a note, and the plaintiff offers in court to strike off all in excess of the amount actually loaned and unpaid, he is entitled to judgment for such amount, in case the defense is established. *Willettts v. Wheeler*, 33 Ill. App. 629.

In *Georgia*, under the *Georgia Code*, § 2057a, usury only forfeits the excess of interest taken or charged, and the lender is entitled to recover the sum loaned with legal interest. *Parker v. Lowery*, 79 Ga. 740. See also *Brooks v. Todd*, 78 Ga. 692.

2. See *supra*, this title, *Statutory Provisions*.

The *Minnesota statute* (Laws 1879, ch. 66, § 3), declares that "all bonds, bills, notes, assurances, conveyances, chattel mortgages, and all other contracts and securities whatsoever" which are usurious, shall be void. The supreme court holds that the effect of this statute is to not merely vitiate the security or evidence of indebtedness, but to absolutely extinguish the debt itself. *Ormund v. Hobart*, 36 Minn. 306.

3. *Martin v. Johnson*, 84 Ga. 481; *Matzenbaugh v. Troup*, 36 Ill. App. 261.

**Trust Deeds.**—In the recent case of *Central Trust Co. v. Burton*, 74 Wis. 329, the supreme court of *Wisconsin* approved and adopted the following language of the court below: "The first position taken by the demurrant was, substantially, that the trust deed was an independent contract, separate and distinct from the notes, and could not be affected by the fact that the notes were usurious, or at least that the only effect of usury in the loan would be to reduce the amount due to beneficiaries, but not to impair the right of the trustee to a decree of foreclosure. Certainly the trust deed is in form a separate and distinct contract, but no more so than a mortgage given to secure payment of a note or bond. The inclination of our courts is to treat all conveyances of real estate, whatever their form, as mortgages, when it is shown that their purpose is to secure the payment of the debt. This is eminently logical, as well as just. The debt is the thing—the basis and foundation of the whole transaction. When the debt is extinguished, or for

The consequences of usury cannot be avoided by the creditor giving up his security for the usurious debt, and taking a new mortgage on the same property therefor.<sup>1</sup>

If, however, there be included in the same security both usurious and valid debts, the former separate and distinct from the latter, the rule is that the creditor may still enforce the security to the extent of the valid claim.<sup>2</sup>

Though the security be in form an absolute conveyance to the creditor, the existence of usury in the debt entitles the debtor

any reason ceases to exist, no logical reason can be assigned for endeavoring to keep up an appearance of life in the mortgage, which is simply an accessory of the debt. The sole object and purpose of the mortgage is to secure the payment of the debt. If there be no debt, if it is paid or extinguished in any way, the mortgage has no earthly reason for its existence; it is *functus officio*. These remarks appear to me to apply as well to a trust deed, whose sole purpose is to secure a debt, as they do to a mortgage. The fact that the nominal conveyance is to a third person, other than the creditor, makes no difference in the substantial character of the transaction. It is still an accessory—a mere security dependent on the existence of a debt for its life."

**Mortgagee Not in Fault.**—A case illustrating the hardships sometimes imposed upon a party to a contract tainted with usury, but who was entirely ignorant of that fact, was recently decided by the supreme court of *Arkansas*. The material facts sufficiently appear from the following portion of the opinion of the court, by Hemingway, J.: "A loan of money at the highest lawful rate of interest, made under the inducement of a promise by the borrower that he would make a valuable gift of personal property to the lender, is usurious. The gift is such only in name; in law and in fact it is a part of the price paid for the use of money. The loan by Julia Godsey of money, a part of which belonged to her and the remainder to Mary Godsey, was induced by the promise that Hendrickson would pay the highest rate of interest allowed by law, and in addition thereto permit Julia to take from his store merchandise of a value equal to interest on the sum lent at the rate of five per cent. per annum. . . . It appears that Mary Godsey had no knowledge of, and received no part of, the excessive charge; and there was nothing in the written

contract, or in the character of the transaction, to give her notice thereof.

. . . But the loan of Julia's money was made in violation of law, and one note and one mortgage taken to secure the entire sum lent. In a suit founded upon that note and mortgage, can Mary recover the amount lent by her? This question must be answered in the negative, for if any part of a consideration is illegal, the whole consideration is void." The court accordingly held that the bill to foreclose should be dismissed, but without prejudice to the right of Mary Godsey to bring an action for money lent. Thus, without fault on her part, she lost the benefit of her security on the ground of usury. *Hendrickson v. Godsey*, 54 Ark. 155.

But in *Maryland* it is held that a mortgage given to secure the amount actually loaned and a large sum additional, as bonus for the lender, can be enforced as to the actual debt. *Smith v. Myers*, 41 Md. 425.

In *Alabama*, it is held that usury in a debt does not, at law, affect the validity of a mortgage given to secure it. *Kelly v. Mobile Bldg., etc., Assoc.*, 64 Ala. 501.

Usury in a debt secured by chattel mortgage, though the transaction took the form of a purchase of the mortgaged property by the creditor from a former legal owner and a sale thereof to the mortgagor, prevents the mortgagee from claiming as a *bona fide* purchaser as against one asserting a prior equitable ownership. *Meyer v. Cook*, 85 Ala. 417.

In *New York*, a usurious mortgage is void as against the mortgagor's judgment creditors. *Carow v. Kelly*, 59 Barb. (N. Y.) 239.

1. *Exley v. Berryhill*, 37 Minn. 182.

2. *Mahn v. Hussey*, 28 N. J. Eq. 546; *Jackson v. May*, 28 Ill. App. 305; *Bran-nock v. Brannock*, 10 Ired. (N. Car.) 428; *McFerrin v. White*, 6 Coldw. (Tenn.) 449.

to have the conveyance declared void, and possession restored to him.<sup>1</sup> But where an absolute deed is given as security for a valid debt, the security is not rendered void by the fact that usury was included in a subsequent renewal note.<sup>2</sup>

The creditor who is guilty of usury, and who loses his security, is not entitled to any relief from a third person not a party to the usury, merely because a portion of the loan was used in satisfying a prior lien on the latter's property.<sup>3</sup>

The defeat of the security carries with it all waivers by the debtor of homestead and exemption rights in the property mortgaged.<sup>4</sup> And the waiver remains void, notwithstanding a subsequent judgment purging the debt of all usury.<sup>5</sup>

Sureties are not bound by a waiver of homestead and exemption rights in a note signed by them, when they have no notice of the existence of usury therein.<sup>6</sup>

Statutes in some of the states provide that the defense of usury cannot be raised against negotiable paper in the hands of an innocent purchaser for value before maturity; and it has been contended that his immunity should be construed to extend also to the securities, upon the faith of which the negotiable instrument itself was purchased; but where the question has been fairly presented, the courts have held that the mortgage, or other security, must be regarded in this respect as separate and distinct from the negotiable

Where a note is made up in part of a pre-existing valid debt, and in part of usurious interest on another account, the note is not void, but the maker is entitled to an abatement thereof to the extent of the usury. *Smith v. Heath*, 4 Daly (N. Y.) 123.

1. *Baggett v. Trulock*, 77 Ga. 369; *Harrold v. Morgan*, 66 Ga. 398.

**Absolute Conveyances.**—Land having been forfeited to the state for delinquent taxes, the owner borrowed money under a usurious contract, with which to redeem it, and caused the land to be conveyed by the state to the lender by absolute deed, as security for the loan. In an action of ejectment brought by a purchaser from the state's grantee, with notice of the usury, the defendant pleaded the usurious contract, and sought to have the deeds and notes canceled. The court held that the state not being a party to the usury, its deed was not affected by it; that the lender took the title as trustee for the owner; and that the debt being void, the defendant was entitled to the relief sought. *Lowe v. Loomis*, 53 Ark. 454.

Upon the sale of the land under execution, the debtor induced J to bid it in, and made a verbal agreement to re-

pay him the amount of his bid with usurious interest. J accordingly bid in the land, and the sheriff conveyed it to him. Afterward, at the debtor's request, J conveyed the land to H, who paid J the amount of his bid, and agreed in writing with the debtor to give him the title, upon being reimbursed, with usurious interest. It was held that these usurious agreements did not affect H's legal title. *Pope v. Heartwell*, 79 Ga. 482.

2. *Dotterer v. Freeman*, 88 Ga. 479.

3. A agreed to pay B \$1,700 for a mortgage of \$2,000 to be procured from C, the owner of the land, which mortgage was to draw legal interest. B delivered the mortgage, and a portion of the money was applied to the payment of a valid prior mortgage upon the same land. It afterward transpired that A's mortgage was a forgery. It was held that as A had acted in pursuance of a usurious contract, he was not entitled to any relief against C, even as to the amount so applied for his benefit. *Thomas v. Fish*, 9 Paige (N. Y.) 478.

4. *Small v. Hicks*, 81 Ga. 691; *Cleg-horn v. Greeson*, 77 Ga. 343.

5. *Lowry v. Parker*, 83 Ga. 341.

6. *Lewis v. Brown*, 89 Ga. 115.

instrument, and entitled to none of its peculiar privileges; the result being, that while the innocent purchaser is allowed to maintain an action on the note, yet, if the defense of usury is established, he loses the benefit of the security which made the note marketable.<sup>1</sup>

Where the creditor has taken possession of property mortgaged or pledged as security for a usurious debt, and the statute declares the security void for that reason, the debtor may maintain an action to recover the possession of the property or its value.<sup>2</sup> And it seems that no demand is necessary before bringing suit, the possession by the creditor being tortious.<sup>3</sup> But notwithstanding a mortgage or trust deed may be void on account of usury, it is held that when the power of sale has been executed, and the property purchased thereunder in good faith by an innocent third party, his title cannot be affected by the usury.<sup>4</sup> But when the mortgagee himself becomes the purchaser at a foreclosure under a power of sale, his title is subject to be defeated on the ground of usury in the mortgage.<sup>5</sup>

**3. As to Debt Originally Valid.**—Where a debt is valid and free from usury in its inception, the courts unanimously hold that it cannot be vitiated or destroyed by any subsequent usurious agreement in respect to it, such as the giving of security, extend-

1. *Scott v. Austin*, 36 Minn. 460.

In *Doll v. Hollenbeck*, 19 Neb. 639, the court held that where the purchaser for value of a note and mortgage before maturity and without notice of usury failed to have the holder put his indorsement on the note itself, which was payable to order, and could show only a written assignment upon the mortgage, he could not enforce the security on account of the usury which infected the debt. The decision, however, was based upon the ground that the purchaser was not the indorser of the note, within the meaning of the law merchant, although he actually owned it, and had given value for it.

Where the nominal mortgagee is in fact the agent of the mortgagor, and negotiates the mortgage for the latter's benefit, to one who knows that the mortgagor is the real party in interest, and who takes usurious interest for the amount advanced, the note and mortgage are void in the hands of a subsequent purchaser after maturity. *Aldrich v. Wood*, 26 Wis. 168.

2. So held in a case where a chattel mortgagee had taken possession of the goods under a clause in the mortgage, but against the consent of the debtor, who had, however, previously given a writing stating that the goods were

"turned over" to the mortgagee. *Wetherell v. Stewart*, 35 Minn. 496.

3. *Wheelock v. Lee*, 15 Abb. Pr. N. S. (N. Y.) 24.

4. *Cuthbert v. Haley*, 8 T. R. 390; *Jackson v. Henry*, 10 Johns. (N. Y.) 186; 6 Am. Dec. 328; *Jordan v. Humphrey*, 31 Minn. 495; *Mumford v. American L. Ins., etc., Co.*, 4 N. Y. 463; *Ammondson v. Ryan*, 111 Ill. 506; 1 Jones, *Mortgages* (4th ed.), § 646.

Thus, where land was conveyed to trustees to secure payment of usurious bonds, it was held that an absolute conveyance by the trustees, in consideration of a surrender of certain of the bonds, could not be avoided on the ground of usury. *Butler v. Myer*, 17 Ind. 77.

5. *Jackson v. Dominick*, 14 Johns. (N. Y.) 435; *Jordan v. Humphrey*, 31 Minn. 495; *Lee v. Peckham*, 17 Wis. 383.

**Title by Foreclosure.**—After the foreclosure of a usurious mortgage, the mortgagee resold the property to the mortgagor for the full amount of the debt and usury, the mortgagor paying part of the purchase price, and giving a note for the balance. It was held that he could not plead the original usury as a defense to the new note. *Switz v. Platts*, 15 Iowa 298.

ing time of payment, executing a new form of obligation, or by any other transaction tainted with usury.<sup>1</sup>

If the new obligation be sold to a third person, though he cannot enforce it on account of the usury, he stands in the shoes of his vendor, and is entitled to recover on the antecedent indebtedness.<sup>2</sup> But if a valid contract has been transferred for a usurious

1. *Abrahams v. Claussen*, 52 How. Pr. (N. Y.) 241; *Brown v. Dewey*, 1 Sandf. Ch. (N. Y.) 56; *Rice v. Welling*, 5 Wend. (N. Y.) 595; *Swartwout v. Payne*, 19 Johns. (N. Y.) 294; *Emmons v. Barnes*, 4 Daly (N. Y.) 418; *Lyon v. Simpson*, 12 Daly (N. Y.) 56; *Gerwig v. Sitterly*, 56 N. Y. 214; *Patterson v. Birdsall*, 64 N. Y. 294; 21 Am. Rep. 609; *In re Consalus*, 95 N. Y. 340; *Kellogg v. Adams*, 39 N. Y. 28; *Real Estate Trust Co. v. Keech*, 69 N. Y. 248; 25 Am. Rep. 181; *Cook v. Barnes*, 36 N. Y. 520; *Farmers', etc., Bank v. Joslyn*, 37 N. Y. 353; *Carson v. Ingalls*, 33 Barb. (N. Y.) 657; *Winsted Bank v. Webb*, 46 Barb. (N. Y.) 177; *Chastain v. Johnson*, 2 Bailey (S. Car.) 574; *Drury v. Morse*, 3 Allen (Mass.) 445; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Hovey v. Shumway*, 1 Root (Conn.) 70; *Sloan v. Sommers*, 14 N. J. L. 509; *Smith v. Hollister*, 14 N. J. Eq. 153; *Hann v. Dekater* (N. J. 1890), 20 Atl. Rep. 657; *Donnington v. Meeker*, 11 N. J. Eq. 362; *Ware v. Thompson*, 13 N. J. Eq. 66; *Terhune v. Taylor*, 27 N. J. Eq. 80; *Vanck v. Crane*, 4 N. J. Eq. 128; *Edgell v. Stanford*, 6 Vt. 551; *Farmers' Bank v. Burchard*, 33 Vt. 346; *Mallett v. Stone*, 17 Iowa 64; 85 Am. Dec. 545; *Indianapolis Ins. Co. v. Brown*, 6 Blackf. (Ind.) 378; *Dotterer v. Freeman*, 88 Ga. 479; *Avery v. Creigh*, 35 Minn. 456; *Richards v. Kountze*, 4 Neb. 201; *Deil v. Oppenheimer*, 9 Neb. 454; *Mitchell v. Cotten*, 2 Fla. 136; *Van Beil v. Fordney*, 79 Ala. 76; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Cobb v. Morgan*, 83 N. Car. 211; *Wharton v. Eborn*, 88 N. Car. 344; *Rountree v. Brinson*, 98 N. Car. 107; *Collier v. Nevill*, 3 Dev. (N. Car.) 30; *Humphrey v. McCauley* (Ark.), 17 S. W. Rep. 713; *Tillman v. Thatcher* (Ark. 1882), 19 S. W. Rep. 968; *Marks v. McGehee*, 35 Ark. 217; *Ambler v. Ruddell*, 17 Ark. 138; *Parker v. Cousins*, 2 Gratt. (Va.) 372; 44 Am. Dec. 388; *Pollard v. Baylors*, 6 Munf. (Va.) 433; *McFerrin v. White*, 6 Coldw. (Tenn.) 449; *York Bank v. Ashbury*,

1 Biss. (U. S.) 230; *Gaither v. Farmers', etc., Bank*, 1 Pet. (U. S.) 43.

In *Bernhisel v. Firman*, 22 Wall. (U. S.) 170, the court, by Mr. Justice Swayne, said: "It is well settled that if a security founded upon a prior one be fatally tainted with that vice (usury), and the prior one were free from it, but given up and canceled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given. The cases to this effect are very numerous."

**English Cases.**—The rule has long been settled in *England*, that no subsequent taking of, or agreement to take, illegal interest will vitiate a contract, debt, or security free from usury in its inception. *Farrall v. Shaen*, 1 Saund. 294; 2 Keb. 525; *Anonymous*, 1 Bulstr. 19; *Rex v. Allen*, Sir T. Raym. 196; *Reg. v. Sewel*, 7 Mod. 118; *Ex p. Jennings*, 1 Madd. 331; *Bradley v. Manning*, 3 Keb. 142; *Nichols v. Lee*, 3 Anstr. 940; *Pollard v. Scholy*, Cro. Eliz. 20; *Gray v. Fowler*, 1 H. Bl. 462; *Phillips v. Cockayne*, 3 Camp. 119; *Abrahams v. Bunn*, 4 Bwn. 2253.

In *Viner's Abr.*, "Usury" H. pl. 6, it is laid down that, "If the first contract is not usurious, it shall never be made so by matter *ex post facto*." See also 2 Hawk. P. C. 377, § 17.

In *Adlington v. Cann*, 3 Atk. 154, Lord Hardwicke is reported to have declared, that though a mortgage be drawn for lawful interest, yet, if the mortgagee afterward take more, the mortgage would be void "upon the word take." Such a doctrine is certainly opposed to all the English authorities, and the reported *dictum* is of very doubtful authenticity.

In *Nichols v. Lee*, 3 Anstr. 940, Baron Thompson observed that, "Lord Hardwicke never could have meant to lay down the proposition that is reported in *Atkins*."

2. *Gerwig v. Sitterly*, 56 N. Y. 214.

In *Oneida Bank v. Ontario Bank*, 21 N. Y. 495, Comstock, J., used the following language in delivering the

consideration, no action can be maintained upon it by a party to such usury.<sup>1</sup>

After the valid debt has been changed in form and made the subject of a usurious agreement, the creditor ought not to be allowed, on his own motion, to disregard the new agreement and sue upon the old debt. The right to enforce the debt may be said to be in obedience until the debtor has elected to set up the defense of usury against the substituted contract.<sup>2</sup>

A mere statement by the debtor that he would not pay the usurious contract is not sufficient to justify the creditor in bringing suit on the pre-existing debt.<sup>3</sup>

On the other hand, usurious agreements by the creditor to extend the time of paying a valid debt are void and bind neither party; the creditor may sue as if no extension had been promised, and the debtor, after pleading the usury, cannot insist upon the benefit of the extension.<sup>4</sup>

If the debtor's plea of usury is sustained, it seems that the creditor may still recover the debt in the same action under the

opinion of the court: "A note or bond may be void for usury, but being founded upon some antecedent claim or contract, free from that defect, there may be a just and legal right to recover the original consideration. The note or bond may be sold, and it will be void even in the hands of an innocent purchaser. But will it be pretended that the purchaser gets absolutely nothing? It is impossible to doubt that he will stand in the shoes of his vendor."

1. *Gaither v. Farmers', etc., Bank*, 1 Pet. (U. S.) 43.

2. Though a note taken in satisfaction of a former valid note is in law void on account of usury, the creditor cannot sue on the original note and defeat the defendant's plea of satisfaction by disclosing the usury and claiming that the new is therefore void. That defense is a privilege which the debtor alone can assert. *Austin v. Chittenden*, 33 Vt. 553.

But in the recent case of *Tillman v. Thatcher* 56 Ark. 334, where the plaintiff took a usurious note in settlement of a valid debt, he was allowed by the court, on the theory that the note was void for the usury, to sue on the original debt, in spite of the defendant's plea that the note was a satisfaction of the account. An instruction was approved, that, "If a security founded upon an antecedent lawful consideration becomes void, or tainted by an usurious element, the original demand will be revived, and may be enforced." The only case

cited by the court in support of this proposition is *Rountree v. Brinson*, 98 N. Car. 107, the circumstances of which were that the plaintiff sued on a note, alleging its consideration to be a balance of account. The defendant answered, setting up usury in the note, but it was not disputed that the original debt was valid. The court merely held that even if the note was usurious, the plaintiff was entitled to recover the antecedent debt.

In *Eastman v. Porter*, 14 Wis. 39, a creditor who had taken a usurious note for a prior valid debt, had previously brought an action on the note and it had been adjudged void for the usury. He then brought this action on the debt, and it was held that he was entitled to recover without first tendering the usurious interest paid on the note, which was a matter of set-off.

3. In *Bost v. Smith*, 4 Ired. (N. Car.) 68, where A gave B a usurious bond for \$220 in discharge of a valid debt of \$220, it was held that, although the debt was not thereby vitiated, B could not recover on the debt of \$220 merely because A had said to a third person that he would pay that sum, but would never pay the usurious bond.

4. *Hunt v. Bloomer*, 5 Duer (N. Y.) 202; *Church v. Malay*, 70 N. Y. 63; *Beauchamp v. Leagan*, 14 Ind. 401; *Pyke v. Clark*, 3 B. Mon. (Ky.) 262. But see *Kelly v. Gillespie*, 12 Iowa 55; 79 Am. Dec. 516, which holds that a usurious note is a sufficient considera-

common counts.<sup>1</sup> But under the rules of code pleading, no recovery could be had in such case, unless the former contract or debt was relied on in the pleading.<sup>2</sup>

4. **As to Executed Contracts.**—After a contract tainted with usury has been, in all respects, fully executed and performed, it is, unless otherwise provided by statute, too late to set it aside on the ground of usury.<sup>3</sup>

**VIII. WHO MAY TAKE ADVANTAGE OF USURY—1. Defense Personal to Debtor.**—It is settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor.<sup>4</sup> The defense has been compared to that of infancy.<sup>5</sup>

The rule that parties *in pari delicto* are both equally precluded from assistance by the courts, does not apply against a borrower

tion for an agreement to extend the time of payment of a previous note.

1. *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Edgell v. Stanford*, 6 Vt. 551.

**Injunction.**—Where, pending an action at law on a written contract for money loaned at usurious rates, the plaintiff was enjoined from proceeding further on the contract, it was held that he was not entitled to recover on the common money counts. *Ambler v. Ruddell*, 17 Ark. 138.

2. *Hansee v. Phinney*, 20 Hun (N. Y.) 153; *Rountree v. Brinson*, 98 N. Car. 107.

In *Barrows v. Thomas*, 43 Minn. 270, which was an action to recover personal property, the plaintiff based his right to recover solely upon a specified mortgage of the property given by the defendant. The defense of usury being interposed, the inquiry upon the trial of that issue extended to the question of usury in a prior note and mortgage, in renewal of which, the mortgage relied on by the plaintiff was given. The latter having been found to be usurious, but the prior note and mortgage free from usury, the court held that the plaintiff was not entitled to recover the property in that action by virtue of the prior mortgage, for the reason that no such right was in issue.

3. Where a debtor has conveyed land by absolute deed to his surety as indemnity, and the surety subsequently pays the debt and takes the land in satisfaction, his contract with the debtor becomes fully executed, and neither the debtor nor any of his creditors can set it aside for usury. *Irwin v. McKnight*, 76 Ga. 669.

Under a statute allowing parties to

contract in writing for any rate of interest, but if not in writing, no recovery can be had for more than six per cent., an executed verbal contract, under which more than six per cent. has been paid, is as valid as though in writing. *Fessenden v. Taft* (N. H. 1889), 17 Atl. Rep. 713.

4. *Dix v. Van Wyck*, 2 Hill (N. Y.) 522; *Ohio, etc., R. Co. v. Kasson*, 37 N. Y. 218; *Bullard v. Raynor*, 30 N. Y. 197; *Billington v. Wagoner*, 33 N. Y. 31; *Williams v. Tilt*, 36 N. Y. 319; *Mechanics' Bank v. Edwards*, 1 Barb. (N. Y.) 271; *Wells v. Chapman*, 13 Barb. (N. Y.) 561; *Austin v. Chittenden*, 33 Vt. 553; *Spengler v. Snapp*, 5 Leigh (Va.) 478; *Campbell v. Johnston*, 4 Dana (Ky.) 177; *Mordecai v. Stewart*, 37 Ga. 364; *Irwin v. McKnight*, 76 Ga. 669; *Zellner v. Mobley*, 84 Ga. 746; 20 Am. St. Rep. 390; *Holladay v. Holladay*, 13 Oregon 523; *Cramer v. Lepper*, 26 Ohio St. 59; 30 Am. Rep. 756; *Smith v. Exchange Bank*, 26 Ohio St. 141; *Studabaker v. Marquardt*, 55 Ind. 341; *Loomis v. Eaton*, 32 Conn. 550; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287; *Lehman v. Marshall*, 47 Ala. 362; *Ransom v. Hays*, 39 Mo. 445; *Carmichael v. Bodfish*, 32 Iowa 418; *Cheney v. Dunlap*, 27 Neb. 401; *Morling v. Bronson* (Neb. 1894), 56 N. W. Rep. 205; *Ladd v. Wiggins*, 35 N. H. 421; 69 Am. Dec. 551.

But it has been held in *Texas* that under the constitution and statutes of that state, a debtor cannot waive his right to insist that a contract entered into by him is usurious. *Miles v. Kelly*, (Tex. Civ. App. 1894) 25 S. W. Rep. 724.

5. *Ransom v. Hays*, 39 Mo. 445.



or debtor who has paid or agreed to pay usury. It is deemed that his consent to the corrupt contract was obtained by moral duress, such as to take from him the character of *particeps criminis*. To hold otherwise would render usury laws nugatory.<sup>1</sup>

The debtor's sureties, guarantors, heirs, devisees, executors, and administrators are also entitled to make the same defense to the contract which he might have made, whenever the usurious contract affects their rights and interests.<sup>2</sup>

But if, for any reason, the maker or drawer of a bill or note is precluded from pleading usury thereto, as in the case of corporations in *New York*, his sureties are also precluded.<sup>3</sup>

A widow whose claim to dower and homestead is superior to the lien of a mortgage on the land of her husband's estate, cannot attack it for usury, because she is not an interested party.<sup>4</sup>

It seems that an accommodation maker or indorser of a note, which has been transferred upon a usurious contract, cannot take advantage of such usury.<sup>5</sup>

The opinion has been judicially expressed, by way of *dictum*,

1. *Hewitt v. Dement*, 57 Ill. 500; *First Nat. Bank v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 453.

2. *Cole v. Hills*, 44 N. H. 227; *Carmichael v. Bodfish*, 32 Iowa 418; *Loomis v. Eaton*, 32 Conn. 550; *Huntress v. Patten*, 20 Mo. 28; *Ransom v. Hays*, 39 Mo. 445; *Cheney v. Dunlap*, 27 Neb. 401; *Campbell v. Johnston*, 4 Dana (Ky.) 177; *Goodhue v. Palmer*, 13 Ind. 457; *Cutchen v. Coleman*, 13 Ind. 568; *Stein v. Indianapolis, etc., Assoc.*, 18 Ind. 237; 81 Am. Dec. 353; *Stockton v. Coleman*, 39 Ind. 107; *Studabaker v. Marquardt*, 55 Ind. 341; *Draper v. Emerson*, 22 Wis. 147; *Cramer v. Lepper*, 26 Ohio St. 59; 20 Am. Rep. 756; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287; *Fenno v. Sayre*, 3 Ala. 458; *Gray v. Brown*, 22 Ala. 262; *Cain v. Gimon*, 36 Ala. 168.

The opinion of Jones, J., at special term, was quoted with approval by the court of appeals in *Merchants' Exch. Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. 635, in the following terms: "All privies to the borrower, whether in blood, representation, or estate, may, both in law and equity, by the appropriate legal and equitable remedies and defenses, attack or defend against any contract or security given by the borrower which is tainted with usury, on the ground of such usury, where such contract or security affects the estate derived by them from the borrower."

An heir-at-law is entitled to recover

back payments of usury made by him to clear his inheritance from an incumbrance given by his ancestor to secure a usurious debt. *Pope v. Marshall*, 78 Ga. 635.

**Sureties.**—In *Culver v. Wilbern*, 48 Iowa 26; 30 Am. Rep. 38, it was held no defense to an action on a note, that it was given by a surety in part payment of his principal's usurious debt.

And in *Lamoille Co. Nat. Bank v. Bingham*, 50 Vt. 105; 28 Am. Rep. 490, it was decided that the surety was not entitled to the benefit of usury paid by the principal.

**Indorsers.**—In *South Carolina* it is held that an indorser of a note void for usury is not bound by his indorsement, made when he was ignorant of the usury. *Brummer v. Wilks*, 2 McCord (S. Car.) 178; *Flemming v. Mulligan*, 2 McCord (S. Car.) 173; 13 Am. Dec. 707. Otherwise, if he makes false representations to the purchaser as to its validity. *Odell v. Cook*, 2 Bailey (S. Car.) 59.

In *Bank of Newbury v. Sinclair*, 60 N. H. 100; 49 Am. Rep. 307, it was held that usurious interest paid by the maker could not be taken advantage of by an indorser.

3. *First Nat. Bank v. Morris*, 4 Thomp. & C. (N. Y.) 182; *De Roe v. Smith*, 4 Thomp. & C. (N. Y.) 690.

4. *Jeffries v. Allen*, 29 S. Car. 501.

5. *Stewart v. Bramhall*, 11 Hun (N. Y.) 139; *Cody v. Goodnow*, 49 Vt. 400; *Kendall v. Vanderlip*, 2 Mackey

that the right to recover back usury paid is assignable;<sup>1</sup> but there are, on the other hand, a number of decisions holding that the right does not pass to the debtor's assignee for the benefit of creditors.<sup>2</sup>

**2. The Usurer Cannot.**—Being an offender against the law, the usurer is not under any circumstances permitted to set up his own usury for the purpose of avoiding any of his undertakings or liabilities connected with the usurious transaction; what he has done or bound himself to do, he must stand by, as if no usury were involved.<sup>3</sup>

**3. Subsequent Incumbrancers.**—According to some authorities, the existence of usury in a mortgage debt cannot be taken advantage of in order to defeat the mortgage, by the holder of a subsequent incumbrance, who takes with actual or constructive notice of the prior lien;<sup>4</sup> particularly if the junior incumbrance was by its terms made subject to the former lien;<sup>5</sup> or if a sale under foreclosure of a second mortgage is made subject to the first, in which case the purchaser cannot impeach the first mortgage for usury.<sup>6</sup> But if the circumstances were such that the second mortgagee had the right to attack the first mortgage, neither he nor the purchaser at his foreclosure sale is deprived of the right by a recital in the sheriff's deed that it is subject to the first mortgage.<sup>7</sup>

Some courts, however, hold that a junior incumbrancer has the same right to make the defense of usury against a prior incumbrance, that the debtor himself would have.<sup>8</sup>

(U. S.) 105. But see *Dowe v. Schutt*, 2 Den. (N. Y.) 621.

1. *O'Neil v. Cleveland*, 30 N. J. Eq. 273.

2. See *infra*, this title, *Recovery of Payments of Usury*.

3. *Riley v. Gregg*, 16 Wis. 666; *M'Knight v. Wheeler*, 6 Hill (N. Y.) 492; *Taylor v. Jackson*, 5 Daly (N. Y.) 497; *Elwell v. Chamberlain*, 4 Bosw. (N. Y.) 320; *National Bank v. Place*, 15 Hun (N. Y.) 564; *Hanse v. Phinney*, 20 Hun (N. Y.) 153; *Milles v. Kerr*, 1 Bailey (S. Car.) 4.

For instance, the usurer cannot sue upon a note which was satisfied by taking a new and usurious note, and set up such usury in reply to the defendant's plea of satisfaction. *Austin v. Chittenden*, 33 Vt. 553.

**Wrongdoer.**—A person who wrongfully converts a promissory note, and collects the amount, including usurious interest, is liable to the owner for the full amount, usury and all. *Allison v. King*, 25 Iowa 56.

4. *Union Nat. Bank v. International Bank*, 123 Ill. 510; *Darst v. Bates*, 95 Ill. 493; *Lee v. Feamster*, 21 W. Va.

108; 45 Am. Rep. 549; *Farmers', etc. Bank v. Kimmel*, 1 Mich. 84; *Ready v. Huebner*, 46 Wis. 692; 32 Am. Rep. 749; *Reeder v. Martin*, 58 Md. 215; *Richardson v. Baker*, 52 Vt. 617; *Powell v. Hunt*, 11 Iowa 430; *Brooks v. Todd*, 78 Ga. 692; *Pritchett v. Mitchell*, 17 Kan. 355; 22 Am. Rep. 287; *DeWolf v. Johnson*, 10 Wheat. (U. S.) 392.

Under *Texas Rev. Stat.*, art. 2980, declaring all contracts for more than twelve per cent. per annum void for the whole rate of interest, the holder of a junior mortgage has the right to pay off a prior usurious mortgage by paying the principal debt without interest; and this, notwithstanding the prior mortgagee has in the meantime procured a deed from the mortgagor. *Maloney v. Eaheart* (Tex. 1891), 16 S. W. Rep. 1030.

5. *Fulford v. Keerl*, 71 Md. 397.

6. *Warwick v. Dawes*, 26 N. J. Eq. 548.

7. *Pinnell v. Boyd*, 33 N. J. Eq. 600.

8. *Trusdell v. Dowden*, 47 N. J. Eq. 396; *Mutual L. Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618; *Dix v. Van Wyck*,

Where securities are given for the common benefit of two or more creditors, the rule seems to be, that neither can attack the other's claim, on the ground of usury.<sup>1</sup>

**4. Subsequent Purchasers.**—The grantee of the mortgagor's equity of redemption merely, pays therefor only what the equity is supposed to be worth, on the basis that the mortgage is valid; and if he were to be allowed to defeat it for usury between the mortgagor and mortgagee, he would thereby acquire a much more valuable estate than he bargained for. The rule, accordingly, is that such purchaser must abide by his contract, and submit to the enforcement of the mortgage.<sup>2</sup>

This rule applies with additional force, in cases where the purchaser takes his deed expressly subject to the mortgage, and deducts the amount thereof from the agreed purchase price.<sup>3</sup> It also applies, with even greater force, in cases where the deed contains an "assumption clause," whereby the purchaser covenants

<sup>2</sup> Hill (N. Y.) 522. See also Hudnit v. Nash, 16 N. J. Eq. 550.

**Insolvent Debtor.**—A junior incumbrancer may attack the prior mortgage for usury, without the consent of the debtor, where the latter is insolvent, in order to protect the fund out of which the liens are to be satisfied. *Cole v. Bansemer*, 26 Ind. 94.

1. *Adams v. Robertson*, 37 Ill. 45; *Busby v. Finn*, 1 Ohio St. 409.

2. *Reed v. Eastman*, 50 Vt. 67; *Cheney v. Dunlap*, 27 Neb. 401; *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312; *Post v. Bank of Utica*, 7 Hill (N. Y.) 391; *Sands v. Church*, 6 N. Y. 347; *Stayton v. Riddle*, 114 Pa. St. 464; *McGuire v. Van Pelt*, 55 Ala. 344.

It has been said that the right to set up the defense of usury is to be distinguished from the right to sue to avoid usurious securities; and that it is only where the grantee of mortgaged premises seeks affirmative relief as a plaintiff, that the question arises whether he is one of the persons authorized by law to attack the mortgage. *Chamberlain v. Dempsey*, 14 Abb. Pr. (N. Y.) 241.

3. *Brolasky v. Miller*, 9 N. J. Eq. 807; *Dolman v. Cook*, 14 N. J. Eq. 56; *Conover v. Hobart*, 24 N. J. Eq. 120; *Lee v. Stiger*, 30 N. J. Eq. 610; *Pinnell v. Boyd*, 33 N. J. Eq. 600, 190; *Hartley v. Harrison*, 24 N. Y. 170; *Henderson v. Bellew*, 45 Ill. 322; *Valentine v. Fish*, 45 Ill. 462; *Cleaver v. Burcky*, 17 Ill. App. 92; *Stephens v. Muir*, 8 Ind. 352; *Nance v. Gregory*, 6 Lea (Tenn.) 343; 40 Am. Rep. 41; *Frost v. Shaw*, 10 Iowa 491; *Huston v. Stringham*, 21

Iowa 36; *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169; *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86.

The acceptance of a deed expressly subject to an outstanding mortgage finally precludes the grantee from pleading usury against such mortgage; nor will the substitution of a new deed with the assumption clause omitted, under a claim that it was inserted in the first deed by mistake, enable the grantee to plead the usury. *Barthet v. Elias*, 2 Abb. N. Cas. (N. Y.) 364.

In *Trusdell v. Dowden*, 47 N. J. Eq. 396, *Van Fleet, V. C.*, in delivering the opinion of the court after stating the rule as given in the text, said: "But this doctrine does not at all rest on the theory that the taint, by the conveyance, has, as between the original parties, been purged from the mortgage. On the contrary, the fact is that the taint as to them still exists in all its original force; but the doctrine rests on this foundation: That the purchaser, by taking title subject to the mortgage, and retaining, out of the price he agreed to pay, sufficient money to pay the mortgage, places himself in a position where he cannot allege usury without attempting to keep back part of the money which he agreed to pay for the mortgaged lands. Having retained enough of the purchase-money to pay the mortgage, under a promise that he would apply the money to the payment of the mortgage, it is plain that if he were allowed to make the defense of usury, and should make it successfully, he would defraud both his grantor and the mortgagee. He would be permitted

and agrees to pay the mortgage, as a part of the purchase price.<sup>1</sup> A grantee from such purchaser is subject to the same rule.<sup>2</sup>

The fact that the mortgagor agreed with the purchaser that he would assert his personal rights, and defend on the ground of usury, does not entitle the purchaser to defend.<sup>3</sup>

Where payments have been made and credited generally upon a mortgage debt wherein usurious interest was reserved, and the amount of such payments is sufficient to extinguish the valid portion of the debt, a purchaser of the mortgaged property may insist that it is free from the mortgage.<sup>4</sup>

A purchaser of mortgaged property with covenants of warranty, and against incumbrances, has his remedy upon his covenants, and therefore ought not to be allowed to defeat foreclosure of the mortgage on the ground of usury.<sup>5</sup>

For an entirely different reason, it is held that a purchaser of land from trustees cannot avoid his mortgage given for the purchase price, on the ground of usury in the debt to secure which the conveyance to the trustees was made. He stands in the position of one claiming under the usurious security.<sup>6</sup>

to speculate on a violation of law that had done him no harm, and to keep back money to which he has no right whatever; and to do so in direct violation of his promise. To prevent this, equity says that he shall not make the defense of usury; but it says so, not because the mortgage has been purged of its taint, but because he kept back enough of the purchase-money to pay the mortgage, under a promise that if the money were left in his hands he would pay the mortgage debt. This is the foundation on which the doctrine just mentioned rests, and it has no other."

1. *Essley v. Sloan*, 116 Ill. 391; *Stiger v. Bent*, 111 Ill. 328; *Jones v. Insurance Co.*, 40 Ohio St. 583; *Cramer v. Lepper*, 26 Ohio St. 59; 20 Am. Rep. 756; *Sullivan Sav. Inst. v. Copeland*, 71 Iowa 67; *Bonnell's Appeal* (Pa. St. 1886), 11 Atl. Rep. 211; *Fisher v. Kahlman*, 3 Phila. (Pa.) 213; *Log Cabin Permanent Bldg. Assoc. v. Gross*, 71 Md. 456; *Fulford v. Keerl*, 71 Md. 397; *Hough v. Horsey*, 36 Md. 181; *Mahoney v. Mackubin*, 54 Md. 268; *Burlington Mut. Loan Assoc. v. Heider*, 55 Iowa 424; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Crenshaw v. Clark*, 5 Leigh (Va.) 65. But see *Parker v. Sulouff*, 94 Pa. St. 527, where a purchaser who had assumed a mortgage was allowed to set off payments of usurious interest.

What Constitutes Assumption.—A

purchaser of mortgaged property gave a bond and mortgage for a portion of the purchase price equal to the amount of a prior usurious mortgage then outstanding, and deposited them with a third party, to be delivered to the grantor in the event that the latter should succeed in setting aside the usurious mortgage; but if he should fail to do so, then the purchaser was to raise money on his own mortgage, and pay off the prior mortgage therewith. It was held that there was no assumption of the prior mortgage so as to estop the purchaser from attacking it for usury. *Berdan v. Sedgwick*, 44 N. Y. 626.

**Security Given by Purchaser.**—When the purchaser of land subject to a mortgage which he assumed, gave his own valid note and mortgage to discharge the former, it was held that he could not set up as a defense to his own mortgage, that the former was in fact usurious. *Hollingsworth v. Swickard*, 10 Iowa 385.

2. *Essley v. Sloan*, 116 Ill. 391; *Jones v. Insurance Co.*, 40 Ohio St. 583.

3. *Stayton v. Riddle*, 114 Pa. St. 464.

4. *Woolley v. Alexander*, 99 Ill. 188.

5. *Studabaker v. Marquardt*, 55 Ind. 341. The contrary is held in *New York*. *Brooks v. Avery*, 4 N. Y. 225; *Post v. Dart*, 8 Paige (N. Y.) 639.

6. *Stoney v. American L. Ins. Co.*, 11 Paige (N. Y.) 635.

In one instance a purchaser at an execution sale, subject to all prior legal incumbrances, was allowed to plead usury against a prior mortgage;<sup>1</sup> and in another, a purchaser from the mortgagor, who agreed to pay whatever might be due from the latter, was allowed to make the same defense.<sup>2</sup> And when a party purchased the property with the information from the grantor of the usurious character of the prior mortgage, and with a view to avoiding the incumbrance, it was held that the defense of usury was available to him.<sup>3</sup>

In *Mississippi*, the purchaser of an equity of redemption is allowed by statute to have usurious interest paid by the mortgagor applied to the principal debt.<sup>4</sup>

Another result of conveying the land to a grantee who assumes the mortgage is, that the mortgagor himself cannot thereafter attack it for usury in proceedings to foreclose where no personal judgment is sought against him.<sup>5</sup> But if the conveyance to a purchaser who assumes the mortgage be afterwards surrendered, or the title becomes revested in the mortgagor, by deed not subject to the mortgage, he becomes restored to his right of attacking the mortgage for usury.<sup>6</sup>

**5. Creditors.**—Some courts hold, consistently with the doctrine that usury is a personal defense, that one creditor cannot plead it for the purpose of defeating another's claim or security against the common debtor;<sup>7</sup> while other courts show a disposition to allow contests of this character, particularly where the debtor is insolvent, and the fund is in court for distribution.<sup>8</sup>

1. *Cummins v. Wire*, 6 N. J. Eq. 73.

2. *M'Alister v. Jerman*, 32 Miss. 142.

3. *Newman v. Kershaw*, 10 Wis. 333.

4. *Mississippi Code* (1871), § 2279.

5. *Chaffe v. Wilson*, 59 Miss. 42.

6. *National L. Ins. Co. v. Olmsted*, 52 Iowa 354.

Where the purchaser of a mortgagor's equity of redemption at a sheriff's sale, afterward procured an assignment of the mortgage, and thus acquired the absolute legal title, it was held, upon a writ of entry brought by him against the mortgagor in possession, that usury in the mortgage notes could be set up to defeat his title. *Richardson v. Field*, 6 Me. 303.

7. *More v. Deyoe*, 22 Hun (N. Y.) 208; *Knickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 137; 7 Abb. N. Cas. (N. Y.) 170.

8. *Good v. Grant*, 76 Pa. St. 52; *McKinney v. Memphis, etc., Hotel Co.*, 12 Heisk. (Tenn.) 104; *Lee v. Feamster*, 21 W. Va. 108; 45 Am. Rep. 549; *Barbour v. Tompkins*, 31 W. Va. 410; *Bensley v. Homier*, 42 Wis. 631; *Car-michael v. Bodfish*, 32 Iowa 418; *Fielder v. Varner*, 45 Ala. 429; *Bask-*

*ins v. Calhoun*, 45 Ala. 582; *Mills v. Carnly*, 1 Bosw. (N. Y.) 159.

A subsequent creditor cannot object to the payment of illegal interest on a judgment, unless it can be shown that the debtor and judgment creditor had colluded to defraud other creditors under the appearance of usury. *Nicholson's Appeal* (Pa. 1887), 11 Atl. Rep. 562.

**Creditors Against Surety.**—Where, at the request of the principal debtor, a usurious note secured by mortgage is paid by a surety, junior mortgagees cannot, in an action by the surety to foreclose the first mortgage, have the amount of the usury charged against him. *Foard v. Grinter's Exrs.* (Ky. 1892), 18 S. W. Rep. 1034.

**Assignee of Mortgage.**—In *La Farge v. Herter*, 9 N. Y. 241, it was held that a creditor to whom a mortgage has been assigned in payment, cannot treat the assignment as a nullity and proceed to enforce his original debt, merely because the mortgagor has filed a bill to restrain foreclosure on the ground of usury. Such defense must first be established by a final judgment.

8. *Nisbet v. Walker*, 4 Ga. 221; *Phil-*

It is also generally held that the debtor's assignee in bankruptcy, receiver, or trustee for the benefit of creditors, is entitled to set up the defense.<sup>1</sup>

**6. Usury Between Subsequent Parties.**—It is no defense to the maker or indorser of a negotiable instrument, that a subsequent transfer was upon a usurious consideration.<sup>2</sup>

**7. In Separate Transactions.**—The fact that there was usury in

lips *v.* Walker, 48 Ga. 55; Brooks *v.* Todd, 78 Ga. 692; Butler *v.* Myer, 17 Ind. 77; Dix *v.* Van Wyck, 2 Hill (N. Y.) 522; Carow *v.* Kelly, 59 Barb. (N. Y.) 239; Van Tassell *v.* Wood, 12 Hun (N. Y.) 388; Thompson *v.* Van Vechten, 27 N. Y. 568.

See Mason *v.* Lord, 40 N. Y. 476, where a judgment creditor was permitted to attack his debtor's assignment of a lease, made as security for a usurious loan.

In Stein *v.* Swensen, 44 Minn. 218, it was held, under the *Minnesota* statute making all usurious contracts and securities void, that a sheriff holding mortgaged property under a writ of attachment was entitled to defend against the mortgage on the ground of usury.

**Insolvency.**—In Pope *v.* Salomon, 36 Ga. 541, it was held that where the money of an absconding debtor was in the hands of a trustee, to be applied in payment of a usurious contract, a court of equity would enjoin such payment, at the instance of a creditor whose debt was not tainted with usury.

The same court, however, holds that one creditor cannot maintain an action to recover usury paid by his insolvent debtor to another creditor. Singleton *v.* Patillo, 78 Ga. 267; Harris *v.* Hull, 70 Ga. 832; Hicks *v.* Marshall, 67 Ga. 714.

1. Wheelock *v.* Lee, 15 Abb. Pr. N. S. (N. Y.) 24; Palen *v.* Johnson, 50 N. Y. 49; 46 Barb. (N. Y.) 21; Green *v.* Morse, 4 Barb. (N. Y.) 332; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Pratt *v.* Adams, 7 Paige (N. Y.) 639; Pearsall *v.* Kingsland, 3 Edw. Ch. (N. Y.) 195; Gray *v.* Bennett, 3 Met. (Mass.) 522; Tamplin *v.* Wentworth, 99 Mass. 63; Corcoran *v.* Powers, 6 Ohio St. 19; Mallon *v.* Munson, 2 Handy (Ohio) 97; Bosanquett *v.* Dashwood, Cas. Temp. Talb. 38; *Ex p.* Skip, 2 Ves. 489; Brandon *v.* Sands, 2 Ves. 514; Tiffanay *v.* Boatman's Inst., 18 Wall. (U. S.) 375; *In re* Prescott, 5 Biss. (U. S.) 523; Moore *v.* Jones, 23 Vt. 739; Woolfolk *v.* Plant, 46 Ga. 422.

2. Cameron *v.* Chappell, 24 Wend.

(N. Y.) 94; Partridge *v.* Williams, 72 Ga. 807.

The maker of a note cannot take advantage of usury between subsequent parties. Conwell *v.* Pumphrey, 9 Ind. 135; 68 Am. Dec. 611; Littell *v.* Hord, Hard (Ky.) 87; Clapp *v.* Hanson, 15 Me. 345; Knights *v.* Putnam, 3 Pick. (Mass.) 184.

It is no defense to the maker of a note that a certain guarantee thereon was tainted with usury. Armstrong *v.* Gibson, 31 Wis. 61; 11 Am. Rep. 599.

**Opposite Doctrines.**—Some authorities hold that the maker of a valid note, when sued by an indorsee, may show in defense that the transfer to the plaintiff was usurious.

In Lloyd *v.* Keach, 2 Conn. 175; 7 Am. Dec. 256, the court, by Swift, C. J., said: "On this point there can be no doubt. The indorsee of a note must show a legal right, that he came lawfully by the possession of it, to entitle him to recover. Of course, it is competent for the defendant to show that he had no legal right, or that the possession was not lawful." See also Fish *v.* De Wolf, 4 Bosw. (N. Y.) 573.

It has been decided that the maker of a valid note may take advantage of usury between an indorser and indorsee, when the latter sues on the note, but not so as against a subsequent *bona fide* holder. Freeman *v.* Brittin, 17 N. J. L. 191.

It is, however, somewhat difficult to see why the maker should be any more concerned with the usury in the one case than in the other. The note being his valid obligation, he ought not to be allowed to avoid paying it on account of usury which did him no harm, and to which he was a stranger.

**Mortgagor.**—The mortgagor in a valid mortgage is not entitled to defeat it by reason of its having been assigned by the mortgagee as security for a usurious debt. Warner *v.* Gouverneur, 1 Barb. (N. Y.) 36; Stevens *v.* Reeves, 33 N. J. Eq. 427.

**Between Indorser and Indorsee.**—But in an action by an indorsee against an

other and separate dealings between the same parties does not constitute any defense against an action upon a contract not itself so tainted.<sup>1</sup>

**8. Strangers to the Usury.**—If a third person, either for accommodation, or in payment of his own debt, contracts to pay the usurious debt of another, he cannot avoid the contract on the ground of such usury.<sup>2</sup> Conversely, if a third person at the debtor's request furnishes the means with which to discharge a usurious debt, the debtor cannot plead usury against the claim of such third person for reimbursement, nor to defeat the original securities in

indorser, the latter may show that the indorsee received the paper as security for a usurious contract made between him and the maker. *Dunscorn v. Bunker*, 2 Met. (Mass.) 8; *Wierner v. Shelton*, 7 Mo. 237.

But usury between the first indorsee of a note and another, will constitute no defense to an action against him on his indorsement, brought by a subsequent indorsee. *Morford v. Davis*, 28 N. Y. 481.

1. *Smead v. Chrisfield*, 1 Disney (Ohio) 18; *Primrose v. Anderson*, 24 Pa. St. 215.

The payment of usurious interest upon the first four notes of a series, does not entitle the maker to plead it as a defense to an action on the fifth. *Riddle v. Rosenfeld*, 103 Ill. 600.

2. *Bearce v. Barstow*, 9 Mass. 45; 6 Am. Dec. 25; *Gathercole v. Young*, 61 N. H. 121; *Dennistoun v. Potts*, 26 Miss. 13.

B was indebted to the plaintiff for a usurious loan. The defendant was indebted to B in an amount larger than his debt to the plaintiff. The defendant, in payment of his own debt, gave a note to the plaintiff for the amount of B's debt, including the usury, and paid B the balance in money. In an action on the note, it was held that the defendant, not being a party to the usury, and having given the note at legal interest in payment of his own valid debt, could not set up the original usury to defeat the note. *Bearce v. Barstow*, 9 Mass. 45; 6 Am. Dec. 25. This case is cited with approval in *Green v. Kemp*, 13 Mass. 515; 7 Am. Dec. 169; *Cook v. Dyer*, 3 Ala. 646; *Reading v. Weston*, 7 Conn. 413; *Botsford v. Sanford*, 2 Conn. 280; *Wales v. Webb*, 5 Conn. 161; *Lowell v. Johnson*, 14 Me. 242; *Stanley v. Kempton*, 30 Me. 120; *Richardson v. Field*, 6 Me. 39; *Tait v. Hannum*, 2 Yerg. (Tenn.) 355; *Allison v. Barrett*, 16 Iowa 280; *Campbell v.*

*Sloan*, 62 Pa. St. 485; *Little v. White*, 8 N. H. 279; *Steele v. Franklin*, 5 N. H. 377; *Dix v. Van Wyck*, 2 Hill (N. Y.) 524.

*A fortiori*, one who assumes payment of an indebtedness incurred by another under a series of current dealings, cannot take any advantage of the fact that usurious interest had been paid by the debtor on items of the account which had been fully paid and settled before the indebtedness in question accrued. *Burwell v. Burgwyn*, 100 N. Car. 389; 105 N. Car. 498.

In an action to foreclose a mortgage given by A to B to secure C's debt, upon which C had made usurious payments, C consented that the amount of such payments might be applied upon the principal debt, "if the law will so apply it." It was held that such application would be made by the court. *First Nat. Bank v. Wood*, 53 Vt. 491.

In *Coulter v. Robertson*, 14 Smed. & M. (Miss.) 18, A held B's note, given for a usurious loan. B arranged with C, who owed him, to have C give his own note to A and take up B's note, which was accordingly done, and B discharged and satisfied C's debt. In an action on C's note to A, it was decided that C could plead the original usury.

In an action upon a note given by the president of a corporation, in his own name, in settlement of a usurious debt of the corporation, the defendant having received from the company the amount of such note, it was held that he could not take advantage of the usury, because he was not privy to the usurious contract. *Drake v. Lowry*, 14 Iowa 125.

**Husband and Wife.**—Where a usurious note given by the husband alone, was secured by a mortgage on the homestead, and executed by both husband and wife, in an action to foreclose, it was held that the wife, though not a

his hands.<sup>1</sup> It has also been decided that a note given in settlement of a usurious debt, but made payable and delivered to a creditor of the usurer in payment of his valid debt, and received by the creditor without notice of the usury, cannot be attacked therefor in his hands.<sup>2</sup>

**IX. ESTOPPEL—1. As Between Original Parties.**—As the prime object of usury laws is to protect the debtor from the oppressive exactions of the creditor, all agreements to the effect that the debtor will not take advantage of the usury are regarded as obtained by the creditor's coercion, and constitute no bar to relief.<sup>3</sup> This is equally true whether such agreement be contemporaneous with, or subsequent to, the usurious transaction;<sup>4</sup> unless, of course, the subsequent agreement amounts to a purging of the usury. Thus, the acceptance by the debtor, without objection, of accounts rendered which include usurious interest, does not estop him to plead the usury when sued for a balance of the account.<sup>5</sup>

**2. As to Third Parties.**—Notwithstanding the favor with which the victim of usury is regarded, he is sometimes estopped by his representations to third parties who have succeeded to the rights of the creditor, in ignorance of the usury and in reliance upon the debtor's statements.

Thus, if the maker of a usurious note or mortgage induces an innocent party to purchase it from the holder, he is estopped, as against such purchaser or his transferee, to set up the usury.<sup>6</sup> So also is the assignor of a bond upon which usurious interest had been received by him for forbearance before the assignment.<sup>7</sup> But clearly there would not be an estoppel as against a purchaser with actual or constructive notice of the usury.<sup>8</sup>

Mere subsequent promises by the debtor to pay the debt do not estop him as against assignees or purchasers, any more than as against the original party.<sup>9</sup> Nor is he estopped, as against an indorsee of his usurious note, by a previous agreement to give a

party to the usury, could attack the mortgage as usurious. *Lyon v. Welsh*, 20 Iowa 578.

1. *Bush v. Livingston*, 2 Cal. Cas. (N. Y.) 66; 2 Am. Dec. 316; *Wendlebone v. Parks*, 18 Iowa 546; *Maples v. Cox*, 74 Ga. 701; *Pothill v. Brown*, 84 Ga. 338; *Pence v. Christman*, 15 Ind. 257.

2. *Breckenridge v. Bullitt*, 3 Litt. (Ky.) 3.

3. *Browning v. Thompson*, 13 B. Mon. (Ky.) 387; *Central Trust Co. v. Burton*, 74 Wis. 329; *Union Nat. Bank v. Fraser*, 63 Miss. 231.

4. *Bosler v. Rheem*, 72 Pa. St. 54; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

5. *Succession of Hickman*, 13 La. Ann. 364.

6. *Henderson v. Hartman*, 65 Miss. 466; *Barnett v. Zacharias*, 24 Hun (N. Y.) 304.

7. *Kenny v. Talbott*, 4 Bibb (Ky.) 39. **Admission that Debt Was Valid.**—The fact that the maker of a note was present at the time of its indorsement, and spoke of it as a good and legal note, and promised to pay it, concealing from the indorsee the fact of usury in its inception, was held not to estop him from defeating an action by such indorsee upon the note, as in the case of *Salomons v. Jones*, 3 Brev. (S. Car.) 54; 5 Am. Dec. 538.

8. *Duquesne Bank's Appeal*, 74 Pa. St. 426.

9. *Bank of Washington v. Arthur*, 3 Gratt. (Va.) 173; *Allison v. Barrett*, 16 Iowa 278.



mortgage to any holder to secure it, nor by actually giving such mortgage to the indorsee at the time of the transfer.<sup>1</sup>

It has been held that a party to accommodation paper who sells it as *bona fide* business paper at a discount exceeding lawful interest, cannot impeach the sale as usurious.<sup>2</sup>

This doctrine is, however, not in harmony with the prevailing rule that a *bona fide* purchaser, at a discount, of accommodation paper from an original party is himself the real lender.<sup>3</sup>

Affidavits or certificates attached to a negotiable instrument or other contract by the debtor, to the effect that it is subject to no defenses and will be paid according to its terms, operate as an estoppel, when relied on by *bona fide* assignees.<sup>4</sup>

The debtor is also estopped by the acts and representations of his authorized agent,<sup>5</sup> even though such agent is the nominal creditor.<sup>6</sup>

The guarantor of a usurious contract is not estopped by his guaranty to plead the usury,<sup>7</sup> particularly as against one knowing its true character.<sup>8</sup>

**3. By Conduct.**—The debtor may, as against an innocent purchaser, estop himself without making any actual representations. Thus, where a mortgagor suffered the mortgaged property to be foreclosed, and took no steps to prevent it on the ground of usury, or to warn bidders, he was precluded from afterwards questioning the title of a *bona fide* purchaser.<sup>9</sup>

#### X. RECOVERY OF PAYMENTS OF USURY—1. By Debtor.—It was at

1. *Musselman v. McElhenny*, 23 Ind. 4; 85 Am. Dec. 445.

2. *Jackson v. Fassitt*, 33 Barb. (N. Y.) 645. See also *Mason v. Anthony*, 3 Abb. App. Dec. (N. Y.) 207; *Dickson v. Vail*, 2 Cin. (Ohio) 103.

The maker of notes to his own order, indorsed and delivered them to his broker, who sold them to the defendant at a discount exceeding legal interest, upon the broker's assurance that the notes were valid business paper. The maker had had previous dealings with the broker, and presumptively knew the custom among purchasers of exacting such representations as were made by the broker. The maker received the proceeds, less the broker's commissions. In an action to have the notes canceled, it was held that he was estopped to plead usury. *Ahern v. Goodspeed*, 72 N. Y. 108.

3. See *infra*, this title, *Accommodation Paper*.

4. *Eitel v. Bracken*, 38 N. Y. Super. Ct. 7; *Hirsch v. Trainer*, 3 Abb. N. Cas. (N. Y.) 274; *Chamberlain v. Townsend*, 26 Barb. (N. Y.) 611; *Mechanics' Bank v. Townsend*, 29 Barb. (N. Y.) 569; *Chapin v. Thompson*, 23

Hun (N. Y.) 12; *Smyth v. Lombardo*, 15 Hun (N. Y.) 415; *Hutchinson v. Abbott*, 33 N. J. Eq. 379.

**Affidavit of Validity.**—The defendant was an accommodation indorser of a note for \$5,000 at nine months with interest, which had its inception on its transfer to the plaintiff, who gave for it \$3,000 in money and \$1,500 in notes. The evidence tended to show that the plaintiff had notice that it was an accommodation note, though he claimed that he bought it as business paper, and in reliance upon a contemporaneous affidavit made by the defendant that the note was subject to no defense of "want of consideration, usury or otherwise." It was held that this affidavit did not estop the defendant from setting up the defense of usury. *Lewis v. Barton*, 106 N. Y. 70.

5. *Sage v. McLaughlin*, 34 Wis. 550.

6. *Platt v. Newcomb*, 27 Hun (N. Y.) 186.

7. *Tiedeman v. Ackerman*, 16 Hun (N. Y.) 307.

8. *Fellows v. Wallace*, 8 Abb. N. Cas. (N. Y.) 351.

9. *Elliott v. Wood*, 53 Barb. (N. Y.) 285.

one time held in *England*, that the borrower was in *pari delicto* with the lender, and therefore could not recover back usury voluntarily paid;<sup>1</sup> but this doctrine was finally repudiated.<sup>2</sup>

And the prevailing doctrine now is, that the debtor does not pay usury voluntarily, but rather under the constraint and oppression of the creditor.<sup>3</sup>

The common-law rule that when a debtor has paid usury he may bring an action to recover it back, as for money had and received, has been followed in a large number of the states of the Union, in some of which the right of action is, expressly or by implication, given by statute.<sup>4</sup>

1. *Tompkins v. Burnet*, 1 Salk. 22.

2. *Clarke v. Shee*, Cowp. 200.

3. *Schroeppel v. Corning*, 5 Den. (N. Y.) 236; *Cummings v. Knight*, 65 N. H. 202; *Philanthropic, etc., Assoc. v. McKnight*, 35 Pa. St. 470; *Williar v. Baltimore Butchers' Assoc.*, 45 Md. 546; *Coughman v. Drafts*, 1 Rich. Eq. (S. Car.) 414; *Meem v. Dulaney* (Va. 1890), 14 S. E. Rep. 363; *Ware v. Bennett*, 18 Tex. 794.

In *North Carolina*, it is still held that both parties are in *pari delicto*. *Latham v. Washington Bldg., etc., Assoc.*, 77 N. Car. 145.

4. *Palmer v. Lord*, 6 Johns. Ch. (N. Y.) 95; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *Porter v. Mount*, 41 Barb. (N. Y.) 561; *Palen v. Johnson*, 46 Barb. (N. Y.) 21; *Cummings v. Knight*, 65 N. H. 202; *Reading v. Weston*, 7 Conn. 409; *Brown v. McIntosh*, 39 N. J. L. 22; *Grow v. Albee*, 19 Vt. 540; *Nichols v. Bellows*, 22 Vt. 581; 54 Am. Dec. 85; *Webb v. Wiltshire*, 19 Me. 406; *Pierce v. Conant*, 25 Me. 33; *Houghton v. Stowell*, 28 Me. 215; *Furlong v. Pearce*, 51 Me. 299; *Wood v. Lake*, 13 Wis. 84; *Nelson v. Betts*, 30 Mo. App. 10; *Hodge v. Owings*, 5 T. B. Mon. (Ky.) 91; *Kirkpatrick v. Wherritt*, 7 B. Mon. (Ky.) 388; *Wood v. Kennedy*, 19 Ind. 68; *Shockley v. Shockley*, 20 Ind. 108; *Bexar Bldg., etc., Assoc. v. Robinson*, 78 Tex. 163; 22 Am. St. Rep. 36; *Walker v. Villavaso*, 18 La. Ann. 712.

*Indebitatus assumpsit* lies to recover back usury paid, and the borrower need not join with him a co-obligor who was his surety. *Davis v. Hoy*, 2 Alk. (Vt.) 303.

But one of two joint makers of a note on which illegal interest is charged by a national bank, cannot recover from the bank the penalty allowed by the *United States Rev. Stat.*, § 5198,

authorizing the person who pays usurious interest to a national bank to recover twice the amount paid, where the illegal interest was paid by the other maker. *Concordia, etc., Bank v. Rowley* (Kan. 1894), 34 Pac. Rep. 1049.

The borrower is entitled to recover back usurious interest, without offering to return a quantity of worthless railroad stock, which the lender had pretended to sell to him as a part of the usurious transaction. *Heath v. Page*, 48 Pa. St. 130.

But where the contract of loan is not void, except as to the excess of interest stipulated to be paid, the lender is not liable to an action for excess of interest paid, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. *McBroom v. Scottish Mortg., etc., Co.*, 153 U. S. 318.

**Recovery from Loan Agent.**—Where an agent to negotiate a loan did so at usurious rates and received a bonus, and afterward bought the note and collected the principal and interest, it was held that he was a party to the usury, and that the borrower could recover back from him. *Williams v. Wilder*, 37 Vt. 613.

**Form of Action.**—The action given by the statute may be brought either at law or in equity, though the usury was paid under a decree in equity. *Sherley v. Trabue*, 85 Ky. 71.

**Judgments.**—It is not a sufficient answer to an action to recover back usurious interest paid, that the defendant has recovered judgment upon the debts embracing the usury, and has satisfied the judgment out of the plaintiff's property. *Scott v. Shropshire*, 2 Duv. (Ky.) 153.

But in *Kearney v. First Nat. Bank*, 129 Pa. St. 577, following *Hopkins v. West*, 83 Pa. St. 109, it was held that

In a number of states, however, the rule is established that in the absence of a statute clearly giving the right, no recovery can be had, either at law or in equity, of excessive interest voluntarily paid.<sup>1</sup> Also that, in the absence of statute, volun-

usury included in a judgment which had been paid, could not be recovered back.

The statutory right of a debtor to recover back usurious interest, is not affected by the fact that at the time the debt was created he gave the creditor a power of attorney to confess judgment thereon, and expressly waived his right to set up the defense or claim of usury. *Mellon's Appeal* (Pa. 1886), 7 Atl. Rep. 201.

**Payments by Third Party.**—In an action by the debtor to recover back usury paid under a mortgage, it is sufficient that such payments were made to the mortgagee by a subsequent purchaser of the mortgaged property, under an agreement with the mortgagor to pay the debt as part of the purchase price. *Nelson v. Cooley*, 20 Vt. 201.

In *Hazard v. Smith*, 21 Vt. 123, it was held that, under similar circumstances, the action must be brought in the name of the original debtor, and not of the third person who had assumed the debt and made the payment.

Where A, at the instance and request of B, borrowed money from C at usurious rates to loan to B, it was held that A could not recover from B the usury so paid to C. *Swift v. Adkins*, 2 Lea (Tenn.) 137.

A owed B, and C owed A; A procured C to pay B the amount of A's debt to B, with usurious interest, and gave C credit for the amount so paid. It was held that this was in effect a payment by A to B, and that A could recover of B the amount of usury paid by C. *Naylor v. Hays*, 7 B. Mon. (Ky.) 478. But where, under like circumstances, C gave his note to B at A's request, and also paid B usurious interest, it was held that the note was usurious and void. *Thompson v. Thompson*, 8 Mass. 135.

**Payment to Innocent Purchaser.**—In an action by the borrower against the lender to recover back usurious interest paid on a note in the hands of an indorsee, it must be alleged, not only that the note was transferred before maturity and without notice by the indorsee of the usury, but also that he purchased for value. *Dunn v. Moore*, 26 Ohio St. 641.

**Corporations.**—The *New York* statute forbidding corporations to set up the defense of usury by implication, prevents them from suing to recover back usury paid. *Butterworth v. O'Brien*, 23 N. Y. 275.

1. *Tompkins v. Hill*, 28 Ill. 519; *Perkins v. Conant*, 29 Ill. 184; 81 Am. Dec. 305; *Manny v. Stockton*, 34 Ill. 306; *Carter v. Moses*, 39 Ill. 539; *Pitts v. Cable*, 44 Ill. 103; *Scroggin v. Brown*, 14 Ill. App. 340; *Lake v. Brown*, 116 Ill. 83; *Nutting v. McCutcheon*, 5 Minn. 382; *Woolfolk v. Bird*, 22 Minn. 341; *Cornell v. Smith*, 27 Minn. 132; *Shelton v. Gill*, 11 Ohio 417; *Graham v. Cooper*, 17 Ohio 605; *Williamson v. Cole*, 26 Ohio St. 207; *Morrison v. Helm*, 4 Bibb (Ky.) 460; *Thompson v. Ware*, 8 B. Mon. (Ky.) 26; *Hopkins v. West*, 83 Pa. St. 109; *Smith v. Coopers*, 9 Iowa 376; *Nicholls v. Skeel*, 12 Iowa 300; *Quinn v. Boynton*, 40 Iowa 304; *Phillips v. Gephart*, 53 Iowa 396; *Fayetteville Merchants' Bank v. Lutterloh*, 81 N. Car. 142; *Dickerson v. Raleigh, etc., Land, etc., Assoc.*, 89 N. Car. 37; *Blain v. Willson* (Neb. 1891), 49 N. W. Rep. 224; *New England, etc., Security Co. v. Aughe*, 12 Neb. 504; *Reid v. Duncan*, 1 La. Ann. 265; *Spurlin v. Millikin*, 16 La. Ann. 217; *Harris v. Hull*, 70 Ga. 831; *Livingston v. Burton*, 43 Mo. App. 272; *Rutherford v. Williams*, 42 Mo. 18; *Moseley v. Smith*, 21 Tex. 441; *Van Vleet v. Sledge*, 45 Fed. Rep. 743; *Longworth v. Taylor*, 1 McLean (U. S.) 514.

In *Illinois*, it is held that where the debtor does not take steps to prevent the foreclosure of a deed of trust, by means of which the debt and usurious interest are collected by the creditor, it is a voluntary payment, and the usury cannot be recovered back. *Tyler v. Massachusetts Mut. L. Ins. Co.*, 108 Ill. 58; *Lake v. Brown*, 116 Ill. 83.

Where a mortgagor has conveyed the mortgaged property to the mortgagee, in consideration of being released from personal liability on the debt, this amounts to a voluntary payment of the entire debt; and he cannot afterward attach the mortgage or deed on the ground that the debt was usurious. *Mason v. Pierce*, 142 Ill. 331.

tary payments of usury cannot be set off in an action on the debt.<sup>1</sup>

It has been held that under a statute authorizing a suit by the borrower to recover usury paid, it cannot be recouped in an action on the debt; that the remedy provided is exclusive.<sup>2</sup>

Actual payment of the usury is indispensable to support an action to recover it back. It is not sufficient that the debtor has given an obligation for its payment, to which the defense of usury could be pleaded.<sup>3</sup>

In accordance with the rule that payments made by the debtor will be applied to the valid part of the debt, it has been held that so long as the whole amount paid does not exceed the debt and lawful interest, the debtor cannot maintain an action to recover back.<sup>4</sup>

But it has also been held, in the same state, that one who pays money upon a contract absolutely void for usury, may recover back, not merely the amount of usury, but the entire amount paid, upon the ground of failure of consideration. *Town v. Wood*, 37 Ill. 512.

In *Minnesota*, it is held that the debtor's allowing a mortgage to be foreclosed for an illegal excess of unpaid interest, claimed in the notice of sale to be due, is equivalent to a voluntary payment, which cannot be recovered back. *Taylor v. Burgess*, 26 Minn. 547.

**Absolute Conveyance.**—Upon the principle that when a debtor voluntarily pays a usurious debt he cannot recover it back, it is held in *Georgia* that a deed given in absolute payment of an existing debt is not affected by usury therein. *Harris v. Hull*, 70 Ga. 831.

In *Maine*, the same doctrine is applied to absolute conveyances in payment of usurious debts, though the right to recover back usury is recognized. *Hale v. Jewell*, 7 Me. 435; 22 Am. Dec. 212. But see *Reading v. Weston*, 7 Conn. 409.

**Payment to Purchaser.**—Where a note tainted with usury is sold by the payee for no more than the sum actually loaned, with lawful interest, and the maker pays to the purchaser the full amount of the note, he cannot, in the absence of statute, sue the original payee to recover back the usury. *Atwell v. Gowell*, 54 Me. 358.

The purchaser of a note at a discount of twenty-five per cent., cannot lawfully recover from his indorser more than the amount he paid, with interest. But

if the indorser voluntarily pays the whole amount of the note, he is not entitled to recover back the excess, because there was no usury in the transaction. *May v. Campbell*, 7 Humph. (Tenn.) 450.

1. *Hinman v. Goodyear*, 56 Conn. 210; *Fayetteville Merchants' Bank v. Lutterloh*, 81 N. Car. 142.

2. *Matthews v. Paine*, 47 Ark. 54; *Pixley v. Ingram*, 53 Hun (N. Y.) 93; *Thomas v. Presbrey* (D. C. App. 1894), 21 Wash. L. Rep. 659.

**National Bank Act.**—The same construction has been placed upon analogous provisions of the Act of Congress of June 3d, 1864. *Barnett v. Muncie Nat. Bank*, 98 U. S. 555; *Cook v. Lillo*, 103 U. S. 792; *Driesbach v. Second Nat. Bank*, 104 U. S. 52; *Walsh v. Mayer*, 111 U. S. 31; *Carter v. Carusi*, 112 U. S. 478.

In *New Hampshire*, payment of illegal interest on a note subsequently transferred by the plaintiff, may be set off in an action on another note. *Ashland Sav. Bank v. Bailey* (N. H. 1890), 21 Atl. Rep. 221.

3. *Chaplin v. Currier*, 49 Vt. 48.

Where the lender, at the time of making the loan, counted out \$1,000, and handed \$900 of it to the borrower, retaining the balance as a bonus, and taking the borrower's note for \$1,000, the Statute of Limitations did not begin to run against an action to recover back the usury, until the payment of the note. *Harvey v. National Life Ins. Co.*, 60 Vt. 209.

4. *Josey v. Davis* (Ark. 1892), 18 S. W. Rep. 185; *Hawkins v. Welch*, 8 Mo. 490; *Tyler on Usury*, p. 421 *et seq.*

Where both debt and usurious inter-

Statutes authorizing an action to be brought within a short period of limitation, have been regarded as cumulative, and not as prohibiting the common-law action at any time within six years.<sup>1</sup>

It has also been held that the general Statute of Limitations will not, so long as any part of the debt remains unpaid, cut off the debtor's right to recover back, by way of set-off, usurious payments made on the debt.<sup>2</sup> But the soundness of this proposition has been questioned upon the ground that the right of action to recover back the usurious interest accrues immediately upon its payment, and if the debtor neglects to sue during the statutory period, he ought not to be allowed to afterward assert the same cause of action by way of set-off or recoupment. And it has been so decided in well-considered cases.<sup>3</sup>

The statute begins to run against the right to recover back, from the time of actual payment, and not from the time of the agreement to pay.<sup>4</sup>

Equity has jurisdiction of suits to recover back usurious payments.<sup>5</sup>

**2. By Third Parties.**—Although the general rule is that the right to plead usury is a privilege personal to the debtor, it is held that his cause of action to recover back usury is a vested right and passes to his assignee in bankruptcy, or for the benefit of creditors;<sup>6</sup> to a receiver appointed in supplementary proceed-

est are included in a note, payment of the usury may be deemed a payment on the principal; but if the usury is evidenced by a separate note, which the debtor pays, he may treat such payment as having no connection with the debt, and sue to recover it back. *Nichols v. Bellows*, 22 Vt. 581; 54 Am. Dec. 85. See also *Davis v. Converse*, 35 Vt. 503.

The doctrine stated in the text is criticised and referred to as an "indefensible theory," in the recent case of *Cummings v. Knight*, 65 N. H. 202.

Notwithstanding a statute requiring suits to recover usury to be brought within a year from time of payment, the debtor when sued may, more than a year after making a partial payment, interpose a plea of usury. He has the option to treat such payment as applied on the principal and lawful interest and not on the usury. *Neale v. Rouse* (Ky. 1892), 19 S. W. Rep. 171.

1. *Porter v. Mount*, 41 Barb. (N. Y.) 561; *Wood v. Lake*, 13 Wis. 84; *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300.

2. *Smith v. Glanton*, 39 Tex. 365; 19 Am. Rep. 31.

3. *Cummings v. Knight*, 65 N. H.

202; *Davis v. Converse*, 35 Vt. 503; *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300.

4. *Furlong v. Pearce*, 51 Me. 299; *Rushing v. Rhodes*, 6 Ga. 228.

5. *Clarkson v. Garland*, 1 Leigh (Va.) 147; *Fay v. Lovejoy*, 20 Wis. 403; *Weatherhead v. Boyers*, 7 Yerg. (Tenn.) 545; *Conner v. Myers*, 7 Blackf. (Ind.) 337.

Even where the right to recover back voluntary payments is denied, the maker of a usurious note, who has been compelled to pay it in the hands of a *bona fide* holder, may, by a bill in equity, recover from the payee the amount of usury, on the ground that the payment was compulsory. *Woodworth v. Huntoon*, 40 Ill. 131; 89 Am. Dec. 340. And in stating an account, equity will credit the debtor with all payments of usurious interest. *Parmelee v. Lawrence*, 44 Ill. 405.

6. *Corcoran v. Powers*, 6 Ohio St. 19; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *Gray v. Bennett*, 3 Met. (Mass.) 522; *Tamplin v. Wentworth*, 99 Mass. 63; *Wheelock v. Lee*, 15 Abb. Pr. N. S. (N. Y.) 24; *Woolfolk v. Plant*, 46 Ga. 422. To the contrary, see *Low v. Mussey*, 36 Vt. 183.

ings against him;<sup>1</sup> and to his administrator.<sup>2</sup> But a judgment creditor, it seems, cannot recover usury paid by his debtor to another, unless the debtor consents or assigns the claim to him.<sup>3</sup>

A surety who pays his principal's debt with knowledge of its usurious character, is entitled to recover back from the creditor, but not from the principal.<sup>4</sup> And when the surety has been reimbursed by the principal, the latter cannot sue to recover back from the creditor, but the action must still be brought by the surety.<sup>5</sup> A surety sued on the debt is not entitled to plead by way of set-off the payment of usurious interest by the principal.<sup>6</sup>

**3. Demand Before Suit.**—It seems that no demand by the debtor is necessary before bringing suit to recover back the usury paid, for the reason that the creditor had no legal right to receive it.<sup>7</sup>

**XI. APPLICATION OF PAYMENTS.**—The general rule, recognized by all the courts, is that so long as any part of the principal debt remains unpaid, the debtor has the right to have all payments previously made, applied by the court as so much paid on the debt itself, whether such payments were made as for usurious interest, or generally, and without reference to the usury.<sup>8</sup>

If the statute declares a forfeiture of all interest for usury, as in *Illinois*, all payments of interest must be applied on the principal debt.<sup>9</sup> And the right to such application is not affected by

1. *Palen v. Johnson*, 46 Barb. (N. Y.) 21; 50 N. Y. 49.

2. *Coon v. Swan*, 30 Vt. 6, in which case the usury was collected by the creditor after the death of the debtor, out of the proceeds of a life-insurance policy, payable to the creditor.

3. *Bensley v. Homier*, 42 Wis. 631; *Estill v. Rodes*, 1 B. Mon. (Ky.) 314; *Graham v. Moore*, 7 B. Mon. (Ky.) 53; *Lee v. Fellowes*, 10 B. Mon. (Ky.) 117; *Carmichael v. Bodfish*, 32 Iowa 418; *Good v. Grant*, 76 Pa. St. 52.

In *Tennessee*, a judgment creditor is allowed to maintain a suit, in the nature of a creditor's bill, to recover back usury paid by his debtor to another. See *McKinney v. Memphis, etc., Hotel Co.*, 12 Heisk. (Tenn.) 104; *Summar v. Jarrett*, 59 Tenn. 23.

4. *Whitehead v. Peck*, 1 Ga. 140; *Hargraves v. Lewis*, 3 Ga. 162; *Jones v. Joyner*, 8 Ga. 562; *Kirkpatrick v. Wherritt*, 7 B. Mon. (Ky.) 388.

5. *Hahn v. Walker*, 3 Dana (Ky.) 183.

6. *Mordecai v. Stewart*, 37 Ga. 364.

7. *Albany v. Abbott*, 61 N. H. 157.

8. *Regar v. O'Neal*, 33 W. Va. 159; *Norvell v. Hedrick*, 21 W. Va. 523; *Campbell v. Sloan*, 62 Pa. St. 481; *Farwell v. Meyer*, 35 Ill. 40; *Woolley v. Alexander*, 99 Ill. 188; *Musselman*

*v. McElhenny*, 23 Ind. 4; 85 Am. Dec. 445; *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78; *Threadgill v. Timberlake*, 2 Head (Tenn.) 395; *Smith v. Young*, 11 Bush (Ky.) 393; *Crutcher v. Trabue*, 5 Dana (Ky.) 80; *Ellis v. Brannin*, 1 Duv. (Ky.) 48; *Booker v. Gregory*, 7 B. Mon. (Ky.) 439; *Wood v. Gray*, 5 B. Mon. (Ky.) 93; *Burhans v. Burhans* (Supreme Ct.), 1 N. Y. Supp. 37; *First Nat. Bank v. Miltonberger* (Neb. 1892), 51 N. W. Rep. 232; *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220; *Spengler v. Snapp*, 5 Leigh (Va.) 478; *Fox v. Taliaferro*, 4 Munf. (Va.) 243; *Turner v. Turner*, 80 Va. 379; *Meem v. Dulaney* (Va. 1890), 14 S. E. Rep. 363; *Zeigler v. Scott*, 10 Ga. 389; 54 Am. Dec. 402, and note; *Humphreys v. McCauley*, 55 Ark. 143; *Gill v. Rice*, 13 Wis. 549; *McGee v. Long*, 83 Ga. 156; *Solomon v. Dreschler*, 4 Minn. 278; *Smith v. Coopers*, 9 Iowa 376.

A mortgagor who, with full knowledge of the facts, pays one per cent. more interest than the highest legal rate, is not entitled to have such excess applied on the principal debt. *Wilcox v. Van Voorhis*, 58 Hun (N. Y.) 575.

9. *Fowler v. Equitable Trust Co.*, 141 U. S. 384; *Saylor v. Daniels*, 37 Ill. 331; 87 Am. Dec. 250; *Mitchell v.*

the debtor's giving a renewal note subsequently to the usurious payments.<sup>1</sup>

If the obligation sued on is separate and distinct from that upon which the usurious payment was made, the defendant is not entitled to have such payment deducted; thus, usurious interest paid on one series of notes cannot be deducted in a suit upon a later series given by one who was an accommodation indorser on the first.<sup>2</sup> Nor can usurious interest paid on one note be deducted from another note of the same series.<sup>3</sup> But payments on a note given as a usurious bonus for a loan will be applied on the actual debt.<sup>4</sup>

Some courts hold that the debtor's right to have such application made of payments of usurious interest is lost, if the Statute of Limitations would bar his common-law right to recover back the amount so paid.<sup>5</sup>

**XII. HOW USURY MAY BE PURGED.**—Usurious contracts, even though declared void by the statute, may nevertheless be so thoroughly purged by the subsequent acts of the parties, as to become valid and enforceable. To have that effect, the usurious contract must be abandoned, the usury already paid be returned to the debtor, or credited upon the valid portion of the debt with his full knowledge and consent, and a new contract made, free from all taint of usury.<sup>6</sup> The settlement must be free from sus-

Lyman, 77 Ill. 525; *Harris v. Bressler*, 119 Ill. 467, *overruling* *First Nat. Bank v. Davis*, 108 Ill. 633; *Turner v. Turner*, 80 Va. 379.

1. *Harris v. Bressler*, 119 Ill. 467.

2. *Macungie Sav. Bank v. Hottenstein*, 89 Pa. St. 328.

3. *Maier's Appeal*, 91 Pa. St. 516.

4. *Blymyer v. Colvin*, 127 Pa. St. 114; 241 W. N. C. (Pa.) 315.

5. *Davis v. Converse*, 35 Vt. 503; *Cummings v. Knight*, 65 N. H. 202; *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300. *Contra*, *Smith v. Glanton*, 39 Tex. 365; 19 Am. Rep. 31.

6. *Barnes v. Hedley*, 2 Taunt. 184; *Wickes v. Gogerly*, 1 C. & P. 397; 11 E. C. L. 434; *Preston v. Jackson*, 2 Stark. 237; *Pickering v. Banks*, Forrester 72; *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367; *Early v. Mahon*, 19 Johns. (N. Y.) 147; 10 Am. Dec. 204; *Chamberlain v. McClurg*, 8 W. & S. (Pa.) 31; *Jacobsen v. Bradley* (Supreme Ct.), 1 N. Y. Supp. 676; *Bank of Monroe v. Strong*, *Clarke Ch.* (N. Y.) 76; *McClure v. Williams*, 7 Vt. 210; *Warwick v. Dawes*, 26 N. J. Eq. 548; *Smith v. Stoddard*, 10 Mich. 148; 81 Am. Dec. 778; *Jenkins v. Greenbaum*, 95 Ill. 11; *Esselman v. Wells*, 8 Humph. (Tenn.) 482; *Holland v. Chambers*, 22 Ga. 193;

*Drake v. Chandler*, 18 Gratt. (Va.) 909; *Phillips v. Columbus City Bldg. Assoc.*, 53 Iowa 719.

In *Trusdell v. Dowden*, 47 N. J. Eq. 396, *Van Fleet v. C.*, speaking for the *New Jersey* court of chancery, said: "The principle is settled that the parties to a usurious contract can do nothing which will have the effect to validate it, so as to deprive the debtor of his right to defend on the ground of usury, except by expunging the usurious element."

**What Constitutes Purgation.**—On a settlement of several notes, some of which were usurious, the debtor gave the creditor certain judgments and claims against third parties, and agreed to make good any deficit resulting from a failure to collect them, and all his notes were surrendered to him. Subsequently he gave a note for the amount of such deficit. It was held that he could not plead the original usury. *Coffman v. Miller*, 26 Gratt. (Va.) 698.

Where a borrower received from the lender only \$1,300, for which he gave his note for \$2,000 at an unlawful rate of interest, a subsequent written agreement on his part to treat the note as valid and binding, in consideration of

picion, and the debtor's knowledge of all the facts in relation to the usury must be made to appear.<sup>1</sup>

The doctrine that to constitute purgation there must be a restoration of whatever usury has been paid, and a complete removal of the usurious element, seems to have been departed from in a number of cases which hold that where a usurious contract is canceled, the usury paid or secured by a separate obligation, and a new contract made for the valid portion of the debt, with legal interest, the latter is free from usury.<sup>2</sup> It has also been held that a new contract executed by a third party for the amount due, upon

\$1 and the repayment of all usurious interest previously paid, and a stipulation for lawful interest thereafter, did not in any manner purge the transaction, the chief element of usury consisting of the \$700 over the amount actually loaned, being allowed to remain in the note. *El Paso Bldg., etc., Assoc. v. Lane*, 81 Tex. 369.

Usury in a loan association is not purged by a subsequent agreement reducing the number of shares, the premium, and payments, where the premium to be paid at the longest time the loan can run, as modified, in addition to the specified rate of interest, amounts to more than the legal rate. *International Bldg., etc., Assoc. v. Biering* (Tex. 1894), 25 S. W. Rep. 622.

**New Promise.**—If the parties to a usurious engagement state an account, and in good faith agree upon a sum which would be due for principal and legal interest, after deducting all that has been paid beyond legal interest, and a new promise is thereupon made to pay that sum, such promise is free from the original usury, and valid in law. *Barnes v. Hedley*, 2 Taunt. 184; *Wright v. Wheeler*, 1 Camp. 165; *Gray v. Fowler*, 1 H. Bl. 462.

In *Taylor v. Morris*, 22 N. J. Eq. 606, De Pue, J., speaking for the court of errors and appeals, said: "If the immediate parties to the transaction repent, and by mutual consent the usurious security be surrendered, a new promise to pay the sum loaned, with legal interest, may then be enforced, on the principle that the parties have purged the transaction of its original vice. But, as between the parties to the usurious instrument, or as against a subsequent holder with knowledge of the defect, the original taint attaches to all substituted obligations or securities, however remote, unless the original vice be removed by expunging the usurious element."

In *Phillips v. Columbus City Bldg. Assoc.*, 53 Iowa 719, the court, by Rothrock, J., said: "It cannot, we think, be seriously questioned that the parties in interest to a usurious contract may, by a new contract, purge the transaction of usury. Suppose, in the case of an ordinary loan of money at usurious rates of interest, after the payment of several installments of such interest, the lender should credit the note with the full amount thereof, and call the attention of the borrower thereto, and the borrower should assent to such credit, and afterward make his payments in such time and in such amounts as that no usury whatever is exacted. Surely such a modification of the original contract would be binding upon the parties. It purges the original contract of usury. Under such a modification the usurious interest is in effect paid back, and a new contract is made which is free from the original taint of usury."

1. *Bank of Monroe v. Strong, Clarke Ch. (N. Y.) 76*; *Jackson v. Cassidy*, 68 Tex. 282.

2. *Fowler v. Garret*, 3 J. J. Marsh. (Ky.) 682; *Postlethwait v. Garrett*, 3 T. B. Mon. (Ky.) 345; *Chadbourn v. Watts*, 10 Mass. 121; 6 Am. Dec. 100; *Kilbourn v. Bradley*, 3 Day (Conn.) 356; 3 Am. Dec. 273; *Gerlaugh v. Basset*, 20 Wis. 671. The soundness of these decisions may be questioned, on the ground that neither the payment of the usury, nor the giving of a separate obligation therefor, indicates any repentance for the unlawful transaction, but rather tends to prove the contrary.

**Separation of Usury.**—In the case of *Siesel v. Harris*, 48 Ga. 652, it was decided that the payment of a portion of a usurious debt and the giving of new notes for the balance did not amount to a purgation, notwithstanding such settlement was made upon the



the surrender of the usurious contract, is valid,<sup>1</sup> particularly where the original debtor has paid, or promised to pay, such third party the full amount for that purpose.<sup>2</sup>

It is not essential that the amount of usury paid should actually be returned to the debtor; it is sufficient if he receives a valuable and *bona fide* consideration for the settlement and release of the usury; as where the debtor, in payment of a usurious debt, conveys property to the creditor at a price greatly exceeding its real value, in consideration of releasing the usury.<sup>3</sup> Of course, if no usury has been paid, but merely reserved, it is sufficiently purged by a surrender of the contract, and the giving of a new one with the usurious element excluded.<sup>4</sup> But if there is any uncertainty as to whether the usury was entirely excluded, the whole matter will be judicially investigated.<sup>5</sup> Though a release under seal of all claim on account of the usury, made contemporaneously with the loan, is treated as a mere subterfuge, and no bar to a recovery

debtor's threatening to plead usury against the enforcement of the original security.

1. *Stanley v. Kempton*, 30 Me. 118.

2. *Wales v. Webb*, 5 Conn. 154.

**Promise by New Party.**—In the case of *Turner v. Hulme*, 4 Esp. 11, a debtor had been lodged in prison upon execution, the debt originally being usurious; and the creditor released him upon receiving the note of two other persons for the entire amount claimed. Lord Kenyon ruled that usury could not be objected against this new note. The doctrine of this decision at *nisi prius* was strongly disapproved and rejected in *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86, in which case Parker, C. J., speaking for the majority of the court, said: "It can hardly be supposed that a usurious lender of money can screen himself from the effects of the law by giving up the security originally taken, and substituting another in its place. If this can be done, much ingenuity is not required to evade and defeat the statute."

**Renewal Note.**—The indorser of a note, being ignorant of the fact that it was usurious, gave the payee, who was a party to the usury, a new note signed by him as maker, for the amount. In an action on the new note, it was held that the trial court erred in charging the jury that the note in suit was a new contract, purged of the taint of usury. It was in effect merely a renewal note, and open to the same defense as the former. *First Nat. Bank v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 453.

3. *Broadwell v. Lair*, 10 B. Mon. (Ky.) 220.

**Reconveyance.**—Property having been sold and bought in by the creditor, under a trust deed securing a usurious loan, the parties agreed upon a settlement under the terms of which a portion of the land was reconveyed to the debtor, and he gave his note and a deed of trust for the purchase price. It was held that the usury in the original loan did not affect the new note. *Ryan v. Newcomb*, 125 Ill. 91.

Where usurious interest had been paid on notes given for a portion of the purchase price of land, and afterward the land depreciated in value to less than the amount of principal and legal interest then due, whereupon the purchaser reconveyed to the vendor and the notes were surrendered, it was held that the purchaser could not maintain a bill to recover back the usurious interest paid. *Smith v. Berry*, 5 B. Mon. (Ky.) 317.

**After Repeal of Statute.**—After the abolition of the usury laws, the parties to a mortgage, usurious when made, agreed upon a settlement whereby the mortgagor conveyed the land absolutely to the mortgagee in payment of the debt. It was held that the settlement was valid. *Bullard v. Jones*, 68 Ga. 472.

4. *DeWolf v. Johnson*, 10 Wheat. (U. S.) 367; *Martin v. Hall*, 9 Gratt. (Va.) 8.

5. *Denny v. Williamson*, 4 B. Mon. (Ky.) 372.

A note tainted with usury was by agreement of the parties resurrendered and a note for a certain quantity of wheat, estimated at a price equal to the

of the usury paid,<sup>1</sup> still it seems that such a release, executed long after the payment, is effectual, though without actual consideration, the absence of which is, in contemplation of law, supplied by the seal.<sup>2</sup> If the contract is wholly void in its inception, no subsequent act of the parties, however formal, can make it valid;<sup>3</sup> thus, a title absolutely void under the *Georgia* statute on account of usury does not become a valid security by subsequently purging the debt.<sup>4</sup> Ordinarily, however, there is a moral obligation to pay the principal and legal interest, which furnishes a good consideration for a new promise of such payment.<sup>5</sup>

Where a usurious obligation has been canceled, and a new one given for the valid debt, an agreement that a security given for the former shall stand as security for the latter is valid and enforceable in equity.<sup>6</sup> But a usurious mortgage is not rendered valid by a subsequent agreement to treat it as purged in consideration of a deduction allowed by the creditor in the settlement of other and separate matters.<sup>7</sup>

The creditor cannot of his own motion purge a contract and escape the penalty by merely indorsing or crediting the amount of the usury as so much paid upon the principal. The full consent of the debtor is indispensable.<sup>8</sup>

There is, however, one case in which the creditor alone may escape from his usury; as where he has made a contemporaneous or subsequent oral agreement to extend the time of payment of an obligation valid by its terms, upon payment of usurious interest, which agreement has not been executed; and by bringing suit on the original obligation, he is deemed to have abandoned such agreement, and thus the usury contemplated is purged.<sup>9</sup>

**XIII. SUBSTITUTED AND RENEWED CONTRACTS.**—So long as the original element of usury remains, and until it has been thoroughly purged by the deliberate act of the parties, the taint of usury attaches to all subsequent contracts and securities, substituted for

full amount of the cash note, was given in its place. It was held that the wheat note was a mere substitute, and usurious. *Dunning v. Merrill*, *Clarke Ch.* (N. Y.) 252.

1. *Herrick v. Dean*, 54 Vt. 568.

2. *Wing v. Peck*, 54 Vt. 245.

3. *Solomons v. Jones*, 3 Brev. (S. Car.) 54; 5 Am. Dec. 538; *Moncure v. Dermott*, 13 Pet. (U. S.) 345.

4. *Johnson v. Griffin B. & T. Co.*, 55 Ga. 691.

5. *Howser v. Planters' Bank*, 57 Ga. 95.

6. *Martin v. Hall*, 9 Gratt. (Va.) 8; *Warwick v. Dawes*, 26 N. J. Eq. 548.

7. *Warwick v. Marlatt*, 25 N. J. Eq. 188.

8. *National Bank v. Eyre*, 52 Iowa 114; *Gray v. Brown*, 49 Me. 544; *Miller v. Hull*, 4 Den. (N. Y.) 104; *Kirkpat-*

*rick v. Houston*, 4 W. & S. (Pa.) 115.

**Unauthorized Credit.**—In *Jackson v. Cassidy*, 68 Tex. 282, *Willie, C. J.*, said: "This vice in the contract was not cured by the entry, after the sale, of a credit to the borrower sufficient to reduce the interest to twelve per cent. per annum. The law does not allow the usurer to evade punishment in that way. It will not allow him to violate its provisions, take the chances for collecting the unlawful interest, and, when detected, by a stroke of his pen to place himself in the position of one who has demanded no more than the law allows him. If this can be done, the statute against usury had as well be repealed."

9. *Allen v. Turnham*, 83 Ala. 323; *Van Beil v. Fordney*, 79 Ala. 76; *Masterson v. Grubbs*, 70 Ala. 406.

or given in renewal of the original debt, no matter how many times removed; and the debtor has the same right of defending against the last substitute or renewal as if it were the original contract.<sup>1</sup> Such changes in the form of the obligation have been designated as merely "items in a running account."<sup>2</sup>

When it is shown that the obligation in suit was given as a

1. *Judy v. Gerard*, 4 McLean (U. S.) 360; *Walker v. Bank of Washington*, 3 How. (U. S.) 62; *Vickery v. Dickson*, 35 Barb. (N. Y.) 96; *McCraney v. Alden*, 46 Barb. (N. Y.) 272; *Jackson v. Dominick*, 14 Johns. (N. Y.) 435; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Jackson v. Packard*, 6 Wend. (N. Y.) 415; *Dunning v. Merrill*, Clarke Ch. (N. Y.) 252; *Clark v. Sisson*, 4 Duer (N. Y.) 408; *Clark v. Loomis*, 5 Duer (N. Y.) 468; *Dean v. Howell*, Hill & D. Supp. (N. Y.) 39; *Fields v. Gorham*, 4 Day (Conn.) 251; *Lowell v. Johnson*, 14 Me. 240; *Musgrove v. Gibbs*, 1 Dall. (Pa.) 216; *Campbell v. Sloan*, 62 Pa. St. 481; *Brown v. Second Nat. Bank*, 72 Pa. St. 209; *Schutt v. Evans*, 109 Pa. St. 625; *Miller v. Irwin*, 85 Pa. St. 376; *Campbell v. McHarg*, 9 Iowa 354; *Garth v. Cooper*, 12 Iowa 364; *Allen v. Fogg*, 66 Iowa 229; *National Bank v. Eyre*, 52 Iowa 114; *Baggs v. Loudonback*, 12 Ohio 153; *Beals v. Lewis*, 43 Ohio St. 220; *Maine Bank v. Butts*, 9 Mass. 49; *Jones v. Whitney*, 11 Mass. 74; *Knapp v. Briggs*, 2 Allen (Mass.) 551; *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86; *Stanton v. Demeritt*, 122 Mass. 495; *Cross v. Mann*, 53 Vt. 501; *Nickerson v. Babcock*, 23 Ill. 561; *Hunter v. Hatch*, 45 Ill. 178; *Brown v. Lacy*, 83 Ind. 436; *Rudd v. Planters' Bank*, 78 Ky. 513; *Fitzpatrick v. Apperson*, 79 Ky. 272; *Eslava v. Crampton*, 61 Ala. 507; *Masterson v. Grubbs*, 70 Ala. 406; *Boyd v. Engelbrecht*, 36 N. J. Eq. 612; *Gibson v. Stearns*, 3 N. H. 185; *Border State, etc., Bldg. Assoc. v. Hayes*, 61 Md. 597; *Toney v. Grant*, 18 Miss. 89; *Stanley v. Westport*, 16 Tex. 200; *Flemming v. Mulligan*, 2 McCord (S. Car.) 173; 13 Am. Dec. 707; *Hammond v. Buys*, 1 Ga. 416; *Archer v. McCray*, 59 Ga. 546; *Robbins v. Muldrow*, 39 Kan. 112; *Nelson v. Hurford*, 11 Neb. 465; *Exeter Nat. Bank v. Orchard* (Neb. 1894), 58 N. W. Rep. 144; *Curtis v. Valiton*, 3 Mont. 153.

**Instances of Renewals.**—Where in pursuance of an agreement to pay twenty-three per cent. interest, a loan was made, and a note given drawing twelve

per cent., the highest legal rate, which was several times renewed, the excess of interest being paid at each renewal except the last, which was for the sum loaned and twelve per cent. interest, it was held that equity would not attempt to separate the transactions, but would treat the last note as usurious. *Lee v. Peckham*, 17 Wis. 383. And see *Doyle v. Holland* (Neb. 1894), 57 N. W. Rep. 989.

Notes given for a debt bore a valid rate of interest on their face, but it was orally agreed between the parties to pay a usurious rate, and afterward renewal notes were given, but no credit allowed for the payments of excessive interest previously made. It was held that the renewal notes were subject to the defense of usury. *Koehler v. Dodge*, 31 Neb. 328.

**Incorporation of Usurious with Non-Usurious Loan.**—The mere fact that a note which, at the time of obtaining a new loan, was incorporated in a new note given for both debts, was tainted with usury, will not taint the new loan with usury. *Porter v. Jefferies* (S. Car. 1894), 18 S. E. Rep. 229.

**Valid Compromise.**—In *Hooper v. Ferguson*, 57 Iowa 39, a debt bearing usurious interest was paid by giving the creditor a lease of a certain building. Subsequently the lessee executed a release of the lower floor, and in consideration thereof the lessor gave him the note sued on, which was on the basis of the original usurious debt. It was held that the latter note was free from the taint.

**Pleading.**—An allegation that a final settlement was agreed upon between the payee and maker of certain notes, but that, as the maker was not at that time prepared to pay in cash, a new note for the sum found due was given "in payment of said former notes and not in renewal," is not a sufficient reply to an answer setting up usury in the former notes, in that it does describe a settlement and voluntary payment of interest. *Hardman v. Wilson*, 40 Ohio St. 630.

2. *Union Nat. Bank v. Fraser*, 63 Miss. 231.

substitute or renewal of a usurious one, the presumption arises that the taint entered into it also.<sup>1</sup> A substitute or renewal is none the less tainted because it calls for legal interest on the balance of a usurious loan after previous payments of the usury have been deducted.<sup>2</sup> If the original obligation was free from usury, a renewal or substitute which is tainted with that vice is unenforcible;<sup>3</sup> but, as is elsewhere in this article more fully explained, the original obligation is not thereby destroyed or affected.<sup>4</sup> In ascertaining whether a new contract is a substitute or renewal, the fact that there are new or different obligors is a circumstance of some importance, but not necessarily conclusive evidence of a novation so as to exclude the original defense. Illustrative cases are given in the note.<sup>5</sup>

1. *Stanley v. Whitney*, 47 Barb. (N. Y.) 586.

2. *Callanan v. Shaw*, 24 Iowa 441.

3. *Heffner v. Brownell* (Iowa, 1891), 47 N. W. Rep. 979; *Loveland v. Ritter*, 50 Ill. 54; *Berlin v. Mapes*, 38 How. Pr. (N. Y.) 288.

**Usurious Renewals.**—A valid note for \$500 in sixty days not being paid at maturity, the holder agreed to extend the time sixty days upon payment of \$50 for forbearance; whereupon the debtor gave a new note for \$500 payable in sixty days, and also gave a due bill for the \$50. It was held that the new note was usurious and void. *Motle v. Dorrell*, 1 McCord (S. Car.) 350; 10 Am. Dec. 675.

But where a usurious note was renewed by giving two notes, one for the principal debt with legal interest, and the other for the usurious interest, and the former was, after maturity, transferred to the plaintiff without notice of the usury, it was held in an action on the note, that the defense of usury could not be interposed. *Aiken v. Waco State Bank* (Tex. 1891), 16 S. W. Rep. 747. It may be observed that no authorities were cited in support of the view taken by the court in this case, which was that all the usury had centered in the interest note, thus eliminating the vice from the renewed principal note.

Where, on a sale of land, seven notes were given for annual installments of the purchase price, and on the vendor's failing to pay the first note at maturity, a new note was given for a sum much larger than the aggregate of all the seven notes and interest, the latter note was held usurious, the court refusing to regard it as evidence of a new sale of the land at a higher price. *Ogden v. Yoder*, 5 J. J. Marsh. (Ky.) 424.

But the mere fact that a renewal note is for a larger sum than the principal and interest then due on the old note, is not sufficient to establish usury, there being nothing to show the intention of the parties or the consideration of the new note. *Morrison v. Verdinal*, 53 Hun (N. Y.) 63; *Tallman v. Sprague* (N. Y. Super. Ct.), 18 N. Y. Supp. 207.

It is not usury to take a new note in lieu of others, one of which was not then due, and to make no allowance for the time the latter had yet to run. *Keckley v. Union Bank*, 79 Va. 458.

**Renewal Payable in Gold.**—A note payable in gold, given in renewal of one for a like amount payable in treasury notes, is usurious where the gold premium was at the time of renewal greatly in excess of legal interest on the debt. *Yates v. Hackethal*, 57 Ill. 534; 11 Am. Rep. 45.

**Recovery Under Original Contract.**—In replevin under a mortgage to secure a usurious note, the plaintiff was not entitled to recover by reason of a former valid note and mortgage, in renewal of which the note and mortgage in the suit were given. *Barrows v. Thomas*, 43 Minn. 270.

4. See *supra*, this title, *Effect of Usury*.

Where, in consideration of an extension of time upon an overdue note, the maker agrees to pay usurious interest, and the same is afterward included in the amount of another note, a plea of usury must be made to the latter, and not to the former. *Collier v. Soule* (Tex. 1892), 19 S. W. Rep. 506; *Aiken v. Waco State Bank* (Tex. 1891), 16 S. W. Rep. 747.

5. **New Parties.**—A new note given in renewal of a usurious one, some of the obligors in the latter being omitted from the renewal note, is not payment,

Whatever usury the debtor has paid on the original obligation, or on a previous substitute, he is entitled to have deducted from the last substitute.<sup>1</sup>

**XIV. MISTAKE.**—To rebut the presumption of usurious intent arising from the taking or reserving of interest greater than the legal rate, it is always competent for the party to show that the excess was the result of an honest mistake, and that there was in fact no intentional agreement for usury.<sup>2</sup> Such mistakes most fre-

and the taint of usury is carried into it. *Kendall v. Crouch*, 88 Ky. 199.

After the death of the obligor in a usurious bond, a friend of his, who was ignorant of the usury, and to prevent a law suit, gave his own bond in lieu of the former. It was held that the new bond was usurious and void. *Edwards v. Skirving*, 1 Brev. (S. Car.) 548.

**Renewals by Sureties and Indorsers.**

—A surety upon a note tainted with usury, to which he was a party, received it from the holder for the purpose of getting it secured by the maker, and gave the holder his own note in place of it. It was held that this was a mere substitution, and usury could be pleaded to the new note. *Botsford v. Sanford*, 2 Conn. 276.

Where the sureties on a bond tainted with usury gave a note to the payee, it was held, in an action on the note, that the sureties were entitled to credit for all usurious interest paid under the bond. *Moore v. Johnson*, 34 W. Va. 672.

A substituted note given by a surety in settlement of his liability on a former note which was given by his principal for a balance due upon a debt, upon which usurious interest had previously been paid, is not a usurious contract or assurance within the meaning of the statute. *Craig v. Butler*, 9 Mich. 21.

Substituting an acceptance for a bill on which the acceptor was an indorser, without any new consideration, does not cut out the defense of usury. *Jones v. Holcombe*, 60 Ga. 665.

**To Creditor's Representatives.**—The debtor can plead usury in the original debt, as against a renewal note given to a deceased creditor's personal representatives. *Van Ausdale v. Potter*, 41 Ohio St. 677.

Renewal notes given to a residuary legatee in place of usurious ones given to the testator, do not prevent the makers from defending against them to the extent of the original usury. *Smith v. Broyles*, 15 B. Mon. (Ky.) 461.

Where principal and usurious inter-

est under a previous note are included in the amount of a new one to the payee's legatee, and the latter note is paid, the maker may sue the legatee to recover the usurious interest. *Eggen v. Huston* (Ky. 1890), 13 S. W. Rep. 919.

1. *Cross v. Mann*, 53 Vt. 501; *Overholt v. National Bank*, 82 Pa. St. 490.

2. *Bevier v. Covell*, 87 N. Y. 50; *Archibald v. Thomas*, 3 Cow. (N. Y.) 284; *Dawson v. Taylor*, 6 Ired. (N. Car.) 225; *Charlton v. Tardy*, 28 Ind. 452.

**Clerical Mistakes.**—A bond was executed on the 23d of May, 1617, for the repayment of a loan of £120 then made, which by its terms was to be paid, together with £12 as interest, "upon the 24th day of May next ensuing." It was shown that in drawing the bond the scrivener had inserted the words "next ensuing" by mistake, and that the parties intended that it should be paid on the 24th day of May in the year next ensuing. The court unanimously agreed that this was not usury, for there was no corrupt agreement between the parties. *Buckley v. Guildbank*, Cro. Jac. 678; 2 Rall. 414.

So where the scrivener had inserted "eleven months," when the actual agreement was for a whole year. *Clarke's Case*, cited in 2 Rall. 414.

So if a mortgage be for £100, with a proviso to be void on payment of £106 at the end of a year, but by mistake of the scrivener it contained no covenant for the mortgagor to have the rents and profits until default, so that in strictness the mortgagee would be entitled both to the interest and the profits, yet this not being expressed, the agreement was not usurious. *Ballard v. Oddey*, 2 Mod. 307.

So where an illiterate scrivener drew a bond for £50 payable in half a year, with £4 interest, instead of payable in one year, as the parties intended. *Nevilson v. Whitby*, Sir W. Jones 396; Cro. Car. 501.

Though the lender has notice of the

quently occur in the computation of interest for fractional parts of a year; and whenever the creditor can show where the mistake occurred, and that he acted in good faith, the charge of usury is thereby rebutted.<sup>1</sup> It is usually a question for the jury, whether a sum in excess of lawful interest was taken through an honest mistake, or corruptly.<sup>2</sup>

Ignorance of the law in respect to usury, or of its effects upon the contract, is not, ordinarily, such a mistake as will relieve the creditor from the consequences of taking a rate of interest beyond that authorized.<sup>3</sup> If, however, the mistake of law was made under the influence of false or deceptive appearances, and not merely from the suggestions of the creditor's own mind, he is entitled to relief from the penalties of usury.<sup>4</sup>

**XV. CONFLICT OF LAWS.**—The general rule is that the question whether a contract is usurious or not is to be determined by the law of the state where it was made, unless the parties have contracted for performance elsewhere.<sup>5</sup> It is equally well settled

mistake in the instrument at the time of bringing suit upon it, this does not make him party to a corrupt agreement. *Bush v. Buckingham*, 2 Vent. 83; *Buckler v. Millard*, 2 Vent. 108.

**Error in Computing Interest.**—A mistake in computation of interest, by which the amount of a bill was made too large, does not prevent a recovery on the bill for the sum really due. *Glasfurd v. Laing*, 1 Camp. 149; *Booth v. Cooke*, 1 Freem. 264.

An account, in settlement of which the note in suit was given, contained various items of debt and interest, and in two items the amount of interest stated exceeded the lawful rate. At the foot of the account was a statement that "in case of errors either way, should any be discovered, they are to be corrected." It was held that the evidence did not establish a usurious agreement. *Stockett v. Ellicott*, 3 Gill & J. (Md.) 123.

Where the maker of an accommodation note drawing the highest legal rate, sold it a few days after its date for its face value, and by oversight, no allowance was made for the accrued interest, there was no usury. *Benjamin v. Rogers* (Supreme Ct.), 10 N. Y. Supp. 777.

A recital in a mortgage that the note secured by it bore interest at twelve per cent., when in fact the note called for only ten per cent. (a lawful rate), does not render the mortgage void for usury. *Ward v. Anderberg*, 31 Minn. 304.

1. *Booth v. Cooke*, 1 Freem. 264; *Bush v. Buckingham*, 2 Vent. 83; *Buckley v. Guildbank*, Cro. Jac. 678; 2 Roll. 414; *Nevison v. Whitby*, Cro. Car. 501; *Bucklin v. Millard*, 2 Vent. 107; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712; *New York Firemen's Co. v. Ely*, 2 Cow. (N. Y.) 678; *New York Firemen's Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Conger v. Tradesman's Bank, Hill & D. Supp.* (N. Y.) 34; *Marvine v. Hymers*, 12 N. Y. 223; *Maine Bank v. Butts*, 9 Mass. 55; *Agricultural Bank v. Bissell*, 12 Pick. (Mass.) 586; *Sutton v. Fletcher*, 6 Blackf. (Ind.) 362; *Livingston v. Bird*, 1 Root (Conn.) 303; *Gibson v. Stearns*, 3 N. H. 185.

2. *Bank of Burlington v. Durkee*, 1 Vt. 399.

3. *Jacks v. Nichols*, 3 Sandf. Ch. (N. Y.) 313; *affirmed* 5 N. Y. 178; *German Bank v. DeShon*, 41 Ark. 331.

4. *Mortimer v. Pritchard*, 1 Bailey Eq. (S. Car.) 505.

5. *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205; *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372; *Sheldon v. Haxton*, 24 Hun (N. Y.) 196; *affirmed* 91 N. Y. 124; *Curtis v. Leavitt*, 15 N. Y. 227; *Pancoast v. Traveler's Ins. Co.*, 79 Ind. 172; *National Bank v. Smoot*, 2 McArthur (D. C.) 371.

Where a debt is contracted in one country, and afterward, in consideration of forbearance, the debtor in another country agrees to pay interest on the debt at a rate higher than that

that it is competent for the parties to contract in good faith for the payment of the debt in another state, with the higher rate of interest allowed there; and such contract will be enforced even in the state where it was made.<sup>1</sup> Where an evidence of debt is made payable in another state, it will be presumed that the parties adopted the interest laws of that state, and the contract will be good, though such rate of interest is higher than allowed by the

allowed by the law of the place where the debt was contracted, but not higher than that allowed by the law of the place where the agreement for such interest was made, it is held that such agreement is valid. *Connor v. Bellamont*, 2 Atk. 382; *Hosford v. Nichols*, 1 Paige (N. Y.) 220; Story on Conflict of Laws (8th ed.), § 293. On the other hand, if the interest so agreed to be paid is lawful in the place where the debt was contracted, but higher than the rate allowed in the place where the interest was stipulated for, it is held that the stipulation cannot be enforced. *Dewar v. Span*, 3 T. R. 425; *Stapleton v. Conway*, 3 Atk. 726. See also *Rose v. Phillips*, 33 Conn. 570.

1. *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205; *Andrews v. Hoxie*, 5 Tex. 171; *Consequa v. Willings*, Pet. (C. C.) 225; *Robinson v. Bland*, 2 Burr. 1077; *Thompson v. Powles*, 2 Sim. 194; *Harvey v. Archbold*, 1 R. & M. 184; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Healy v. Gorman*, 15 N. J. L. 328; *Houghton v. Page*, 2 N. H. 42; *Bard v. Poole*, 12 N. Y. 495; *Davis v. Garr*, 6 N. Y. 124; 55 Am. Dec. 387; *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Roberts v. McNeely*, 7 Jones (N. Car.) 506; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Berrien v. Wright*, 26 Barb. (N. Y.) 208; *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Kennedy v. Knight*, 21 Wis. 340; 94 Am. Dec. 543; *Arnold v. Potter*, 22 Iowa 194; *Robb v. Halsey*, 19 Miss. 140; *Duncan v. Helm*, 22 La. Ann. 418; *Townsend v. Riley*, 46 N. H. 300; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; 31 Am. Dec. 264; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497.

A contract made in *Rhode Island* was valid by the laws of that state, but usurious by the law of *New York*. Notes were given under the contract purporting to be made in *New York*, payable there, and the contract was to be substantially performed there, but the notes were negotiated in *Rhode Island*. It was held that the *Rhode Island* law governed. *Brown v. American Finance Co.*, 31 Fed. Rep. 516.

A note dated, executed, delivered, and made payable in *New York*, given for an existing debt arising in and owned by a resident of another state, is governed by the usury laws of *New York*. *Merchants' Bank v. Southwick*, 67 How. Pr. (N. Y.) 324.

The law of the state where the payee resides and the note is made payable, governs, and not the state where the maker resides and receives the money. *Sharp v. Davis*, 7 Baxt. (Tenn.) 607; *Bowles v. Eddy*, 33 Ark. 645.

Under a contract to loan money in *Germany*, the borrower drew notes in the city of *New York*, made payable there, and mailed them to the payee in *Germany*. It was held that the notes were governed by the usury law of *New York*. Mailing was a delivery in that state. *Heidenheimer v. Mayer*, 42 N. Y. Super. Ct. 506.

**Georgia Doctrine.**—A resident of *Massachusetts* lent money through an agent to a resident of *Georgia*; the money loaned was delivered to the borrower in *Georgia*, and the note for its payment was executed in *Georgia*, secured by mortgage on land situate there, but it was made payable in *Massachusetts*. Under the laws of *Georgia*, the loan would be usurious, by reason of certain deductions from the amount stated in the note; but under the laws of *Massachusetts* the transaction would be valid. In an action brought in *Georgia* upon the note, it was held that to the extent of the usury under the laws of that state, the note could not be enforced. *Blandford, J.*, speaking for the court, said: "If this court should hold that a note made in this state, but payable in the State of *Massachusetts*, for money advanced by the agent of a person who resided in *Massachusetts*, could be collected notwithstanding it contained sixteen per cent. usurious and unlawful interest, then the law of this state as to usury would be inoperative and useless. The money lenders of those states which have no usury laws, but which allow to be collected any rate of interest contracted for, could flood this state

law of the former.<sup>1</sup> But as the courts look to the real intention and not the outward expression of the parties in all cases, contracts

with their agents, and, by the loan of money, exact the highest rates of interest—even one hundred per cent. The contract of lending and borrowing money always includes two agreements—one, by the lender, to deliver the money; and the other, by the borrower, to repay it. As the pleas do not allege that the agreement to deliver the money was to be performed elsewhere, the place of delivery was *Georgia*. It was in the performance of this agreement that the usury was reserved. The whole amount of the usury was deducted from the money delivered, and this was done in *Georgia*. The taint of usury does not result from payment, but from agreement, performed or unperformed. Were payment necessary, the deduction of the usury from the amount of the loan is equivalent to payment, not for the purpose of recovering it back, but for the purpose of affixing the taint, and resisting ultimate payment *pro tanto*. The note bears no usurious interest, but a part of the principal is usury already reserved in *Georgia*, by holding back a part of the loan. That part of the note represents money now in the creditor's possession, and which he has never delivered to the borrower. Suppose the note were for that money only, with eight per cent. interest on it. Would it be collectible because payable in Boston? Would it not be a contract to pay in Boston usury reserved in *Georgia*? Is usury reserved in *Georgia*, by deducting it from the loan, less usury because agreed to be actually paid elsewhere? The parol agreement out of which the note sued on in this case sprung, was made in this state. Part of that agreement was performed in this state. The usury set forth in defendant's plea was paid in this state, and all that was left to be performed of that agreement was the payment of the notes sued on in this state. Whether a contract is made with reference to the place, or state, or county in which it is to be performed is a question of no easy solution. However this may be, there is enough in this case to show that in all likelihood the parties to the contract sued on, contemplated the law of the domicile of the maker as the law which should govern this contract in all respects. There is a portion of this contract

which, under no circumstances, could be enforced in the State of *Massachusetts*—that as to the land upon which it is sought to set up a lien. Nor can we very readily see how any portion of this contract could be enforced in the State of *Massachusetts* against a person resident in the State of *Georgia*." *Martin v. Johnson*, 84 Ga. 481.

**Louisiana Decision.**—A decision which has excited considerable criticism is that of *Depau v. Humphreys*, 8 Martin N. S. (La.) 1, where the question was as to the validity of a note executed and delivered in New Orleans, and made payable in New York, bearing interest at ten per cent., which was a lawful rate by the law of *Louisiana*, but higher than that allowed by the law of *New York*. If the note had been made in the latter state, it would have been entirely void. The supreme court of *Louisiana* decided that it was not usurious; and that, although made payable in *New York*, the interest might lawfully be stipulated for, according to the rate sanctioned in either state; that there may be two places of contract, the place where the contract is actually made, and that in which it is to be paid or performed; and that the contract for interest will be valid unless the law of both places be violated.

Mr. Justice Story dissents from the doctrine of that decision, and cites the views of many continental jurists as opposed to it. Story on Conflict of Laws (8th ed.), § 298 *et seq.*

In *Chapman v. Robertson*, 6 Paige (N. Y.) 627; 31 Am. Dec. 264, Walworth, Ch., expresses his entire concurrence in the *Louisiana* decision. To the same effect, see *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306; *Bank of Louisville v. Young*, 37 Mo. 398; *National Bank v. Smoot*, 2 MacArthur (D. C.) 371.

In *Pratt v. Adams*, 7 Paige (N. Y.) 615, it was held in effect, that a contract for a loan of money may stipulate for a rate of interest lawful where the contract was made, though greater than that where it is to be performed, if it was not intended as a means of evading the usury law of the place of performance.

1. *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651; *Butler v. Edgerton*, 15 Ind. 15.



made payable elsewhere will be denied the protection of the rule under consideration, if it be made to appear that the parties were not acting in good faith, but resorted to that method for the purpose of concealing a transaction, usurious by the law to which they were actually subject.<sup>1</sup> If no place of payment be specified, the law of the place where the debtor resided and where the loan was made and the contract drawn will govern.<sup>2</sup>

The fact that a contract made and to be performed in one state is secured by a mortgage upon land in another, does not affect the rule that the *lex loci contractus* governs. The security is a

1. *Chapman v. Robertson*, 6 Paige (N. Y.) 627; 31 Am. Dec. 264; *Cutler v. Wright*, 22 N. Y. 472; *Balme v. Wombough*, 38 Barb. (N. Y.) 352; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Junction R. Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226; *Bolton v. Street*, 3 Coldw. (Tenn.) 31; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497; Story on Conflict of Laws (8th ed.), § 293a.

In *Andrews v. Pond*, 13 Pet. (U. S.) 65, the court, by Taney, C. J., said: "The defendants allege that the contract was not made with reference to the laws of either state (*New York* and *Alabama*), and was not intended to conform to either. That a rate of interest forbidden by the laws of *New York*, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange in order to evade the law. Now, if this defense is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon a usurious agreement, which neither will execute. Unquestionably, it must be the law of the state where the agreement was made, and the instrument taken, to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases, the agreements were permitted by the *lex loci contractus*, and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere."

The maker of a note resided in Boston, and it was dated and made payable there. The payee and the maker's agent resided in New York, where the contract for the note was made, one of the agreements being that the consideration for the note, in lieu of money, should be certain greatly depreciated bonds, to be taken by the maker at their par value to the amount of the note, it being understood that he was to raise the money he needed by selling the bonds. It was also agreed that he might, at his option, replace the bonds by others of the same value, by paying interest on the face of the note at the rate of twenty-five per cent. for the first year and six per cent. thereafter. In an action on the note brought in *Massachusetts*, where such a contract is not contrary to the statute, it was held that the laws of *New York* governed the contract, and rendered it usurious and void. *Holmes v. Manning* (Mass. 1888), 19 N. E. Rep. 25.

2. Even though the contract was delivered elsewhere. *Morris v. Hockaday*, 94 N. Car. 286; 55 Am. Rep. 607; *Senter v. Bowman*, 9 Heisk. (Tenn.) 14.

Where a citizen of *New York* lent money to a firm in *Iowa*, and took a certificate of indebtedness therefor, dated at the office of the firm in *Iowa*, and in which no place of payment was specified, the interest reserved being valid by the laws of *Iowa*, but usurious by those of *New York*, it was held an *Iowa* contract, and valid. *Potter v. Tallman*, 35 Barb. (N. Y.) 182.

The *Ohio* courts hold that when a note is executed there by a citizen of another state, for money to be used by him in such other state, at a rate of interest valid there, and no place of payment is specified, the usury laws of *Ohio* will not be enforced against it. *Scott v. Perlee*, 39 Ohio St. 63; 48 Am. Rep. 421.

mere incident, and its locality cannot control the rate of interest.<sup>1</sup> Sometimes, however, the locality of the security assists in determining what law the parties had in view in making the contract; as where the land is located in the domicile of the debtor, and the money is received by him there.<sup>2</sup>

Where accommodation paper is executed and made payable in one state, and is given its inception by being discounted in another state, the question of usury in the discount is to be determined by the law of the former state.<sup>3</sup> This is the rule, in the absence of evidence that the original parties intended that the paper should be negotiated elsewhere. If, however, such intention is clearly shown, and it appears that the transaction was *bona fide*, the law of the place of discount will govern.<sup>4</sup>

In a suit in *Virginia* on a note given by a resident of *Texas* for money borrowed of a resident of *Virginia*, and remitted to *Texas*, the note being dated in *Texas* and signed by two sureties, residents of *Virginia*, it was held that it was a *Texas* contract. *Backhouse v. Selden*, 29 Gratt. (Va.) 581.

1. *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367; *Lloyd v. Scott*, 4 Pet. (U. S.) 211; *Newman v. Kershaw*, 10 Wis. 333; *Connor v. Bellamont*, 2 Atk. 382; *Cope v. Alden*, 53 Barb. (N. Y.) 350.

2. See *Fitch v. Remer*, 1 Biss. (U. S.) 337; *Hosford v. Nichols*, 1 Paige (N. Y.) 220; *Balme v. Wombough*, 38 Barb. (N. Y.) 352.

Where a loan was contracted for in Philadelphia, payable in New York and secured by mortgage on land in *Alabama*, where the borrower resided, and where the money was delivered and the securities executed, and the rate of interest reserved was higher than that allowed in *New York*, but was lawful in *Alabama*, and there was no evidence of intention to evade the *New York* law, it was held that the contract should be governed by the laws of *Alabama*. *Hitchcock v. U. S. Bank*, 7 Ala. 386.

An agreement in good faith between a citizen of *Nebraska* and a citizen of *New York* for a loan by the latter to the former at a rate valid in *Nebraska* and to be secured on land in *Nebraska*, is good, even though actually executed in *New York*, where such rate is usurious. *Kellogg v. Miller*, 2 McCrary (U. S.) 395.

Where a note was given in *South Carolina*, secured by mortgage on land in that state, but payable in *North*

*Carolina* at a rate of interest unlawful in the latter state, but lawful in the former, the court of *South Carolina* refused to be governed by the law of *North Carolina*. *Thornton v. Dean*, 19 S. Car. 583; 45 Am. Rep. 796.

3. *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372; *Dickinson v. Edwards*, 77 N. Y. 573; 33 Am. Rep. 671; *overruling Bowen v. Bradley*, 9 Abb. Pr. N. S. (N. Y.) 395; *Wayne Co. Sav. Bank v. Low*, 6 Abb. N. Cas. (N. Y.) 76; *Clayes v. Hooker*, 4 Hun (N. Y.) 231.

In *Dickinson v. Edwards*, 77 N. Y. 573; 33 Am. Rep. 671, *Folger, J.*, remarked: "It is said that there is no violation of the law of this state in the simple act of paying money in solution of a promise to do so, and that, as the act of taking a discount at a rate unlawful by our law was not done in this state, no act against its law was done or to be done here. But the act of taking the unlawful discount is not complete until the note has been paid. It rests in agreement until then. When the note has been paid at the place of payment and the amount gone to the credit of the holder, then is the act first complete, and the law is then also violated, and within this state. It would be a novel and startling doctrine, that the usury laws of a state could not be violated by a transaction agreed upon outside its bounds."

4. *Providence Co. Sav. Bank v. Frost*, 14 Blatchf. (U. S.) 233; *Tilden v. Blair*, 21 Wall. (U. S.) 241; *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566; 37 Am. Rep. 533; *Bank of the State v. Lewis*, 45 Barb. (N. Y.) 340.

If the note be made in one state and discounted in another, at a rate

Judicial notice will not be taken of the usury laws of another state to aid a plea of usury; they must be proved as facts.<sup>1</sup> It has been held also that in the absence of proof, it will not be presumed that another state has any statute against usury;<sup>2</sup> but the better doctrine is in favor of the presumption that the statutes of the sister state are the same as those of the state in which the court is held.<sup>3</sup>

**XVI. IN RESPECT TO NEGOTIABLE INSTRUMENTS**—1. **In General.**—A negotiable instrument is a species of personal property, which may be sold and transferred for whatever price the owner may see fit to accept, even though much less than its face value; and such a transaction, being a mere sale, cannot be affected by the Statute of Usury.<sup>4</sup> Under this head are included bonds, as well

usurious in both, the law of the state where the discount was made governs as to the penalty. *Heath v. Griswold*, 18 Blatchf. (U. S.) 555. See also *Connor v. Donnell*, 55 Tex. 167.

1. *Davis v. Garr*, 6 N. Y. 124; 55 Am. Dec. 387; *Robb v. Halsey*, 19 Miss. 140; *Jones v. Bank of Tennessee*, 8 B. Mon. (Ky.) 122; 46 Am. Dec. 540; *Greenwade v. Greenwade*, 3 Dana (Ky.) 495; *Clinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Reiff v. Bakken*, 36 Minn. 333; *Griffin v. Inman*, 57 Ga. 370.

Where usury is not pleaded, the court will not declare usurious a contract made in another state, though the rate of interest reserved is higher than allowed by the law of the former. In such case it is not incumbent on the plaintiff to prove that such rate was authorized by the law of the state where made. *Reiff v. Bakken*, 36 Minn. 333.

On the other hand, it is held that where the defense of usury is interposed, the plaintiff is not entitled to recover any interest, though a certain note be expressly reserved, where he offers no evidence of his right to such interest by the law of the place of payment. *Camp v. Randle*, 81 Ala. 240.

2. *Smith v. Muncie Nat. Bank*, 29 Ind. 158.

3. *McCraney v. Alden*, 46 Barb. (N. Y.) 272; *Monroe v. Douglass*, 5 N. Y. 447; *Leake v. Bergen*, 27 N. J. Eq. 360.

4. *Judy v. Gerard*, 4 McLean (U. S.) 360; *Lafayette Bank v. State Bank*, 4 McLean (U. S.) 208; *Wycoff v. Longhead*, 2 Dall. (U. S.) 92; *Junction R. Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226; *Holmes v. Williams*, 10 Paige (N. Y.) 326; 40 Am. Dec. 250; *Corning v. Pond*, 29 Hun (N. Y.) 129; *Elwell v. Chamberlain*, 4 Bosw. (N.

Y.) 320; *Ingalls v. Lee*, 9 Barb. (N. Y.) 647; *Maas v. Chatfield*, 90 N. Y. 303; *Churchill v. Suter*, 4 Mass. 156; *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86; *Baily v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385; *Williams v. Reynolds*, 10 Md. 57; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125; *Shackleford v. Morriss*, 1 J. J. Marsh. (Ky.) 497; *Metcalf v. Pilcher*, 6 B. Mon. (Ky.) 529; *Saltmarsh v. Planters', etc., Bank*, 17 Ala. 761; *Capital City Ins. Co. v. Quinn*, 73 Ala. 558; *Alabama Gold L. Ins. Co. v. Hall*, 58 Ala. 1; *Ballinger v. Edwards*, 4 Ired. Eq. (N. Car.) 449; *Brock v. Thompson*, 1 Bailey (S. Car.) 322; *Gimmi v. Cullen*, 20 Gratt. (Va.) 439; *Byrne v. Grayson*, 15 La. Ann. 457.

In *Nichols v. Fearson*, 7 Pet. (U. S.) 107, in regard to the validity of an indorsement of a bill at a discount greater than legal interest, the court, by Johnson, J., said: "The courts of *New York* have gotten over these difficulties by adjudicating that whenever the note or bill, in its inception, was a real transaction, so that the payee or promisee might at maturity maintain a suit upon it, a transfer by indorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper, in its origin, was only a nominal transaction."

Where a note was given by a judgment debtor to the sheriff as security for the payment of an execution, with instructions to sell it and apply the proceeds upon the execution, if the debtor should fail to satisfy the same within ten days, and the sheriff, after the expiration of that time, the execution being unpaid, sold the note at a discount greater than

as bills and notes.<sup>1</sup> The circumstance that the seller accompanied the transfer with his indorsement, guaranty or absolute warranty of payment by the maker, does not convert the transaction into a loan, if the parties acted in good faith.<sup>2</sup> Some authorities, however, hold that a transfer of this character practically amounts to a loan from the indorsee to the indorser, and that if more than legal interest be deducted it becomes usurious.<sup>3</sup>

The mere intention of the parties to a negotiable instrument to raise money upon it at usurious rates, does not vitiate it as between them, when no act has been done to carry the intention into effect.<sup>4</sup>

A common device for concealing usury is to draw a negotiable instrument at legal interest, for an amount larger than the actual debt; but when it is shown that the excess was in the nature of additional interest, the instrument is vitiated as usurious.<sup>5</sup> So, though

legal interest, it was held that the note was valid in the hands of the purchaser. *Tuttle v. Clark*, 4 Conn. 153.

The payee and indorser of a bill, who has been compelled to pay it to one to whom it had been indorsed at a discount greater than legal interest, is entitled to recover the full amount from the drawer and acceptor. *Hosier v. Eliason*, 14 Ind. 523.

A party to negotiable paper void in the hands of the holder on account of usury is entitled to have it delivered up and canceled. *Taylor v. Grant*, 35 N. Y. Super. Ct. 353.

**Purchase of Own Note.**—In *Young v. Miller*, 7 B. Mon. (Ky.) 540, it was considered usurious for a creditor to receive his own note, not yet due, at a discount greater than the highest legal rate of interest, in payment of a debt due from the payee. But unless the transaction was in pursuance of a prior understanding, from which a usurious intent could be inferred, it would seem that the creditor did no more than to buy the paper, as a third person might have done, at an agreed price.

**Payment of Discount by Debtor.**—The purchase of a note and mortgage for less than its face value, the debtor paying to the mortgagee, with the knowledge of the purchaser, the amount of the discount, is not necessarily usurious. The real intention of all the parties to the transaction is to be inquired into. *Stewart v. Hamel*, 91 N. Y. 199.

The purchase of a note in the regular course of business, at a discount greater than legal interest, is not usurious, even though the amount of the discount was, without the knowledge of

the purchaser, furnished by the debtor. *Colehour v. State Sav. Inst.*, 90 Ill. 152.

Where a purchaser of several notes at less than their face value, takes a new note from the maker for the full amount, it is not usury, as the relation of borrower and lender does not exist. *Appeal of Donehue* (Pa. 1888), 15 Atl. Rep. 924.

1. *Moncure v. Dermott*, 13 Pet. (U. S.) 345; *Hausbrough v. Baylor*, 2 Munf. (Va.) 36; *Donnington v. Meeker*, 11 N. J. Eq. 362.

2. *Musgrove v. Gibbs*, 1 Dall. (U. S.) 216; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Mazuzan v. Mead*, 21 Wend. (N. Y.) 285; *Holford v. Blatchford*, 2 Sandf. Ch. (N. Y.) 149; *Manice v. New York Dry Dock Co.*, 3 Edw. Ch. (N. Y.) 143; *Goldsmith v. Brown*, 35 Barb. (N. Y.) 484; *Mechanics' Bank v. Foster*, 44 Barb. (N. Y.) 87; *Western Reserve Bank v. Potter*, *Clarke Ch.* (N. Y.) 432; *Rapelye v. Anderson*, 4 Hill (N. Y.) 474; *Oldham v. Turner*, 3 B. Mon. (Ky.) 67; *Farmer v. Sewall*, 16 Me. 456; *Durant v. Banta*, 27 N. J. L. 624.

In *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256, it is held that the sale of a note or bill with warranty, at an unusual discount, is not even *prima facie* evidence of usury.

3. *McElwee v. Collins*, 4 Dev. & B. (N. Car.) 209; *Collier v. Nevill*, 3 Dev. (N. Car.) 31; *Cowles v. McVickar*, 3 Wis. 725; *Friend v. Duryee*, 17 Fla. 118.

4. *Bank of Monroe v. Strong*, *Clarke Ch.* (N. Y.) 76.

5. *Wilday v. Morrison*, 66 Ill. 532; *Hyde v. Findley*, 26 Miss. 468; *Holmen v. Rugland*, 46 Minn. 400; *Clark*

the instrument be only for the actual debt, and bears lawful interest on its face, it is vitiated by a contemporaneous oral agreement to pay an additional sum or value as interest.<sup>1</sup> And the taking of separate notes, one for the principal debt, and another for the unlawful interest, is a device which will not save the former from the consequences of the statute.<sup>2</sup>

The defense of usury in one obligation cannot be set up in an action on a separate and distinct obligation between the parties.<sup>3</sup>

**2. Exchange.**—Where a note or bill is, for the convenience of the maker, made payable at a place outside of the state, it is not usury to include, besides the highest rate of interest, the current rate of exchange between the two places.<sup>4</sup> But an agree-

*Investment Co. v. McNaughton*, 46 Minn. 8; *Gilder v. Hearne*, 79 Tex. 120; *International Bldg., etc., Assoc. v. Biering* (Tex. Civ. App. 1894), 23 S. W. Rep. 621.

But an agreement by which a borrower agrees to pay a smaller rate of interest than the highest legal rate, without any date being fixed for the payment of the loan, is not usurious, although the note is given for a much larger sum than the amount borrowed. *International Bldg., etc., Assoc. v. Biering* (Tex. Civ. App. 1894), 23 S. W. Rep. 621; *Abbott v. International Bldg., etc., Assoc.* (Tex. Civ. App. 1894), 23 S. W. Rep. 629.

1. *Morton v. Rutherford*, 18 Wis. 298; *Atwood v. Whittlesey*, 2 Root (Conn.) 37; *Willard v. Reeder*, 2 McCord (S. Car.) 369.

**Parol Evidence.**—In the case of *Butterfield v. Kidder*, 8 Pick. (Mass.) 512, however, it was held that evidence of a contemporaneous parol agreement to pay unlawful interest could not be admitted to defeat a note bearing on its face lawful interest.

In *Cousins v. Grey*, 60 Tex. 346, it was held that an agreement, made at the time of executing a note drawing legal interest, that thereafter a new contract should be made with interest usurious by the law in force at the date of the note, renders the note itself usurious.

2. *Clark v. Badgley*, 8 N. J. L. 233; *Wood v. Cuthbertson*, 3 Dakota 328.

In *Glisson v. Newton*, 1 Haywood, (N. Car.) 336; 1 Am. Dec. 559, the court said: "Any shift or device whatsoever, to take more than the interest allowed, and particularly the device of securing the principal and interest by distinct assurances, is incompetent to the purpose of taking the case out of the operation of the act.

. . . Were the act to be evaded by so simple a contrivance as that of taking two securities, the one for principal, the other for the unlawful premium, it would answer no purpose whatsoever."

3. In *Taylor v. Breisch* (Pa. 1887), 11 Atl. Rep. 388, Green, J., said: "All our recent decisions are to the point that a defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties, much less can it be done where the parties are not the same." *Citing Bright v. Banking Co.*, 3 Pa. St. 478; *Maher's Appeal*, 91 Pa. St. 516; *Appeal of Second Nat. Bank*, 85 Pa. St. 528; *Lennig's Appeal*, 93 Pa. St. 301.

4. *Merritt v. Benton*, 10 Wend. (N. Y.) 116; *Williams v. Hance*, 7 Paige (N. Y.) 581.

In *Buckingham v. McLean*, 13 How. (U. S.) 151, Curtis, J., said: "The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury, is that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent; and this reason exists, where the lender discounts the drawer's bill, as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and customary compensation for the loss in value by change of place of payment."

An agreement by the maker of a note drawn in *Illinois* and payable in *New York*, to pay exchange at the time of extending or paying the note, is not *per se* usurious, because exchange may then be in his favor. *Griffin v. Marine Co.*, 52 Ill. 130.

ment for exchange in addition to the highest rate of interest upon a note or bill between parties in the same state and payable there, is usurious, being merely another name for additional interest.<sup>1</sup> But it matters not that the creditor had previously paid exchange in order to bring the money with which to make the loan from another state.<sup>2</sup> Where both debtor and creditor reside in the same place, an agreement to pay the debt and interest with exchange on a distant city is regarded as a device to cover usury.<sup>3</sup> In respect to foreign exchange, it is held that funds situated in a foreign country are the subject of commerce, and may be sold by the owner at home for the best price he can obtain.<sup>4</sup>

Generally, it may be said that the taking of the amount of actual

**Knowledge of Lender.**—Where the money loaned was sent by the lender to a middleman engaged in making the loan, the fact that the latter, without the lender's knowledge, deducted for his own benefit a small sum to cover exchange, in addition to his commissions, does not constitute usury. *Riley v. Olin*, 82 Ga. 312.

1. *Mix v. Madison Ins. Co.*, 11 Ind. 117; *Towslee v. Durkee*, 12 Wis. 480.

As a matter of law, a given sum of money is of the same value in all parts of the same state. Hence, where a bank at Lyons, N. Y., on discounting a note payable at Albany, N. Y., took in addition to the highest legal rate of interest, one-half of one per cent. as the difference of exchange between Lyons and Albany, at that time it was held that the transaction was usurious. *Price v. Lyons Bank*, 33 N. Y. 55; 88 Am. Dec. 368.

But where a note payable in the city of New York is discounted in the country, it is not usury to pay the borrower the proceeds by a draft on the city at the usual rates of exchange. *Union Bank v. Gregory*, 46 Barb. (N. Y.) 98.

But a loan is not usurious by reason of an understanding that the lender is to receive the borrower's deposits and pay them over on demand, and that all notes discounted for the borrower shall be paid in the city of New York, by means of which the lender is enabled to receive, in addition to legal interest, the benefit of an exchange of one-half of one per cent. in favor of New York. *Beals v. Benjamin*, 33 N. Y. 61.

2. In *Jacks v. Nichols*, 3 Sandf. Ch. (N. Y.) 313, the facts were that the lender had brought his money to *New York* from *Georgia*, at a cost of nine per cent. for exchange. He subse-

quently loaned it in *New York*, payable there, and stipulated for legal interest and also seven and one-half per cent. exchange; his object being to partly reimburse himself for the expense of getting his money to *New York*. It was held that there was no justification for the charge, and that the loan was usurious.

3. *Siter v. Sheets*, 7 Ind. 132.

Where a note is executed and payable in *Wisconsin*, a provision for payment of exchange on *New York* is usurious, if its purpose is to conceal the taking of illegal interest. *Rock Co. Bank v. Wooliscroft*, 16 Wis. 22.

**Question for Jury.**—The question whether a reservation of exchange, in discounting bills and making advances upon goods to be sold elsewhere, is usurious, depends upon the actual intention of the parties, as determined from all the circumstances, and is for the jury. *Grand Gulf Bank v. Archer*, 8 Smed. & M. (Miss.) 151; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508.

4. In *Leavitt v. De Launy*, 4 N. Y. 363, *Harris, J.*, said: "Foreign exchange is a commodity which may be bought or sold like merchandise. Its price is governed chiefly by the state of trade between the place where it is negotiated and the place where it is payable. The sale of exchange is, in effect, a transfer of funds which the drawee has, or is supposed to have, in another country, to the purchaser. Such funds are more or less valuable, according to circumstances. Such value is chiefly affected by the state of trade between the country where the funds are owned and that where they are held. To some extent, also, such value is affected by the time required to transfer funds from one country to another, and the hazard incurred in making such trans-

difference of exchange between the place of payment and the residence of the creditor, is not usury, unless resorted to in bad faith and as a mere device to evade the law.<sup>1</sup>

**3. Usury Between Indorser and Indorsee.**—A note or bill valid in its inception, but which has been transferred by the holder for a usurious consideration, clearly cannot be enforced as between the immediate parties to the usury.<sup>2</sup> It is also clear that the payee of a note or bill who sells and indorses it to a *bona fide* purchaser cannot, when sued on his indorsement, plead that the instrument was usurious.<sup>3</sup> But the authorities are not agreed upon the question whether the indorsee who is party to the usury can recover from the maker or prior indorsers. In support of such right it is maintained that, notwithstanding the usury, the indorsee acquired title to the paper, by an executed contract, and that prior parties, having no connection with the subsequent usury, cannot avoid their obligations by setting it up against the holder.<sup>4</sup> And it is

fer. Funds thus situated are the subject of commerce. The owner may sell them for the best price he can obtain, without the hazard of having the sale avoided for usury."

1. *Ontario Bank v. Schermerhorn*, 10 Paige (N. Y.) 109; *Cayuga Co. Bank v. Hunt*, 2 Hill (N. Y.) 635; *Cuyler v. Sanford*, 13 Barb. (N. Y.) 339; *Price v. Lyons Bank*, 30 Barb. (N. Y.) 85; *Murray v. Barney*, 34 Barb. (N. Y.) 336; *Eagle Bank v. Rigney*, 33 N. Y. 613; *Central Bank v. St. John*, 17 Wis. 157.

2. *Daniel on Negotiable Instruments* (3d ed.), § 759.

In an action by the indorsee against the indorser, the latter may show that it was received as security for a usurious contract between the indorsee and the maker. *Dunscomb v. Bunker*, 2 Met. (Mass.) 8; *Weimer v. Shelton*, 7 Mo. 237.

An agreement by the indorser of a note to secure to the indorsee, in case of the insolvency of the maker, more than the consideration paid for the transfer, with lawful interest, was held usurious in *Yankey v. Lockheart*, 4 J. Marsh. (Ky.) 276.

3. *M'Knight v. Wheeler*, 6 Hill (N. Y.) 492.

4. *Conwell v. Pumphrey*, 9 Ind. 135; 68 Am. Dec. 611; *Clapp v. Hanson*, 15 Me. 345; *Partridge v. Williams*, 72 Ga. 807; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; 8 Am. Dec. 219; *Cameron v. Chappell*, 24 Wend. (N. Y.) 94; *Collier v. Nevill*, 3 Dev. (N. Car.) 31; *Littell v. Hord*, Hard. (Ky.) 87; *Cowles v. McVickar*, 3 Wis. 725;

*Armstrong v. Gibson*, 31 Wis. 66; 11 Am. Rep. 599; *Daniel on Negotiable Instruments* (3d ed.), § 759.

In *Knight v. Putnam*, 3 Pick. (Mass.) 184, which was an action by the indorsee of a note against the maker, and the defense was that the indorsee had received it upon a usurious contract with his indorser, the court, by Wilde, J., said: "But it is objected that, as the transfer is usurious, the plaintiff's title fails, although the original contract remains good, and that he cannot derive title from an illegal transaction, in which he was a guilty party. This objection would have weight, if a usurious contract were *malum in se* or merely void. But it has been frequently held, that a contract contaminated with usury is only voidable by the party injured or those claiming under him. Now, it is manifest that the maker of a note is not affected by a usurious agreement between the indorser and indorsee. He is liable on his contract, and it is immaterial to him whether the action be brought in the name of the indorser or in that of the indorsee. But I hold further, that the transfer of a note on a usurious consideration is neither void nor voidable. So far as the indorsement operates as a transfer of the note, it is an executed contract, and the statute against usury is not applicable. It only applies to the implied promise or guaranty of the indorser, which being an executory contract may be avoided. But in no case can an executed contract be set aside on the plea of usury. It is not, however, nec-

so held, even though the indorsee received the paper merely as collateral security.<sup>1</sup> On the other hand, it is maintained that if the indorsee acquired title through a usurious transaction, prior parties have the right to take advantage of his violation of the statute.<sup>2</sup>

Another question upon which the authorities are at variance is as to the right of an innocent indorsee, under a valid transfer subsequent to the usurious indorsement, to recover against those who became parties to the instrument prior to the usury. The cases which hold that the indorsee may himself recover, under such circumstances, would *à fortiori* hold that the same right exists in favor of a subsequent innocent purchaser.<sup>3</sup> Other authorities,

essary to insist on this distinction for the purpose of sustaining the present verdict. It is sufficient for this purpose, that the transfer is voidable only, and that it is not competent for the defendant, he not being a party to the transfer, to avoid it. The note being free from usury between the immediate parties to it, no after transaction with another person can, as respects those persons, invalidate it."

In *Collier v. Nevill*, 3 Dev. (N. Car.) 31, which was an action on a valid bond, brought by an assignee, who purchased it from the obligees upon a usurious contract, *Ruffin, J.*, said: "If the security be in its origin usurious, it is void, into whose hands soever it gets, by the words of the statute. If it be good in its origin, a subsequent usurious agreement between the same parties does not avoid it, though it may subject the one party to the penalty, if anything be received under the corrupt agreement. And if it be good in its origin, the subsequent transfer of it, usuriously, does not affect it as against the maker. No redress can be had on the indorsement as between the parties to it. The very object of the statute is to protect the borrower as an oppressed man. But there is here no oppression on the obligor, who is a true debtor. The law was not intended for his protection."

If a note has a legal inception in the hands of the payee, no subsequent transfer upon a usurious consideration can defeat recovery by the holder against the maker. *Catlin v. Gunter*, 11 N. Y. 368; 62 Am. Dec. 113; *Bush v. Livingston*, 2 Cal. Cas. (N. Y.) 66; 2 Am. Dec. 316.

1. *Partridge v. Williams*, 72 Ga. 807.

Thus, the accommodation maker or indorser of a note, which has been de-

posited by the payee as collateral security for a usurious loan, cannot take advantage of the usury when sued on the note. *Kendall v. Vanderlip*, 2 Mackey (U. S.) 105.

So of a usurious discount by the payee. *Stewart v. Bramhall*, 11 Hun (N. Y.) 139; *Cady v. Goodnow*, 49 Vt. 400; *Smith v. Exchange Bank*, 26 Ohio St. 141.

2. *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256; *Freeman v. Brittin*, 17 N. J. L. 191. But see *Durant v. Banta*, 27 N. J. Eq. 624; *Nichols v. Fearson*, 7 Pet. (U. S.) 103. See *Story on Promissory Notes* (3d ed.), § 193.

In the leading case of *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256, *Swift, C. J.*, said: "On this point there can be no doubt. The indorsee of a note must show a legal right, that he came lawfully by the possession of it, to entitle him to recover. Of course, it is competent for the defendant to show that he had no legal right, or that the possession was not lawful."

3. *Freeman v. Brittin*, 17 N. J. L. 191. See also *Bush v. Livingston*, 2 Cal. Cas. (N. Y.) 66; 2 Am. Dec. 316; *Daniel v. Cartony*, 1 Esp. 275; *Parr v. Eliason*, 1 East 92.

"The better opinion," according to *Daniels on Negotiable Instruments* (3d ed.), § 760, "is, that the holder without notice may sue and recover against all the parties save the indorser from whom the usury was exacted. As to him, in so far as his contract is an assurance for the payment of money, it cannot be enforced. But nevertheless, in so far as it evidences the fact that he has transferred the legal title, it seems to us that the indorsement would be sustained as valid for that purpose, upon the ground that the object and spirit of the statute



however, consider that the usurious indorsement has the effect to vitiate all subsequent transfers, both as against the indorser who was party to the usury, and all prior parties.<sup>1</sup>

It has been suggested by text-writers that the difficulty may be obviated by the subsequent indorsee striking out the usurious indorsement, and asserting the title under a prior indorsement in blank, a course of procedure not always practicable or desirable.<sup>2</sup>

**4. Innocent Purchasers.**—Under the English Statute of Usury, which declared all usurious contracts void, an innocent purchaser for value, and before maturity of a negotiable instrument tainted with usury, as between the original parties, was held to stand in no better position than the payee. Being void in its inception, it was considered that the instrument could not acquire validity by a transfer.<sup>3</sup> In many of the states of the Union, under similar statutes, the same ruling prevails, and no immunity is allowed an

would be subserved, and no violence done to its letter fairly interpreted. The objection to this view lies in the difficulty in distinguishing a note usurious as between the maker and payee, from an indorsement usurious as between the indorser and indorsee. In the first case, the note would be void in the hands even of an innocent holder, and some of the authorities have held that, as the indorsement would in like manner be void, no title could be traced through it, and no recovery had against the indorser. That no recovery could be had against him we concede; but if the indorsement be declared so far void that title could not be traced through it, it would throw the forfeiture of the debt, not upon the usurer, as the law throws it, but upon the innocent holder; and to construe the statute to contemplate and design such a result would reverse the rule that courts should construe statutes so as to favor the remedy. The instrument, being valid in its inception, stands on the same footing as a chattel, which the holder may sell at any price; and if operated with, like a horse or goods, under a usurious contract, a subsequent purchaser without notice would be protected, at least so far as the title is concerned, upon the principle that the wrongdoer will not be heard to deny rights acquired under executed contracts, to which he is a party. . . . If this be not true, the legal debtor would be exonerated from the debt, and the usurer escape punishment, while the innocent holder alone would suffer. No such result can have been contemplated. The title having actually passed from the indorser, we think

he could be no more heard to controvert it against an innocent party, than he would be to recover back money paid under a usurious bargain, or to recover in trover the instrument itself."

1. *Lowes v. Mazaredo*, 1 Stark. 385; *Chapman v. Black*, 2 B. & Ald. 588; *Lloyd v. Scott*, 4 Pet. (U. S.) 205; *Nichols v. Fearson*, 7 Pet. (U. S.) 103; *Whitworth v. Adams*, 5 Rand. (Va.) 333.

In *Lowe v. Waller*, Doug. 735, the rule was laid down that a *bona fide* holder of a bill valid in its inception, cannot recover when the payee's indorsement, through which he must claim title, has been made upon a usurious consideration. But if the first indorsement was valid, a subsequent usurious indorsement will not affect such *bona fide* holder; because such intermediate indorsement is not necessary to his title to sue the original parties to the bill. *Parr v. Eliason*, 1 East 92; *Daniel v. Cartony*, 1 Esp. N. P. Cas. 274; *Jones v. Davidson*, Holt's N. P. Cas. 256.

2. Story on Promissory Notes (3d ed.), § 193; Parsons on Notes and Bills, vol. 2, p. 431; Daniel on Negotiable Instruments (3d ed.), § 760.

3. The leading English case upon this point is *Lowe v. Waller*, Doug. 735, the plaintiff in which was the indorsee of a bill of exchange originally made upon a usurious consideration, and it appeared that he purchased it in good faith and for value, and was entirely ignorant of the usury; but it was determined by the court of king's bench, after extended consideration and able argument by counsel, that the

innocent purchaser.<sup>1</sup> If, however, the purchaser has been induced to take the instrument through the fraudulent representations of the maker, it is held that the latter will not be allowed to take advantage of the usury as against such purchaser, or those

language of the Statute of Usury was so broad and clear, that it must be held to render the bill void in the plaintiff's hands.

Where, however, a broker had agreed with the defendants to get their bills discounted, and that he should retain out of the proceeds the exorbitant brokerage of ten shillings per cent., but he was not to advance the money himself, nor was his name on the bills, in an action by the indorsee of one of such bills against the defendants as acceptors, it was contended that the bill was usurious in its inception, and therefore void even in the hands of an innocent holder, as the plaintiff was admitted to be. But the court held that, as there was no actual loan of money for a usurious consideration by the plaintiff who advanced the money on the bill, the taking of exorbitant brokerage by the broker for getting it discounted could not affect it in the hands of an innocent indorsee, who had deducted only legal interest. *Dagnall v. Wigley*, 11 East 43; 2 Camp. 33.

1. *Morgan v. Tipton*, 3 McLean (U. S.) 339; *Churchill v. Suter*, 4 Mass. 156; *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232; *Bayley v. Taber*, 5 Mass. 286; 4 Am. Dec. 57; *Chadbourn v. Watts*, 10 Mass. 12; 6 Am. Dec. 100; *Kendall v. Robertson*, 12 Cush. (Mass.) 156; *Young v. Berkley*, 2 N. H. 410; *Payne v. Trezevant*, 2 Bay (S. Car.) 23; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 206; 2 Am. Dec. 149; *Clafin v. Boorum*, 122 N. Y. 385; *Laramore v. Bank of Americus*, 69 Ga. 722; *Gilder v. Hearne*, 79 Tex. 120.

In *Flemming v. Mulligan*, 2 McCord (S. Car.) 173; 13 Am. Dec. 707, Colcock, J., said: "According to the well-settled construction of the statute, where unrestricted by any subsequent enactment, a negotiable instrument, if usurious in its original concoction, is void in the hands of a *bona fide* holder. The circumstances of the order in which the names of the parties to the loan appear upon the instrument is not the criterion of determining its validity. The question is, whether it was in the first instance employed with a view to

a usurious contract. Thus, a note indorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void as against both maker and indorser, in the hands of an innocent indorsee; for, notwithstanding the indorsement, the transaction contemplated in the creation of the note was between the maker and the person discounting it. And whether the lender's name appears on it or not in no wise varies the case."

In *Solomons v. Jones*, 3 Brev. (S. Car.) 54; 5 Am. Dec. 538, Brevard, J., said: "That the plaintiffs were indorsees without notice, cannot be admitted as a sufficient reason to repel the charge of usury; because the original usurious contract is to be viewed in the light of a criminal transaction, which no subsequent circumstance, or acts, can purge away, and render innocent or lawful. As between the original parties to the transaction, where the contract on which a promise or contract is founded is illegal, the plaintiff ought not to recover, and by positive statute law, made to prevent gaming and usury, which are regarded as public mischiefs, the innocent indorsees of negotiable instruments, which have been given upon such illegal considerations, are equally disentitled to recover against the makers of such instruments. The contracts in such cases are void in their inception, as never having had any legal existence. Such innocent indorsees, however, may have recourse to their indorsers, for every indorsement is in the nature of a new bill or note."

In *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86, Parker, C. J., said: "The action is brought by persons claiming to be, and who must from the evidence be taken to be, innocent indorsees, who have purchased the note *bona fide* and for a valuable consideration. This character, however, will not avail them if the note is evidence of a contract originally usurious, or if it was security for a loan of money upon which more than six per cent. had been reserved or taken. To this point no authorities need be cited, for since the great struggle to protect contracts

claiming through him.<sup>1</sup> In some other states, however, the rule prevails that the defense of usury between the original parties cannot be interposed as against an innocent purchaser before maturity; and if it be the correct view that the word "void" in the statute is to be construed in the sense of voidable merely, it is difficult to see why the right to plead usury should be extended further than is allowed in respect to other equities between the original parties.<sup>2</sup>

so situated from the effects of the Statute of Usury, in the case of *Lowe v. Waller*, Doug. 736, no attempt has been made, with any seriousness, to give validity to such notes for the benefit of indorsees." Followed in *Kendall v. Robertson*, 12 Cush. (Mass.) 158.

The defendant, the indorser on a note, gave his own note in lieu of it. Unknown to him, the original note was usurious. It was held, that he could defend on the ground of usury, against a *bona fide* purchaser of his own note for value and before maturity. *First Nat. Bank v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 453.

A usurious note in the hands of an indorsee was surrendered, and a new note given to him which included the usury. He sold the latter note for value to a *bona fide* purchaser. It was held that the purchaser could not maintain an action against the maker under the statute, authorizing a *bona fide* assignee of a usurious contract to recover from the usurer the consideration paid, but that he must look to his indorser, the payee. *Brown v. Wilcox*, 15 Iowa 414.

In *Jackson v. Cassidy*, 68 Tex. 282, the sale of a member's stock by a building association under a contract void for usury, was held to pass no title, even to a *bona fide* purchaser.

**Holder of Usurious Mortgage.**—In *Alabama* it is held that the holder of a usurious mortgage cannot be regarded as a *bona fide* purchaser without notice, and that he is not entitled to any protection against prior incumbrances or secret equities of which he had neither actual nor constructive notice. *Saltmarsh v. Tuthill*, 13 Ala. 390; *McCall v. Rogers*, 77 Ala. 349; *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Woolsey v. Jones*, 84 Ala. 88.

**Exception.**—Where a note, though given without consideration and for the purpose of raising money by its sale, has passed through the hands of persons who supposed it to be valid busi-

ness paper, and after being discounted at a rate exceeding legal interest, it is purchased at its full value by one who has no notice of its true character, the rule that a note usurious in its inception is void in the hands of a *bona fide* purchaser, does not apply; and the last indorsee is entitled to recover upon it from the maker. *Ayer v. Tilden*, 15 Gray (Mass.) 178.

1. *Jackson v. Jones*, 13 Ala. 121; *Pearson v. Bailey*, 23 Ala. 537.

**Purchase at Maker's Request.**—The plaintiff induced the defendants, for his accommodation and to gain time, to advance the money due upon a mortgage given by him to a third person, and to hold the mortgage as security for the advance. The mortgage debt was in fact usurious, but the defendants had no knowledge of it. It was held that the plaintiff could not set up the usury against the mortgage in the defendant's hands. *Perdue v. Brooks*, 85 Ala. 459.

2. *Frazer v. Sybert*, 2 Heisk. (Tenn.) 340; *Conkling v. Underhill*, 4 Ill. 388; *Saylor v. Daniels*, 37 Ill. 331; 87 Am. Dec. 250; *Coor v. Spicer*, 65 N. Car. 401; *Young v. Berkley*, 2 N. H. 410; *Forbes v. Marsh*, 3 N. H. 119; *Williams v. Little*, 11 N. H. 66; *Creed v. Stevens*, 4 Whart. (Pa.) 223; *Cheney v. Campbell*, 28 Neb. 376; *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220; *Evans v. DeRoe*, 15 Neb. 630; *Gross v. Funk*, 20 Kan. 655; *Tucker v. Wilamouicz*, 8 Ark. 157; *First Nat. Bank v. Bentley*, 27 Minn. 87.

But a mere pledge of the instrument as collateral security for an existing debt does not give the pledgee the immunity of a *bona fide* purchaser. *Williams v. Little*, 11 N. H. 66.

The defense of usury is not available to defeat recovery of the principal of a promissory note, against a national bank which has discounted it. *Chase Nat. Bank v. Faurat*, 72 Hun (N. Y.) 373.

But the maker of a note showing on

In a number of states, it is now provided by statute that the defense of usury in a negotiable instrument cannot be pleaded against it in the hands of a *bona fide* purchaser without notice.<sup>1</sup>

When it has been shown that a negotiable instrument was usurious in its inception, the burden of proof devolves upon the party claiming to be an innocent purchaser, of showing that he purchased it for value, before maturity, and without notice of the usury.<sup>2</sup>

The courts are agreed upon the proposition that where a negotiable instrument or other debt has come into the hands of an innocent purchaser, and the maker or debtor thereafter voluntarily gives him a new evidence of debt in renewal or as a substitute for the usurious one, the original usury cannot be pleaded against such new obligation.<sup>3</sup> And it is held that the giving of a new

its face that it is usurious, is not estopped from setting up the defense of usury as against a transferee of the note, who admits that he knew, at the time he purchased it, of its usurious character. *Miles v. Kelly* (Tex. Civ. App. 1894), 25 S. W. Rep. 724.

1. *Idaho Rev. Stat.* (1887), § 1266; *McClain's Iowa Annot. Code* (1888), § 3257; *Kansas Gen. Stat.* (1889), § 3499; *Maryland Pub. Gen. Laws* (1888), art. 49, § 2; *Massachusetts Acts* (1863), ch. 242; *North Bridgewater Bank v. Copeland*, 7 Allen (Mass.) 139; *Howell's Michigan Annot. Stat.*, § 1596; *Minnesota Gen. Stat.* (1878), ch. 23, § 4.

The exception by *Minnesota Laws* (1879), ch. 66, § 3, of *bona fide* purchasers of negotiable paper from the operation of the usury law, does not extend to a mortgage to secure such paper. *Smith v. Parsons* (Minn. 1894), 57 N. W. Rep. 311.

2. *Darst v. Backus*, 18 Neb. 231; *Lincoln Nat. Bank v. Davis*, 25 Neb. 376; *Wortendyke v. Meehan*, 9 Neb. 229; *Richardson v. Stone* (Neb. 1891), 49 N. W. Rep. 763; *Blackwell v. Wright* (Neb. 1889), 43 N. W. Rep. 116.

**Minnesota Statute.**—The defendants gave valid notes to S. which were indorsed and delivered by S to the plaintiff's bank before maturity, as collateral security for a loan then made to S. After the maturity of these notes, the defendants applied to S, supposing he still held them, for an extension of time, which S agreed to allow provided the defendants would pay interest at eighteen per cent. per annum for the extension. Accordingly a new note was made for each of the original notes, the principal in each case being

the principal and legal interest then due on the original; and a separate note was given to S for the excess of interest. S then went to the plaintiff and obtained the original notes, by leaving in their place the substituted notes, but he retained the new note for usurious interest. The plaintiff had no knowledge of the unlawful agreement between the defendants and S. In an action on one of the substituted notes, it was held that the plaintiff was a *bona fide* holder and entitled to recover under the statute; also that the plaintiff was not chargeable with notice of the agreement made by S, because S was not in any sense the plaintiff's agent. *First Nat. Bank v. Bentley*, 26 Minn. 87.

3. *Brinkerhoff v. Foote*, 1 Hoffm. Ch. (N. Y.) 291; *Jackson v. Henry*, 10 Johns. (N. Y.) 185; 6 Am. Dec. 328; *Kent v. Walton*, 7 Wend. (N. Y.) 256; *Smedburg v. Whittlesey*, 3 Sandf. Ch. (N. Y.) 320; *Smedburg v. Simpson*, 2 Sandf. (N. Y.) 85; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Gee v. Bacon*, 9 Ala. 699; *Mitchell v. McCullough*, 59 Ala. 179; *McCullough v. Mitchell*, 64 Ala. 250; *Palmer v. Call*, 2 McCrary (U. S.) 522; *Call v. Palmer*, 116 U. S. 98.

The fact that a prior usurious contract is made the consideration of a new agreement with an innocent third party, and which is not intended as a device to evade the usury laws, does not affect the new agreement. *Call v. Palmer*, 116 U. S. 98.

A note payable to a person other than the creditor, given in renewal of a usurious loan, and delivered by the creditor to the payee, is void in the hands of the latter, even though he

note to an indorsee by the maker without objection, is of itself a binding admission that he is a *bona fide* purchaser without notice of the usury.<sup>1</sup>

It is immaterial that the first note or bill was non-negotiable.<sup>2</sup> Also that the new security was given after the former had become due and the holder had learned of the usury.<sup>3</sup> But it has been held that a mortgage given to an innocent holder of a usurious note, after he had learned of the usury, was unenforceable.<sup>4</sup>

If a note or bill be free from usury in its origin, the tendency of the courts is to hold that an innocent indorsee may recover upon it against the maker, notwithstanding previous usurious transfers.<sup>5</sup>

**5. Accommodation Paper.**—A negotiable instrument which is without valuable consideration as between the original parties, and is made for the purpose of enabling one or the other of them to raise money by negotiating it, is held to have no legal inception until it comes into the hands of some person who gives value for it. And when attempted to be enforced by a purchaser, the amount of consideration paid for the transfer frequently gives rise to perplexing questions of usury, upon which the courts have always been, and still are, much divided in opinion. Unquestionably, if the purchaser from the original holder has actual or constructive knowledge of the true character of the instrument, and that until its transfer it is mere waste paper, he is bound to pay its full face value, deducting no more than the lawful interest for the time it has to run, otherwise he commits usury through a transaction in substance and effect a loan to the original maker or payee at unlawful interest.<sup>6</sup> But when such a purchaser has no

received it in good faith, and without notice of the usury. *Treadwell v. Archer*, 76 N. Y. 196.

**Purchaser at Mortgage Sale.**—Analogous to the case of a new security given to a *bona fide* purchaser of negotiable paper, is that of an innocent purchaser of property at a sale under a power in a usurious mortgage. He is held to be protected from the effects of the usury. *Jackson v. Henry*, 10 Johns. (N. Y.) 185; 6 Am. Dec. 328.

1. *Kent v. Walton*, 7 Wend. (N. Y.) 256; *Smedburg v. Whittlesey*, 3 Sandf. Ch. (N. Y.) 320.

2. *McCullough v. Mitchell*, 64 Ala. 250.

3. *Smedburg v. Simpson*, 2 Sandf. (N. Y.) 85.

4. *Morgan v. Tipton*, 3 McLean (U. S.) 339.

Where an auctioneer, without notice of the fraud, receives a deposit of goods fraudulently obtained, and makes advances upon them for which he charges five per cent. above the regular commissions, the transaction is usurious, and

he cannot claim to be a *bona fide* purchaser as against the true owner. *Ramsdell v. Morgan*, 16 Wend. (N. Y.) 574.

5. *Burt v. Gwinn*, 4 Har. & J. (Md.) 507; *Foltz v. Mey*, 1 Bay (S. Car.) 486; *King v. Johnson*, 3 McCord (S. Car.) 365.

6. *Tufts v. Shepherd*, 49 Me. 312; *Veazie Bank v. Paulk*, 40 Me. 109; *Nailor v. Daniel*, 5 Del. 455; *Williams v. Banks*, 11 Md. 198; *Gooch v. Massey*, 4 Humph. (Tenn.) 374; *May v. Campbell*, 7 Humph. (Tenn.) 450; *Richardson v. Scobee*, 10 B. Mon. (Ky.) 12; *Connor v. Donnell*, 55 Tex. 167.

**Evidence.**—In an action against the maker and indorser of notes which had been delivered by the former to the latter, and by the indorser to the plaintiff, the defense of usury was interposed. The indorser testified that he requested the plaintiff to discount the notes for the witness and the maker. It was held that the witness should have been allowed to testify fully as to

knowledge of the fact that it was made for accommodation, and takes it under the belief that it is valid business paper, the question arises whether the Statute of Usury can be pleaded against him because he purchased it for less than the nominal value. One class of decisions holds, that notwithstanding the absence of any intention on his part to commit usury, he is the actual lender, with the maker or payee as borrower, and that the deduction of more than legal interest renders the instrument usurious in its inception, and open to attack in whosoever hands it may come.<sup>1</sup>

In a number of states, however, the better rule has been adopted that inasmuch as a usurious intent on the part of the lender is

the circumstances under which he received the notes from the maker, with a view to showing that they had no inception until the plaintiff discounted them. *Schnitzer v. Husted*, 14 N. Y. Supp. 918.

A "grave suspicion" that a note which was sold for considerably less than its face value had its first inception at the time of such transfer, is not sufficient, in the absence of more tangible proof, to establish the defense of usury. *Vosburgh v. Diefendorf*, 1 N. Y. Supp. 58.

1. *Bennet v. Smith*, 15 Johns. (N. Y.) 355; *Powell v. Waters*, 8 Conn. (N. Y.) 669; *Bossange v. Ross*, 29 Barb. (N. Y.) 576; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Hall v. Earnest*, 36 Barb. (N. Y.) 585; *National F. Ins. Co. v. Sackett*, 11 Paige (N. Y.) 660; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Blodgett v. Wadhams, Hill & D. Supp.* (N. Y.) 65; *Eastman v. Shaw*, 65 N. Y. 522; *Catlin v. Gunter*, 11 N. Y. 368; 62 Am. Dec. 113; *Knights v. Putnam*, 3 Pick. (Mass.) 184; *Whitten v. Hayden*, 7 Allen (Mass.) 407; *Sylvester v. Swan*, 5 Allen (Mass.) 134; 81 Am. Dec. 734; *Kendall v. Robertson*, 12 Cush. (Mass.) 156; *Bock v. Lauman*, 24 Pa. St. 435; *Sauerwein v. Brunner*, 1 Har. & G. (Md.) 477; *Cockey v. Forrest*, 3 Gill & J. (Md.) 482; *Cook v. Pierce*, 2 Houst. (Del.) 499; *Hays v. Walker*, 7 Blackf. (Ind.) 540; *Nichols v. Levins*, 15 Iowa 362; *Zabriskie v. Spielman*, 46 N. J. L. 35; *Freeman v. Brittin*, 17 N. J. L. 191; *Metcalf v. Watkins*, 1 Port. (Ala.) 57; *Saltmarsh v. Planters', etc., Bank*, 14 Ala. 668; *Bynum v. Rogers*, 4 Jones (N. Car.) 399; *Simpson v. Fullenwider*, 12 Ired. (N. Car.) 334; *Ruffin v. Armstrong*, 2 Hawks (N. Car.) 411; 11 Am. Dec. 774; *German Bank v. DeShon*, 41 Ark. 331; *King*

*v. Johnson*, 3 McCord (S. Car.) 365; *Boisgerard v. Fogartie*, 2 Brev. (S. Car.) 199; *Cantey v. Blair*, 1 Rich. Eq. (S. Car.) 41; *Newman v. Williams*, 29 Miss. 212; *In re Dodge*, 9 Ben. (U. S.) 480.

Thus, a note given by the maker to the payee, to be shown to others as evidence that the maker was willing to take certain stock in a proposed company, and discounted by the payee at more than legal interest, was held usurious in the hands of the purchaser. *Eastman v. Shaw*, 65 N. Y. 522.

The fact that the maker gave the payee, for whose accommodation the note was made, security for its payment at maturity, does not affect the rule. *Dowe v. Schutt*, 2 Den. (N. Y.) 621.

In *Dickerman v. Day*, 31 Iowa 444; 7 Am. Rep. 156, *Miller, J.*, stated the doctrine of the cases as follows: "In respect to an accommodation note sold or discounted at a greater rate of discount than legal interest, the authorities are not uniform; some of the cases holding that the purchaser of such note from the payee, being the first party paying anything for it, is therefore the first owner, and that as the payee before the sale of the note had not acquired a legal right to sue the accommodation maker, the purchaser must pay the full face of the note, or the transaction will be usurious. That, as between the maker and the payee, the note is without consideration and void in the hands of the payee, and becomes valid only upon being negotiated to a *bona fide* purchaser, and hence a party who buys an accommodation note before it has been used for any business purpose, stands in the same situation in respect to the defense of usury, as if he were the payee named therein, and this though

an indispensable element of usury, a *bona fide* purchaser of accommodation paper, supposing it to be valid business paper, will be fully protected in dealing with it. as such, and it is no defense to the maker that he bought it for less than its nominal value.<sup>1</sup>

It is suggested that the adoption of the first-mentioned doctrine was the result of regarding a purchaser of accommodation paper as being in a position similar to that of an innocent purchaser of paper usurious in its inception, and applying the same rule to both; whereas in fact there is no analogy between the two cases. In the latter, the only question is, usury being admitted, shall its penalties be inflicted upon a subsequent party who has purchased in good faith from the usurer; while in the former, the existence of usury is the very matter in issue. Ignoring the absence of usurious intent, the act of the innocent purchaser in buying the paper is what the courts hold as constituting a usurious transaction.<sup>2</sup>

he had no knowledge that the note was accommodation paper and supposing it to be business paper." This doctrine, however, was not approved in the case cited.

In *Campbell v. Nichols*, 33 N. J. L. 81, it was held, after an exhaustive review of the decisions, that the purchase by a third person of a note which had no previous legal inception, at a discount greater than legal interest, amounts to a usurious loan, even though the purchaser was deceived by the representations of the maker's agent into believing that the note was put into the market for value in the regular course of business.

1. *Nichols v. Fearson*, 7 Pet. (U. S.) 103; *Otto v. Durege*, 14 Wis. 571; *French v. Grindle*, 15 Me. 163; *Lane v. Stewart*, 20 Me. 98; *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256; *Belden v. Lamb*, 17 Conn. 441; *Ramsey v. Clark*, 4 Humph. (Tenn.) 244; 40 Am. Dec. 645; *Holeman v. Hobson*, 8 Humph. (Tenn.) 127; *Wetmore v. Bradley*, 3 Head (Tenn.) 727; *Frazer v. Syper*, 2 Heisk. (Tenn.) 342; *Overton v. Hardin*, 6 Coldw. (Tenn.) 377; *Sherman v. Blackman*, 24 Ill. 345; *Carlisle v. Hill*, 16 Ala. 398; *Hunt v. Acre*, 28 Ala. 580; *Taylor v. Bruce*, Gilm. (Va.) 42; *Brummel v. Enders*, 18 Gratt. (Va.) 873; *Whitworth v. Adams*, 5 Rand. (Va.) 333; *Law v. Sutherland*, 5 Gratt. (Va.) 357; *Moseley v. Brown*, 76 Va. 419.

**New York Cases.**—In *Cohn v. Husson*, 13 Daly (N. Y.) 334, and *Jackson v. Colden*, 4 Cow. (N. Y.) 266, it was held that usury could not be pleaded as against a purchaser of negotiable

paper after delivery to the payee, at a discount greater than legal interest, but without notice that it was made for accommodation. See also *Ely v. Britton*, 15 N. Y. Supp. 101.

In *Van Duzer v. Howe*, 21 N. Y. 531, it was held that a draft was not usurious in the hands of a purchaser, by reason of the fact that the drawer paid an accommodation indorser a sum of money for his indorsement and services in procuring the discount.

Where two persons exchanged their own notes with each other, with a view to raising money upon them, and a third person purchased them at a discount exceeding lawful interest, it was held that the notes were not thereby rendered usurious. *Cobb v. Titus*, 10 N. Y. 198; *Rice v. Mather*, 3 Wend. (N. Y.) 62.

2. In the recent case of *Jackson v. Travis*, 42 Minn. 438, where the payee of a note secured by mortgage sold them to the defendants at a discount greater than the lawful interest, the defendants being ignorant of the fact that in the whole transaction the nominal payee was merely the agent of the maker, and was selling the note for the latter's benefit, it was held that there was no usury as to the defendants. In delivering the opinion of the court, Gilfillan, C. J., after stating that it was not always necessary that both parties to a usurious contract should be equally cognizant of the device adopted to evade the law, said: "But it is necessary that the party upon whom its penalties are to be imposed should know of and be a party to the intent to violate

**6. Discounts.**—The custom among banks and merchants of deducting in advance the highest legal rate of interest, upon the discounting of negotiable paper, is uniformly held to be free from usury, even in those states where it has been considered usurious for private persons to stipulate for payment of interest in advance.<sup>1</sup> Unless otherwise provided by their charters, banks occupy the same position in respect to the usury laws as do private individuals, and must take, whether by discount or otherwise, no more than the legal rate of interest on loans.<sup>2</sup>

It is, of course, usury for the party making the loan to deduct as discount more than the lawful rate of interest for the time the instrument has to run.<sup>3</sup>

In discounting a note, it is not usury to include in the computation the three days of grace allowed by the law merchant.<sup>4</sup> Nor to include both the first and last day of a note at thirty or sixty days.<sup>5</sup> Nor to discount a note as of a prior date, where the bank

it. If the assumed borrower might set up his own device and secret intent to evade the law against usury, to give the transaction a character different from what the other party in good faith supposed and intended it to be, and thus be enabled to avoid his own engagements, he would be taking advantage of his own wrong."

1. *National Bank v. Smoot*, 2 McArthur (D. C.) 371; *Walker v. Bank of Washington*, 3 How. (U. S.) 62; *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712; 8 Cow. (N. Y.) 398; *Bank of Utica v. Phillips*, 3 Wend. (N. Y.) 408; *Manhattan Co. v. Osgood*, 15 Johns. (N. Y.) 162; *New York F. Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652; *State Bank v. Cowan*, 8 Leigh (Va.) 238; *State Bank v. Ayres*, 7 N. J. L. 130; *Bank of St. Albans v. Scott*, 1 Vt. 426; *Vahlberg v. Keaton*, 51 Ark. 534.

In referring to the taking in advance, on a discount, of the entire amount of interest, Denio, J., speaking for the court, in *Marvine v. Hymers*, 12 N. Y. 223, said: "It is obvious that in this way the lender, by investing the money thus retained, may realize more than at the legal rate of seven per centum per annum, and if the case were *res novum*, it would be difficult to sustain the practice. But we are not authorized to disregard the uniform course of decisions which for a long series of years have declared it to be legal."

A note for \$6,000 was discounted by a bank, with the indorsement, "Discounted for \$4,000 only, and should be so read." It was held that there was no

usury in the transaction. Merchants, etc., *Bank v. Evans*, 9 W. Va. 373.

A. sold his land to the defendant at the agreed price of \$350, for which sum the defendant gave his note and mortgage, payable to the order of the plaintiff. Pending the negotiations, A. had arranged to sell the note and mortgage to the plaintiff for \$275; and for convenience A. caused the defendant to execute them directly to the plaintiff. It was held a case of discount on the sale of negotiable paper, and valid. *Armstrong v. Freeman*, 9 Neb. 11.

"Banking Principles."—The term "banking principles," in statutes authorizing banks to loan and negotiate their money upon banking principles, authorizes them to deduct the interest on loans at the time of making them. *Maine Bank v. Butts*, 9 Mass. 54.

2. *Chafin v. Lincoln Sav. Bank*, 7 Heisk. (Tenn.) 499.

Where a bank is forbidden by its charter to take more than six per cent. per annum in advance on its loans and discounts, the taking of negotiable and *bona fide* business paper of a third party in payment of a pre-existing debt against the holder is not usurious, though at a greater discount than six per cent. *Dunkle v. Renick*, 6 Ohio St. 527.

3. *Clafin v. Boorum*, 122 N. Y. 385.

4. *Bank of U. S. v. Crabbe*, 2 Cranch (C. C.) 299; *Union Bank v. Gozler*, 2 Cranch (C. C.) 349; *Bank of St. Albans v. Scott*, 1 Vt. 426; *Bank of St. Albans v. Stearns*, 1 Vt. 430.

5. *Crump v. Nicholas*, 5 Leigh (Va.) 251; *State Bank v. Cowan*, 8 Leigh (Va.) 238.



had previously paid checks drawn by the applicant on the strength of the proposed discount.<sup>1</sup>

A requirement by the bank that the proceeds of the discount, or any part of them, shall be kept in the bank during the period of the loan, renders the transaction usurious, for the reason that the borrower thus pays interest on money which he does not receive or have the use of.<sup>2</sup> But the giving of a certificate of deposit, payable at a future day, for the proceeds of a note discounted, does not constitute usury, when done at the request and solely for the accommodation of the person procuring the discount.<sup>3</sup>

**XVII. STIPULATIONS CONCERNING INTEREST—1. Payable in Advance.**—It has long been the settled doctrine that the taking of interest in advance, at the highest legal rate, upon the discounting of negotiable paper by banks in the regular course of business, is not a violation of the statute against usury.<sup>4</sup> Most statutes now contain an express permission to do so.

**Double Interest.**—A note was discounted by a bank, and the interest taken in advance at a regular discount day occurring a few days before the maturity of the note; the note was renewed, the interest again being taken in advance from the date of renewal. It was renewed a third time in the same manner, the result being that for the few days between the time of renewal and the maturity of the notes, double interest was taken; but it did not appear that there was any previous agreement to make the renewals in that manner, or that there was any intention to evade the law. It was held not usury. *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770.

1. *Walker v. Bank of Washington*, 3 How. (U. S.) 62.

2. *East River Bank v. Hoyt*, 32 N. Y. 119.

Where a bank, in discounting a note, required the customer to keep deposited in the bank a portion of the proceeds until the note matured, it was declared to be a clear case of usury, "without even the decencies of a cloak to cover its nudity." *East River Bank v. Hoyt*, 32 N. Y. 119; 29 How. Pr. (N. Y.) 280.

For the same reason, a requirement that the person procuring the discount shall accept as cash certain post-dated notes, renders the transaction void for usury. *State Bank v. Ayres*, 7 N. J. L. 130; *Gaither v. Farmers'*, etc., Bank, 1 Pet. (U. S.) 44.

3. *Knox v. Goodwin*, 25 Wend. (N. Y.) 643.

Though a person procuring a discount or loan may, without rendering the transaction usurious, receive a certificate of deposit from the bank, drawing a lower rate of interest than the discount, yet it is not enough to repel the imputation of usury that the proposition for the certificate came from the borrower and not from the bank. It must be shown to have been given at the *bona fide* request of the borrower, and solely for his accommodation. *Gillett v. Averill*, 5 Den. (N. Y.) 85.

4. *Thornton v. Bank of Washington*, 3 Pet. (U. S.) 36; *Lyman v. Morse*, 1 Pick. (Mass.) 295n; *Maine Bank v. Butts*, 9 Mass. 49; *Agricultural Bank v. Bissell*, 12 Pick. (Mass.) 586; *Manhattan Co. v. Osgood*, 15 Johns. (N. Y.) 162; *Bank of Utica v. Phillips*, 3 Wend. (N. Y.) 408; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 712; *New York Fireman's Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 552; *Hawks v. Weaver*, 46 Barb. (N. Y.) 164; *Ticonic Bank v. Johnson*, 31 Me. 414; *Stribbling v. Bank*, 5 Rand. (Va.) 132; *State Bank v. Hunter*, 1 Dev. (N. Car.) 100.

In an early case decided in the Supreme Court of the *United States*, the court, by Story, J., said: "The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent.

A private person has the same right as a banking concern, to make discounts, and deduct the interest.<sup>1</sup> The doctrine also very generally prevails that in loans and money transactions other than discounts, the highest rate of interest may be stipulated for, payable in advance, without violating the statute.<sup>2</sup> The objection, however, has been made to this rule, that it enables the lender, by the use of the sum taken in advance, to obtain a greater compensation for the use of his principal than the highest legal rate.<sup>3</sup>

**2. Payable at Short Intervals.**—If the taking of interest in advance at the highest rate is not usurious, it necessarily follows that stipulations for the payment of accrued interest at intervals shorter than a year, are not within the statute; and the courts so hold.<sup>4</sup>

per annum on the sum due by the note. The sole objection is the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent. per annum upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any, charters contain an express provision authorizing in terms the deduction of the interest in advance, upon making loans or discounts. It has always been supposed that an authority to discount or make discounts did, from the very force of the terms, necessarily include an authority to take interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in *England*, where no statute authorizes banks to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers upon loans, in the ordinary course of business, is not usurious." *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 457.

1. *Parker v. Cousins*, 2 Gratt. (Va.) 372; 44 Am. Dec. 388.

A note payable one year after date is not usurious in *Texas*, in calling for \$400 with twelve per cent. interest from maturity, although \$350 was received thereon, and the remainder was used for paying the first year's interest and an attorney's fee of ten dollars. *Tucker v. Coffin* (Tex. Civ. App. 1894), 26 S. W. Rep. 323.

2. *Fowler v. Equitable Trust Co.*, 141 U. S. 384; *Haas v. Flint*, 8 Blackf. (Ind.) 67; *English v. Smock*, 34 Ind. 115; 7 Am. Rep. 215; *McGill v. Ware*, 5 Ill. 21.

The interest may be deducted in advance for the whole period of the loan. *Hawkes v. Weaver*, 46 Barb. (N. Y.) 164. Or it may be made payable annually or semi-annually in advance. *Bloomer v. McInerney*, 30 Hun (N. Y.) 201; *Hoyt v. Bridgewater Copper Min. Co.*, 6 N. J. Eq. 625.

3. *Hogan v. Hensley*, 22 Ark. 413; *Insurance Co. v. Carpenter*, 40 Ohio St. 260.

In *Barnes v. Worlich*, Cro. Jac. 25, it was declared by the court that an agreement to deduct the interest instantly upon the loan would be usurious, "for then he had not lent the entire sum for one year, and the other had not had the use of his money according to the intention of the law."

In *Lloyd v. Williams*, 3 Wils. 262; 1 W. Bl. 793, it was held that the taking of interest in advance constituted usury. To the same effect, see *Floyer v. Edwards*, Cowp. 112; *Marsh v. Martindale*, 3 B. & P. 154.

4. *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Mowry v. Bishop*, 5 Paige (N. Y.) 98.

**Payable Semi-Annually.**—*Monnett v. Sturges*, 25 Ohio St. 384; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Tallman v. Trusdell*, 3 Wis. 443.

Even though the statute provides that interest may be contracted for "at any rate not exceeding eight per centum per annum, payable annually," interest at that rate may be made payable semi-annually. *Cook v. Court-right*, 40 Ohio St. 248; 48 Am. Rep. 681.

So under a statute prohibiting more than "ten cents on the hundred by the

**3. Interest from Prior Date.**—An instrument is not on its face usurious by reason of a provision for interest from a period prior to its date. The courts recognize the fact that agreements for the payment of money are frequently executed subsequently to the transactions which form their consideration.<sup>1</sup> Clearly, however, if it be shown that a note or other evidence of debt was antedated for the purpose of obtaining more than legal interest, usury is thereby established.<sup>2</sup>

It has been held to be usury to include in a note given for the price of goods sold on a term of credit which had expired, interest from the date of sale, in the absence of an agreement for interest made at the time of granting the credit.<sup>3</sup>

As it often becomes necessary, in the making of loans, to subject the borrower to delays pending the examination of the securities offered, the execution and approval of papers, etc., even after the agreement to make the loan has been entered into, it is no more than reasonable that the borrower should be required to pay interest during that time on the amount which has been set aside for his use, and remains idle in the lender's hands. And such is the doctrine, subject only to the limitation that the delay shall be reasonable and *bona fide*.<sup>4</sup>

year." *Hawley v. Howell*, 60 Iowa 79; *Ragan v. Day*, 46 Iowa 239.

**English Cases.**—The earliest English decision upon the validity of contracts for the highest legal rate of interest payable at intervals of less than a year, is *Barnes v. Worlich*, Cro Jac. 25, where it was held by the court of king's bench (two judges dissenting), that it was not usury to stipulate for £10 interest on a loan of £100, £5 to be paid at the end of six months and the other £5 at the end of the year.

A similar ruling, upon the same state of facts, was affirmed in the exchequer chamber in the case of *Grysill v. Whichcott*, Cro. Car. 283; *Sir W. Jones* 303, *sub nom* *Whichcot v. Grysell*.

**Payable Quarterly.**—*Mowry v. Shumway*, 44 Conn. 493; *Brown v. Vandye*, 8 N. J. Eq. 795.

**Monthly.**—A custom among stockbrokers to compute interest monthly on balances does not necessarily involve usury. *Hatch v. Douglass*, 48 Conn. 116; 40 Am. Rep. 154.

*California Civil Code*, § 1918, provides that parties may agree in writing for any rate of interest, which shall be allowed up to the entry of judgment. It is held that an agreement to pay one and one-half per cent. interest per month, payable monthly, is valid, and

the court cannot afford any relief. *Coleman v. Commins*, 77 Cal. 548.

1. *Ewing v. Howard*, 7 Wall. (U. S.) 499; *U. S. v. Williams*, 5 McLean (U. S.) 133; *Halden v. Pollard*, 4 Pick. (Mass.) 173; *Marvin v. Feeter*, 8 Wend. (N. Y.) 533; *Andrews v. Hart*, 17 Wis. 297; *Rutherford v. Smith*, 28 Tex. 322; *Levy v. Hampton*, 1 McCord (S. Car.) 145.

A note expressed for "eighty-five dollars with three years interest at six per cent.," payable one year after date, is not on its face usurious, because it does not appear but that, at the date of the note, there was a debt due with two years' interest already accrued. *Scheidig v. Bemis*, 58 Hun (N. Y.) 606.

2. *Williams v. Williams*, 15 N. J. L. 255.

3. *White v. Friedlander*, 35 Ark. 52.

4. *Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Wilson v. Kirby*, 88 Ill. 566.

**Retention by Lender.**—Upon the acceptance of an application for a loan, a note and mortgage were forwarded to the borrowers by mail for execution, and the sum to be loaned was set apart for them, awaiting the return of the securities, and the examination and approval of the abstract of title, which was examined immediately upon its receipt, and a draft for the amount of the loan sent to the borrower by return mail.

The fact that, pending the examination of the security, the lender's agent, without authority, used the money temporarily for his own purposes, does not render the loan usurious, though the borrower pays interest during the time.<sup>1</sup>

Clearly it is not *per se* usurious for the lender to retain in his hands a portion of the loan upon which interest has been reserved, where the money is held subject to the call of the borrower and for his convenience.<sup>2</sup>

**4. Use of Rowlett's Tables.**—There is a conflict of authorities upon the question whether the practice among banks of computing interest according to Rowlett's Tables, by which thirty days constitute a month, or three hundred and sixty days a year, is usurious where the highest legal rate of interest is taken. The better rule, however, is that, in the absence of a deliberate intention to take illegal interest by that method, and where it appears that the tables were used only for convenience of computation, there is nothing usurious in their use.<sup>3</sup>

The court held that the fact that the note was bearing interest from its date, and during the interval, did not necessarily make it usurious, the transaction having been in the usual course of business, and well understood between the parties. *Daley v. Minnesota Loan, etc., Co.*, 43 Minn. 517.

The borrower gave notes for a year's interest on the amount of the loan, but the money was not paid to him until some time after the date of the notes. At the time of receiving the money, however, pursuant to a previous agreement, the interest accrued up to that time was indorsed on the note. It was held that there was no usury. *Scruggs v. Scottish-American Mortgage Co.* (Ark. 1891), 16 S. W. Rep. 563.

1. *Bevier v. Covell*, 87 N. Y. 50.

2. *Keys v. Moultrie*, 3 Bosw. (N. Y.) 1.

But the retention by the lender's agent of the money loaned for several months after the execution and delivery of the note and mortgage, and the collection of interest thereon from their date, constitute usury, where not done for the accommodation of the borrower. *Barr v. African M. E. Church* (N. J. 1887), 10 Atl. Rep. 287.

3. *Agricultural Bank v. Bissell*, 12 Pick. (Mass.) 586; *Planters' Bank v. Snodgrass*, 4 How. (Miss.) 573; *State Bank v. Cowan*, 8 Leigh (Va.) 238; *Parker v. Cousins*, 2 Gratt. (Va.) 372; 44 Am. Dec. 388; *Planters' Bank v. Bass*, 2 La. Ann. 430.

In the case of *Agricultural Bank v.*

*Bissell*, 12 Pick. (Mass.) 586, it appeared that the bank, in discounting a note at sixty days, computed interest according to Rowlett's Tables, by which three hundred and sixty days, or twelve months of thirty days each, are counted as a year, and by that method of computation the amount deducted slightly exceeded the lawful rate of interest; but there was no intention to take unlawful interest. It was held that there was no usury. *Shaw, C. J.*, speaking for the court, said: "As the statute prescribes the rate of interest for one year, and so at the same rate for a longer or shorter time, it is obvious that when the interest is to be computed in days or months, it is impossible to follow the prescribed rule precisely without taking the fraction of a day; and that this is not required, is now settled by the whole current of authorities. From the impossibility of executing the statute with literal exactness, has resulted the necessity of resorting to an execution *cy-près*, in many cases, where it is intended to conform to the intent and spirit of the statute. So it has been the practice to consider a contract for money payable in months, to be payable in calendar months, and to consider a calendar month as the twelfth part of a year, and to compute interest accordingly, though they are of different lengths. A note given in February at two months will have fifty-nine days to run and pay one per cent. interest, as for the sixth part of a year; but a note given in December at two months will

By statute in some states, it is now provided that interest computed at the rate of one-twelfth of the highest legal rate per annum for every thirty days shall not be construed to exceed the legal rate.<sup>1</sup>

**5. Interest After Maturity.**—Stipulations to the effect that, if the debt be not paid at maturity, it shall draw interest thereafter at a rate greater than the statutory limit, are now generally regarded as penalties to induce prompt payment, and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held free from usury.<sup>2</sup> The par-

have sixty-two days to run and pay the same rate of interest. The same difficulty arises in computing interest for a small number of days; and therefore some approximation, which can be made by an easy and practical mode of computation, if made in good faith and without being intended as a cover for usury, has been considered allowable, without drawing after it the penalty of the statute. Such being the universal practice of other persons, as well as banks, we think a jury would not be warranted, from the mere fact that the interest thus computed slightly exceeds the legal rate, to infer a corrupt and usurious agreement. And we think the present case comes within this rule." To the same effect, see *Planters' Bank v. Bass*, 2 La. Ann. 430.

**New York Rule.**—In *New York Fireman's Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678, the court, by Sutherland, J., said: "That the principle of calculation adopted by the plaintiffs was the one in general or universal use among banks, cannot alter the sense of the case. A statute cannot be obviated by the custom or usage of a particular trade. . . . The custom or usage of banks or individuals cannot shorten a year to three hundred and sixty days." See also *Catesby's Case*, 6 Coke 62.

1. *Connecticut* Gen. Stat. (1888), § 2941; *Starr & C. Annot* *Illinois* Stat. (1885), ch. 74, §§ 4-11; *Maryland* Pub. Gen. Laws (Rev. 1888), art. 49; *Kelly's Minnesota* Stat. (1891), § 2091.

2. *Upton v. O'Donahue* (Neb. 1891), 49 N. W. Rep. 267; *Burke v. Raab*, 4 Ill. App. 338; *Lawrence v. Cowles*, 13 Ill. 577; *Downey v. Beach*, 78 Ill. 53; *Fisher v. Otis*, 3 Chand. (Wis.) 8300; 3 Pinn. (Wis.) 78; *Chaffe v. Landers*, 46 Ark. 364; *Jones v. Hubbard*, 5 Call (Va.) 211; *Call v. Scott*, 4 Call (Va.) 402; *Pollard v. Baylors*, 6 Munf. (Va.) 433; *Wadsworth v. Champion*, 1 Root (Conn.) 393; *Tuttle v. Clark*, 4 Conn. 153; *Cole v. Lockhart*, 2 Ind. 631;

*Gambril v. Doe*, 8 Blackf. (Ind.) 140; 44 Am. Dec. 760; *Billingsley v. Dean*, 11 Ind. 331; *Sumner v. People*, 29 N. Y. 337; *Bank of Chenango v. Curtiss*, 19 Johns. (N. Y.) 326; *Jansen v. Lewis*, 2 Stew. (N. Y.) 426; *Rogers v. Sample*, 33 Miss. 310; 69 Am. Dec. 349; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 429; *Fisher v. Anderson*, 25 Iowa 28; 95 Am. Dec. 761; *Wilson v. Dean*, 10 Iowa 432; *Gower v. Carter*, 3 Iowa 244; 66 Am. Dec. 71.

In the leading case of *Lloyd v. Scott*, 4 Pet. (U. S.) 225, McLean, J., speaking for the Supreme Court of the *United States*, said that where a person undertakes to pay "a specific sum exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury, for the reason that by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty."

But notes given to secure usurious interest on the principal debt, are not rendered valid by a provision that they may be avoided by punctually paying the principal. *Seekel v. Norman*, 78 Iowa 254.

Though a contract is for the payment of a larger sum than the debt with legal interest, yet if by its terms the debtor may discharge it in full by paying only the actual debt within a certain time, it is not usurious. *Cutler v. How*, 8 Mass. 257; *Cutler v. Johnson*, 8 Mass. 266.

A provision in a note drawing the highest legal rate of interest "from date until paid," that the principal shall become payable sixty days before the date specified as the maturity of the note, does not render it usurious. *Telford v. Garrels*, 132 Ill. 550.

A testatrix, by writing under seal, acknowledged the receipt of \$200 from one of her executors, which she promised to pay during her lifetime, but that if she should fail to do so, her executors

were directed to pay the \$200 upon her death and the death of another, together with twenty per cent. per annum from date. In her will she recited this promise, and directed payment to be made accordingly. It was held that the executor was entitled, as against a legatee, to retain the whole amount. *Watson v. McClanahan*, 13 Ala. 57. But see *Fry v. Coleman*, 1 Grant's Cas. (Pa.) 445, where an agreement to give a third note of \$100, if the other two of the same amount were not paid within ten days after maturity, was regarded as usurious.

**Forfeiture of Security.**—In *Ramsey v. Morrison*, 39 N. J. L. 591, an agreement by the borrower that in case of non-payment of the debt and interest at maturity, the lender should be entitled to hold absolutely certain stock pledged as collateral security, was held free from usury.

**Minnesota Doctrine.**—Under a statute limiting conventional interest to twelve per cent., and providing that "all contracts shall bear the same rate of interest after they become due as before, if it clearly appears therefrom that such was the intention of the parties," the supreme court of *Minnesota* held that a provision in a note, "with interest after maturity at the rate of twelve per cent. per annum until paid," could not be enforced; that it was not competent for the parties to agree upon a higher rate of interest after than before maturity; that the allowance after default was strictly damages and not interest, and that only the legal rate of seven per cent. after maturity could be recovered. *Newell v. Houlton*, 22 Minn. 19; *White v. Ilitis*, 24 Minn. 43.

Earlier decisions, under a law allowing any rate of interest to be contracted, for in writing, are to the same effect, the reasoning of the court being that no agreement of the parties as to interest after maturity can affect the statutory rate of damages fixed at seven per cent. *Talcott v. Marston*, 3 Minn. 339; *Kent v. Bown*, 3 Minn. 347. See also *Mason v. Callender*, 2 Minn. 350; 72 Am. Dec. 102.

Where a note drew interest at five per cent. per annum, but was silent as to interest after maturity, the court held that it was proper to allow interest at seven per cent. as damages for non-payment. *Moreland v. Lawrence*, 23 Minn. 84; *Lash v. Lambert*, 15 Minn. 416; 2 Am. Rep. 142.

**English Cases.**—The doctrine laid

down by Lord Mansfield is now well established, that whenever it is, by the contract, within the power of the borrower to pay the principal debt within a certain time, without interest, or only lawful interest, the reservation of a greater rate in the event of non-payment is not usurious. *Folger v. Edwards*, Cowp. 112; *Hawkins P. C.*, ch. 82, § 119; *Garret v. Foot*, Comb. 133; *Burton's Case*, 5 Rep. 68; *Long v. Storie*, 10 Eng. L. & Eq. 182; *Roberts v. Fremaine*, Cro. Jac. 509; *Garnet v. Ferot*, Camp. 133; *Oliver v. Oliver*, 2 Roll. 469; *King v. Drury*, 2 Lev. 7; *Nicholls v. Maynard*, 3 Atk. 520; *Morripet v. King*, 2 Bur. 891.

In *Garnet v. Ferot*, Camp. 133, Holt, C. J., said: "If I covenant to pay £100 a year hence, and if I do not pay it, to pay £20, it is not usury, but only in the nature of a *nomine pænæ*."

In *Roberts v. Tremayne*, Cro. Jac. 509, the rule was stated by Doderidge, J., as follows: "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one £100 for two years, to pay for the loan thereof £30, and if he pay the principal at the year's end he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself."

**Principal Due on Default in Installment.**—Where a note payable in installments is given for the amount of the debt and legal interest up to the time of maturity, a stipulation that on default in the payment of any installment, the whole sum shall immediately become payable, does not render the contract usurious, because by paying the installments as agreed, nothing more than legal interest is paid. *Wells v. Girling*, 4 Moore 78; 5 E. C. L. 733; *Moore v. Cameron*, 93 N. Car. 51.

**Rates After Maturity Held Lawful.**—Twenty-five per cent; *Gould v. Bishop Hill Colony*, 35 Ill. 324. Twenty-four per cent; *Davis v. Rider*, 53 Ill. 416; *Weyrich v. Hobelman*, 14 Neb. 432. Twenty per cent; *Conrad v. Gibbon*, 29 Iowa 120. Thirty per cent; *Peavler v. McLaughlin*, 20 Ill. App. 536. Fifty per cent; *Wight v. Shuck*, 1 Morris (Iowa) 425; *Shuck v. Wight*, 1 Greene (Iowa) 128.

**Damages on Foreign Bills.**—In *Miller v. Bates*, 35 Ala. 580, it was held that if a bill of exchange between citizens of the same state was made payable in

ties may also stipulate that, in case of non-payment at maturity, the debt shall draw interest at an excessive rate from the date of the contract.<sup>1</sup> Within the same rule are agreements to pay certain sums as penalties or stipulated damages for failure to perform contracts other than money obligations.<sup>2</sup>

The true test is—has the debtor the absolute right to discharge and satisfy the contract at maturity by paying the principal debt and lawful interest? If he has, the contract is not vitiated by providing for the payment of an additional sum after maturity. It is otherwise, if by the terms of the contract the debtor is obliged to make the additional payment at all events.<sup>3</sup>

If the circumstances surrounding the transaction indicate that the parties did not intend that payment should be made at the date ostensibly fixed therefor, a provision for excessive interest will be regarded as a shift to evade the statute.<sup>4</sup>

It is clear that agreements made after maturity, to pay unlawful interest in consideration of further forbearance, are not within the protection of the rule.<sup>5</sup>

**6. Interest for Past Forbearance.**—An agreement to pay interest at a higher rate than allowed by law, in consideration of past forbearance, is held to be free from usury, though it may be unenforceable for want of consideration.<sup>6</sup>

another state for the purpose of obtaining statutory damages for non-payment, and not as a device to evade the usury law, it would be good.

**Change in Statute.**—A note payable in one year, "with interest at the rate of fifteen per cent. after maturity," was executed prior to, but became due after, the enactment of a statute prohibiting the recovery of more than seven per cent. per annum for the forbearance of a debt after maturity. It was held that the fifteen per cent. was recoverable as interest under the contract, and not as a penalty, and that the statute was not intended to apply to contracts in which the rate after the maturity was agreed upon. *Hubbard v. Callahan*, 42 Conn. 524.

1. *Fisher v. Anderson*, 25 Iowa 28; 95 Am. Dec. 761; *Rogers v. Sample*, 33 Miss. 310; 69 Am. Dec. 349.

2. *Tardeveau v. Smith*, Hard. (Ky.) 183; 3 Am. Dec. 727.

3. *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180; 21 Am. Rep. 209.

4. *Pike v. Crist*, 62 Ill. 461; *Sanner v. Smith*, 89 Ill. 123. As where the note was made payable one day after date, with interest at twenty per cent. after maturity. *Osborn v. McCowen*, 25 Ill. 201.

**Intent Not to Pay at Maturity.**—An

agreement in a note to pay after maturity an illegal rate of interest was held usurious, where, by the terms of a prior contract of sale between the parties, out of which the note arose, such interest was contemplated, the parties evidently intending at that time that the debt should be allowed to stand for some length of time after maturity. *Carroll Co. Sav. Bank v. Strother*, 28 S. Car. 504.

5. *Wiley v. Hight*, 39 Mo. 130.

**6. For Past Forbearance.**—In an action on a note given for interest on a prior indebtedness, where the defense was usury, it appeared that the face of the note represented the difference between twelve per cent. (the highest legal rate) accrued on the debt according to its terms at the time the note sued on was given, and a still higher rate then agreed upon by the parties as "extra interest." It was held that there was no usury, the agreement being merely for past forbearance. *Berry, J.*, speaking for the supreme court, said: "Upon careful consideration of the pleadings and the testimony reported, we have come to the conclusion that the only contract which there is anything in the case tending to establish, is a contract to make up the amount of interest which, at the time of the

7. **Interest in Gold.**—It is held that where a note stipulates for interest "in gold or its equivalent," payment of a sum in legal-tender notes equal to the agreed interest in gold is not usurious.<sup>1</sup>

8. **Interest on Interest.**—The decisions upon the question whether stipulations for compound interest, or interest upon interest, are usurious where the rate reserved is the highest allowed by the statute, are not harmonious. It was formerly held, and is still the rule, in some states, that agreements made at the time of the principal contract to the effect that as installments of interest mature they shall become a part of the debt, and thereafter draw interest—in other words, agreements for compounding interest at the highest rate—enable the creditor to get more than legal interest for the forbearance of the principal debt, and are usurious.<sup>2</sup>

execution of the note, had accrued on certain prior indebtedness of defendant, at the stipulated rate of twelve per cent., to such an amount as would have accrued thereon at some rate higher than twelve per cent. A contract to pay interest is a contract to pay a compensation for the future use of money. The contract in this case was a contract to pay a compensation for the past use of money, and therefore not a contract to pay interest, in any proper or legal sense, or within the meaning of the statute. It follows that the contract was not invalid under the statute, as stipulating for interest in excess of twelve per cent. But the evidence in this case tending to show that the contract was of the character ascribed to it, and that it was without consideration, the want of consideration furnished a good defense to the note in suit as against the payee." *Daniels v. Wilson*, 21 Minn. 530.

Three months after notes bearing ten per cent. interest had matured, the debtor signed an agreement that, in consideration of an extension of two years from their maturity, he would pay twelve per cent. per annum (the highest legal rate) upon the notes, from the date of maturity until paid. The defense of usury being set up, the supreme court of *Texas* held that this was in effect an agreement to pay twenty-four per cent. for a period of less than two years, inasmuch as the debtor had already received the benefit of the three months' forbearance, without any additional consideration, and was accordingly usurious, but that the original promise to pay ten per cent. was not affected or impaired. *Krause v. Pope*, 78 Tex. 478.

1. *Isett v. Caldwell*, 101 Pa. St. 32.

2. *Cox v. Brookshire*, 76 N. Car. 314; *McFaddon v. Fortier*, 20 Ill. 509; *Drury v. Wolfe*, 134 Ill. 294; *First Nat. Bank v. Davis*, 108 Ill. 633; *Su-jette v. Wilson*, 13 Oregon 514; *Kins-brough v. Lukins*, 70 Ind. 373; *Ward v. Brandon*, 1 Heisk. (Tenn.) 490; *Mathews v. Toogood*, 23 Neb. 536; 8 Am. St. Rep. 131; *Curtis v. Valiton*, 3 Mont. 153.

To constitute usury in the taking of interest on interest, it is not necessary to show that the agreement therefor was made in advance. *Leonard v. Patton*, 106 Ill. 99.

In *Peddlicord v. Connard*, 85 Ill. 102, it was held usury to compound interest every sixty days on overdrafts.

In *North Carolina*, it is considered that the usury act forbids compound interest. *Cox v. Brookshire*, 76 N. Car. 314.

**Rule in Colorado.**—On a loan of \$150, a note of \$177 was given, at three per cent. interest per month after maturity. The \$27 was the amount of interest at that rate from the date of the note to its maturity. The supreme court of *Colorado* held that, as to the latter amount, the note was usurious and void, notwithstanding the statute (*Colorado Gen. Stat. § 1708*) allows parties to contract for any rate of interest. The ground of the decision is that the agreement was in effect to pay compound interest, and the *Colorado* rule is, that such agreements, made in advance, are unlawful. In delivering the opinion of the court, Helm, C. J., said: "A disposition undoubtedly appears in some of the modern decisions and text-books to reject the doctrine that compound interest contracted for in advance is *per se* unlawful. But, the question being *stare decisis* in this state, and



A more common form of agreement is to pay the reserved rate of interest at stated intervals, with a further stipulation that if such interest be not paid when due, it shall itself draw interest thereafter. The more reasonable doctrine is that such stipulations are not usurious, being merely intended as compensation to the creditor for being deprived of the use of his interest.<sup>1</sup> But in a number of states the courts have drawn a distinction between agreements of this character made prior to default in payment of interest, and similar agreements made after such default; and they hold that only in the latter case can agreements for interest on interest be lawfully made.<sup>2</sup>

there being much to commend the doctrine, it will not now be disturbed. We do not intimate that the arrangement would have been illegal had the promise of appellant to pay compound interest been made after, instead of before, the interest to be compounded accrued." *Hochmark v. Richler*, 16 Colo. 263.

The earlier decisions of the supreme court of *Colorado*, which were relied upon as establishing the rule for that state, are the following: *Denver Brick, etc., Co. v. McAllister*, 6 Colo. 261; *Fillmore v. Reithman*, 6 Colo. 121; *Beckwith v. Beckwith*, 11 Colo. 568.

In *Minnesota*, it was held at an early day that an agreement to pay interest on interest, if not paid when due, would not be enforced, the decision being based on *State v. Jackson*, 1 Johns. Ch. (N. Y.) 13; *Mason v. Callender*, 2 Minn. 302; *Talcott v. Marston*, 3 Minn. 238.

In *Dyar v. Slingerland*, 24 Minn. 267, *Gilfillan, C. J.*, said, "If the question might be considered open in this state, we could see no satisfactory reason, based either on principle or public policy, why it might not be allowed," but the court felt bound to follow the rule established by the earlier cases.

**Compound Interest Not Usury.**—Notwithstanding the respectable array of authorities against the validity of agreements for compounding interest, it is difficult to find any good reason for calling it usury. Suppose the transaction is in the form of a loan of \$1,000 for five years, at ten per cent. interest, payable annually. It is obvious that at the end of the first year the borrower will owe an additional \$100. If he desires the use of that \$100 during the next year, the lender may lawfully lend it to him the instant he pays it, and take interest on the new loan at the highest rate. Each successive year during the whole period of

the loan the lender could lawfully make a new loan to the borrower of the various installments of interest as the same were paid in. Why should it not be equally lawful for the parties to agree in advance, the one to borrow, and the other to lend, these installments of interest from time to time, at the same rates?

1. *Scott v. Saffold*, 37 Ga. 384; *Merck v. American Freehold, etc., Co.*, 79 Ga. 213; *Guin v. New England, etc., Security Co.*, 92 Ala. 135; *Hager v. Blake*, 16 Neb. 12; *Taylor v. Hiestand*, 46 Ohio St. 345; *Dickson v. Surginer*, 3 Brev. (S. Car.) 417; *Tread. Const. (S. Car.)* 501; *Brown v. Brent*, 1 Hen. & M. (Va.) 4.

A note due one year from date, with interest at eight per cent. "from maturity until paid," provided that "if the interest be not paid when due, to become as principal and bear the same rate of interest." The court held that this clause did not render the note usurious, because no time was fixed when the interest would become due, and hence the provision was nugatory. *Hoskins v. Cole*, 34 Ill. App. 541.

The fact that interest on a trust deed is to be paid by coupon notes semi-annually, and that such coupons bear interest at twelve per cent. after maturity, does not constitute usury in *Texas*. *Martin v. Land Mortg. Bank* (Tex. Civ. App. 1894), 23 S. W. Rep. 1032.

2. *Oliver v. Decatur*, 4 Cranch (U. S.) 461; *Camp v. Bates*, 11 Conn. 487; *McGovern v. Union Mut. L. Ins. Co.*, 109 Ill. 151; *Gilmore v. Bissell*, 124 Ill. 488; *Telford v. Garrells*, 31 Ill. App. 441; *affirmed* 132 Ill. 550; *Wallis v. Lehman*, 36 Ark. 569; *Turner v. Miller*, 6 Ark. 463; *Magruder v. State Bank*, 18 Ark. 9; *Grider v. Driver*, 46 Ark. 50; *Hale v. Hale*, 1 Coldw. (Tenn.) 233; 78 Am. Dec. 490; *Sinclair v. Peebles*, 5 Coldw.

**9. Interest as Part of Purchase Price.**—Where property is sold at a cash price, it is usury to stipulate for more than legal interest on deferred payments.<sup>1</sup>

(Tenn.) 584; *Woods v. Rankin*, 2 Heisk. (Tenn.) 46; *Ledoux v. Goza*, 4 La. Ann. 160; *Keane v. Branden*, 12 La. Ann. 20; *Fobes v. Cantfield*, 3 Ohio 18; *Miner v. Paris Exch. Bank*, 53 Tex. 559; *Barbour v. Tompkins*, 31 W. Va. 410; *Craig v. McCullough*, 20 W. Va. 148; *Columbia Co. v. King*, 13 Fla. 451; *Pinckard v. Ponder*, 6 Ga. 253; *Mosher v. Chapin*, 12 Wis. 453; *Howland v. Marr*, 20 Wis. 275; *Austin v. Bacon*, 28 Wis. 416; *Case v. Fish*, 58 Wis. 56; *Keiser v. Decker*, 29 Neb. 92; *Tylee v. Yates*, 3 Barb. (N. Y.) 222; *Stewart v. Petree*, 55 N. Y. 621; *Goodrich v. Clute* (Supreme Ct.), 3 N. Y. Supp. 102; *Fitzhugh v. McPherson*, 3 Gill (Md.) 408; *Quinby v. Cook*, 10 Allen (Mass.) 32; *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

**Agreement After Due.**—In *Austin v. Bacon*, 28 Wis. 416, *Cole, J.*, said: "That compound interest, or interest upon interest, was included in this note and mortgage, does not admit of doubt, but I am satisfied from the evidence that this was done by the agreement of the respective parties, debtor and creditor, and without any corrupt intent to violate the law upon the subject of usury. It was nothing more than a contract for the payment of interest upon interest previously due and payable according to the note and mortgage given June 15th, 1852. Such contracts have been sustained by this court."

In *Stansbury v. Stansbury*, 24 W. Va. 517, it was held usurious to stipulate for interest on interest already due, as a condition of granting further forbearance.

Where the amount of a renewal note is ascertained by taking the amount of the principal and interest at the maximum rate due on the former note, and adding thereto compound interest computed on the former note for a part of the time, the new note is usurious, or at least without consideration, as to the excess of interest thus computed. *Simpson v. Evans*, 44 Minn. 419.

**Mistake.**—In the recent case of *U. S. Mortgage Co. v. Sperry*, 138 U. S., 313 reversing the decision below, 26 Fed. Rep. 727, the debtor applied to his creditor for a loan, to be used in part in paying past due interest on previous loans made to him by the cred-

itor. Out of the new loan, the creditor retained not only the amount of interest due on the previous loans, but in addition thereto interest on the overdue interest coupons, both parties in good faith believing that these coupons bore interest after maturity; but it was subsequently decided by the court that the coupons did not bear interest. Upon this state of facts, the Supreme Court of the *United States* held that, although the amount thus retained was greater than the maximum rate allowed by the statute upon the original loans, yet as the parties had not intended to contract for such excessive rate, but had arrived at it by mistake, there was no usury.

1. *Irvin v. Mathews*, 75 Ga. 739; *Mitchell v. Griffith*, 22 Mo. 515.

**Usurious Devices.**—A, the owner of a slave, asked \$1,000 for him, which B, was willing to give, but could not pay cash. A was willing to allow time, provided the price was increased by ten per cent. per annum until payment. After discussing the best method of avoiding usury, A told B to name the time he wanted, and A would then name his price. B said three years, whereupon A said he must have \$300 more. A bill of sale was then drawn, expressing the price as \$1,000 and B gave A his note for \$1,300 payable in three years, but "to be paid at such time as I please, and to deduct ten per cent. per annum off of the amount paid at each payment." It was held to be usury. *Thompson v. Nesbit*, 2 Rich. (S. Car.) 73.

The defendant bought certain milling machinery of the plaintiff, and gave a mortgage for \$10,000, payable in five years with interest. As part of the same transaction, the parties made an agreement that until the payment in full of the mortgage debt, the defendant should pay the plaintiff five cents per barrel for every barrel of flour manufactured in the defendant's mill, not to be less than 30,000 barrels or \$1,500 per year. Also that the interest on the mortgage should be regarded as included in the five cents per barrel. It was also agreed "that upon the payment in cash of the said sum of \$10,000 at any time within the five years, the payment of five cents

But if the parties act in good faith, and without design to evade the statute, they may lawfully agree that the price on credit shall be a certain sum designated as principal and a further sum designated as interest, though the latter exceeds the legal rate on the former for the period of credit. In other words, they may agree that both sums shall constitute the purchase price payable at the time fixed.<sup>1</sup>

per barrel shall cease and determine." It was contended by the plaintiff that the payment of five cents per barrel was a part of the purchase price, but the supreme court held that it was merely a device for usury, *Gordon, J.*, saying: "If, then, these five cents per barrel were to continue to be paid as long as the principal debt remained unpaid and no longer, and if the payment thereof was to cease *eo instante* the debt was extinguished, what was it, if not a compensation for the use of money? If this was a part of the *bona fide* price of the machinery, how does it come that its payment depended upon the continuance of the principal debt, and was to cease just as soon as that debt was extinguished? It is too plain for discussion that this was a device, and a clumsy one at that, to evade the Statute of Usury." *Hartranft v. Uhlinger*, 115 Pa. St. 270.

1. *Beete v. Bidgood*, 7 B. & C. 453; 14 E. C. L. 80; *Cutler v. Wright*, 22 N. Y. 472; *Graeme v. Adams*, 23 Gratt. (Va.) 225; 14 Am. Rep. 130; *Kraker v. Shields*, 20 Gratt. (Va.) 377; *Succession of Latchford*, 42 La. Ann. 529; *Hansbrough v. Peck*, 5 Wall. (U. S.) 507; *Hogg v. Ruffner*, 1 Black (U. S.) 115; *Jackson v. Kirby*, 37 Vt. 448; *Tousey v. Robinson*, 1 Metc. (Ky.) 663; *Gruell v. Smalley*, 1 Duv. (Ky.) 358; *Borum v. Fouts*, 15 Ind. 50; *Garity v. Cripp*, 4 Baxt. (Tenn.) 86; *Brown v. Gardner*, 4 Lea (Tenn.) 145; *Ford v. Hancock*, 36 Ark. 248; *Berry v. Walker*, 9 B. Mon. (Ky.) 464; *Aksin v. Lebus* (Ky. 1887), 4 S. W. Rep. 305.

An agreement on the purchase of land, to pay \$1,500 cash, and \$500 more with \$100, "for interest on it," at the purchaser's death, is not usurious. The \$100 is a part of the purchase price, being so intended by the parties. *Parker v. Coburn*, 10 Allen (Mass.) 82.

It is not usury to agree, upon the sale of goods at a certain price, that if payment be not made in thirty days, fifteen per cent. additional shall be included

as part of the purchase price. *Bass v. Patterson*, 68 Miss. 310; 24 Am. St. Rep. 279.

The vendor of land asked \$10,000 cash, but, the vendee being unable to pay cash, it was agreed that a deed and a bond and mortgage for \$12,000, payable at a future date with interest, should be executed, to be held by the vendor until he could dispose of the bond and mortgage for \$10,000, when he would deliver the deed. This arrangement was carried out, the seller delivering the deed upon receiving \$10,000 for the sale of the securities. It was held that the bond and mortgage were not usurious. *Brooks v. Avery*, 4 N. Y. 225.

In *Long v. Israel*, 9 Leigh (Va.) 556, A agreed that B might buy C's land as cheap as he could, and that he would give B \$900 for it. B bought the land for \$750, and it was conveyed directly to A, who gave B his note for the \$900. It was held that the note was not usurious.

In *Jones v. Hubbard*, 6 Call (Va.) 211, A had agreed to buy B's land, which was about to be sold under a trust deed, at the amount of the creditor's claim, and to sell it again to B at a price to be subsequently agreed upon, which sum, though never actually agreed upon, was understood by the parties to be such an amount as would reimburse A for the money paid out, the sacrifices he might have to make to obtain it, and liberally compensate him for all his trouble in the premises. The court held that the transaction was entirely free from usury.

In *Matlock v. Cobb*, 62 Miss. 43, it was held that the fact that the creditor in a trust deed purchased the property at a sale under the deed, and subsequently conveyed it to the debtor for a consideration equal to the original debt and accrued usurious interest, did not render such sale and conveyance usurious.

In *Reger v. O'Neal*, 33 W. Va. 159, Brannon, J., said: "Usury is interest

**XVIII. DEPRECIATED CURRENCY AND FUNDS.**—Where a loan is made in bank notes, stocks, or other funds which are at the time substantially depreciated in market value, upon a contract to repay the full par value of such funds, and the difference between the actual and par values, or such difference added to the interest reserved, exceeds lawful interest for the period of the loan, the courts are inclined to regard the transaction as a cover for usury.<sup>1</sup> But usury cannot be predicated as a matter of law from the mere inequality between currency loaned or exchanged and that agreed to be repaid for it. The intention is a question of fact, to be determined from all the circumstances.<sup>2</sup> Where the depreciation is but slight, and the funds loaned commonly pass current in business transactions, agreements to repay their par value in current money

exceeding the lawful rate for the loan or forbearance of money, and does not exist where such interest is essentially and honestly a part of the consideration in the purchase of land, even though it be called for in the form of a percentage on a principal sum, and be called 'interest,' and be in excess of the lawful rate; the interest, in such case, of an honest purchase, where it is not a mere cover for what is in fact a loan, being as much a part of the purchase price as that part appearing as the principal."

1. *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Seymour v. Strong*, 4 Hill (N. Y.) 255; *Warfield v. Boswell*, 2 Dana. (Ky.) 224; *Collins v. Secreh*, 7 T. B. Mon. (Ky.) 335; *Burnham v. Gentrys*, 7 T. B. Mon. (Ky.) 354; *Brown v. Nevitt*, 27 Miss. 801; *Turney v. State Bank*, 5 Humph. (Tenn.) 407.

Thus, a note payable in specie, drawn for the nominal value of a loan made in bank notes, which were depreciated nearly one half, is usurious. *Fleming v. Thomas*, 4 J. J. Marsh. (Ky.) 48.

So of a loan of *Tennessee* bank notes, which same were at twenty-five per cent. discount, to be repaid at their nominal value in specie. *Weatherhead v. Boyers*, 7 Yerg. (Tenn.) 545.

So of an agreement, upon discounting a note, to pay the borrower the proceeds in bank notes at their nominal value, which were in fact worth only fifty-four per cent. *Bank of United States v. Owens*, 2 Pet. (U. S.) 537.

It is not usury, however, for a bank to give its own bills, at their nominal value, in making a loan, though such bills are below par, on account of the bank having suspended specie payments. *Mauzy v. Ingraham*, 28 Miss. 171.

In determining the question of usury, it matters not what use the borrower intends to make of the depreciated funds received. *Archer v. Putnam*, 12 Smed. & M. (Miss.) 286. As that he professed his ability to use them at par in paying debts. *Ehringhaus v. Ford*, 3 Ired. (N. Car.) 522.

2. *Hamilton v. Moore*, 7 Humph. (Tenn.) 35; *Talbot v. Warfield*, 3 J. J. Marsh. (Ky.) 83; *Stevenson v. Unkefer*, 14 Ill. 103.

An agreement to pay, at the end of one year, \$90 in state notes, worth at the time of the contract only fifty per cent., in consideration of a loan of \$37.50 in specie, was held not a usurious transaction, the value of the notes at the time of payment being uncertain. *Wilson v. Kilburn*, 1 J. J. Marsh. (Ky.) 494.

**Intent.**—In *Doak v. Snapp*, 1 Coldw. (Tenn.) 180, depreciated state bonds of the nominal value of \$2,250, were transferred to the plaintiff under an agreement to pay "interest on said bonds at the rate of six per cent., in half-yearly payments, from this date. And I moreover promise to pay, on or before April 5th, 1845, to the said Snapp or order, the \$2,250 in *Georgia* state bonds, or their equivalent in other money." On a bill brought to have the contract declared usurious, the plaintiff having appealed from a decree against him below, the supreme court, by Caruthers, J., said: "It would not necessarily follow, if the bonds were sold for their nominal value, where they were much depreciated, to be paid in full at a given time, that it would be usurious. That would depend on the intention and purpose of the parties, whether it was a contrivance to get usurious interest or not. The stocks,

are not usurious in the absence of evidence that usury was intended.<sup>1</sup> If the borrower has the *bona fide* privilege of paying the loan in the same kind of funds, at their par value, the transaction cannot be said to be usurious, no matter what the extent of the depreciation.<sup>2</sup> And where the agreement is to repay in depreciated funds, it is not usury to exact the nominal amount and interest, though their value is greater at the time of payment than at the date of the agreement.<sup>3</sup> So where a loan of coin is to be repaid in kind, a stipulation that if paid in paper money then at the rate of one dollar and a half in such currency for every dollar in coin, is not *prima facie* usurious.<sup>4</sup>

Of course, if the transaction is a *bona fide* sale of property, and not a loan, it is not rendered usurious by the fact that payment is made in depreciated funds.<sup>5</sup>

or even depreciated bank notes, might be worth to the purchaser or borrower more than they would then sell for; or even the lender might prefer to keep them, for the chances of improvement in value, rather than to part with them at less than the amount for which they called on their face. Upon the whole, we think the decree is right, and affirm it."

Upon a loan of \$6,500, it was stipulated that \$5,000 of the amount should be accepted by the borrower in bills of a bank which had suspended specie payments some time before, and whose bills were commonly refused by business men. A large quantity of these bills were at that time held by the lender as security against the bank, and the lender entertained a hope that the bank would re-establish its credit, but it soon after proved to be insolvent. It was held that the burden was upon the borrower to prove that the lender knew of the insolvency at the time of the loan. *Stuart v. Mechanics, etc., Bank*, 19 Johns. (N. Y.) 508.

1. *Slosson v. Duff*, 1 Barb. (N. Y.) 432; *Lowry v. Chautauqua Co. Bank*, *Clarke Ch.* (N. Y.) 67; *Hayward v. Le Baron*, 4 Fla. 404.

A loan at the highest rate of interest, made in bills taken by the borrower at par, but which were in fact one per cent. below par and unbankable, yet currently circulating at par among individuals, is not necessarily usurious. The intent is a question of fact for the jury. *Robbins v. Dillaye*, 4 Abb. App. Dec. (N. Y.) 71.

A creditor of an insolvent estate borrowed a sum made up in part of cash, but principally of promissory notes somewhat below par in market value, and gave the assignees his note for the

nominal amount. The assignees had no intention of making a usurious loan, and acted in entire good faith. It was held that the transaction was valid. *Sizer v. Miller*, 1 Hill (N. Y.) 227.

A loan, at par, of the bills of a bank which had stopped specie payments, but which was not shown to be insolvent or embarrassed, and whose bills were not shown to be held below par in the market, made to a borrower not shown to be in necessitous circumstances, was held free from usury. *Stuart v. Mechanics, etc., Bank*, 19 Johns. (N. Y.) 496.

In *Codd v. Rathbone*, 19 N. Y. 37, the defendant drew checks, payable in foreign bank bills which were currently received by the drawee and other banks at a discount, but which circulated at par among merchants, and the checks were thus paid by the drawee. In an action on a note given for the amount of the checks, it was held that the transaction was not usurious, in the absence of a prior agreement that the checks should be drawn payable in such bills.

2. *Caton v. Shaw*, 2 Har. & G. (Md.) 13.

For a loan of \$80 in specie, the borrower promised to pay "\$88 in current bills, such as pass at A between man and man." Usury having been set up as a defense, it was held proper for the plaintiff to show that the kind of bills referred to were, at the time of the loan, depreciated ten per cent. below par. *Phelps v. Riley*, 3 Conn. 266.

3. *Helm v. Jesse*, 5 J. J. Marsh. (Ky.) 428; *Turpin v. Turpin*, 7 J. J. Marsh. (Ky.) 33.

4. *Finley v. McCormick*, 6 Heisk. (Tenn.) 392.

5. *Stockwell v. Holmes*, 33 N. Y. 53.

**XIX. AGENT'S COMMISSIONS ; BONUS—1. Borrower's Agent.**—Payment or agreement for payment by the borrower of commissions for services in procuring the loan, rendered by a third person acting *bona fide* as the agent or broker for the borrower, and of which commissions the lender receives no part, directly or indirectly, can never render the loan usurious, for the plain reason that the lender is no party to the transaction.<sup>1</sup> The fact that the lender is cognizant of the agreement between the borrower and his own agent does not affect the rule, so long as the commissions are solely for the latter's benefit ;<sup>2</sup> nor does the fact that the borrower's

1. *Baldwin v. Doying*, 114 N. Y. 452; *Hetfield v. Newton*, 3 Sandf. Ch. (N. Y.) 564; *Barretto v. Snowden*, 5 Wend. (N. Y.) 181; *Cox v. Massachusetts Mut. L. Ins. Co.*, 113 Ill. 382; *Haldeman v. Massachusetts Mut. L. Ins. Co.*, 120 Ill. 390; *Telford v. Garrells*, 31 Ill. App. 441; *affirmed* in 132 Ill. 550; *Fay v. Lovejoy*, 20 Wis. 407; *Philo v. Butterfield*, 3 Neb. 256; *Davis v. Sloman*, 27 Neb. 877; *Guin v. New England, etc., Security Co.*, 92 Ala. 135; *May v. Flint* (Ark. 1891), 16 S. W. Rep. 575; *Weems v. Jones*, 86 Ga. 760; *Equitable Mortg. Co. v. Craft*, 58 Fed. Rep. 613.

Where the lender neither takes nor contracts to take usury, he is not affected by a contract between the borrower and a loan broker to pay the latter out of the loan for his services, the lender having no interest in the broker's business or its proceeds. *Weems v. American Mortg. Co.*, 86 Ga. 760.

In *Richards v. Purdy* (Iowa, 1894), 58 N. W. Rep. 886, it was held that a loan was not rendered usurious by the borrower giving a note to the lender's agent, who was also the borrower's agent, as a commission for securing the loan, although it was made payable to the lender as a matter of convenience, to have it secured by the mortgages, if the lender did not authorize the charge for commissions or know of it.

A procured B to borrow money for him, and agreed to pay three per cent. per month therefor. B obtained the money from a third person at legal interest, and the latter took a note from A for the amount; but B received from A the three per cent. per month for his own use. It was held that A's note for the amount so loaned was not usurious. *Coster v. Dilworth*, 8 Cow. (N. Y.) 299. To the same effect, see also *Barretto v. Snowden*, 5 Wend. (N. Y.) 181.

It is not a usurious loan for a guardian to take a bonus for his own benefit, on lending his ward's money to one who has knowledge of the ownership. *Fellows v. Longyor*, 91 N. Y. 324.

But it is held that a usurious bonus taken by an executor for his own benefit in lending the estate's funds, must be deducted from the face of the note. *Landis v. Saxton*, 89 Mo. 375.

**Double Brokerage.**—One of the earliest cases holding that the payment of commissions by the borrower to a broker for obtaining a loan does not render the loan usurious, is *Dagnell v. Wigley*, 11 East 35. The facts were that the defendants, for the purpose of obtaining money, accepted a bill of exchange, and gave it to one Rimmer to negotiate, under an agreement to pay him double the usual brokerage. Rimmer deducted the amount of his brokerage from the proceeds of sale of the bill, and, as it came due the defendants accepted another bill for the purpose of raising funds to pay the first, which latter bill Rimmer also negotiated for them, receiving therefor double brokerage. This arrangement was resorted to several times. In an action by the holders of the last bill against the acceptors, the payment of exorbitant brokerage to Rimmer was relied on as vitiating the bill; but the defense was overruled by Lord Ellenborough, C. J., who said: "It does not appear that Rimmer's name was on the bill at all, nor was he to advance the money. It does not therefore strike me as a security given for a usurious consideration, but Rimmer was to receive an exorbitant brokerage for his trouble in getting the bill discounted." To the same effect see *Salarte v. Melville*, 7 B. & C. 427.

2. *Crane v. Hubbel*, 7 Paige (N. Y.) 413; *Merck v. American Freehold, etc., Co.*, 79 Ga. 213; *Ottillie v. Waechter*, 33 Wis. 255.

In the absence of collusion, com-

agent shares his commissions with the lender's agent.<sup>1</sup> But if, by previous agreement or tacit understanding, the commissions are shared between the borrower's agent and the lender himself, the taking of the commissions thereby becomes the act of the lender, and must be regarded as additional interest.<sup>2</sup>

**2. Lender's Agent.**—The general rule is now well settled that commissions paid or agreed to be paid by the borrower to an agent of the lender for his services in procuring or advising the loan, and which, if added to the stipulated interest, would exceed the statutory limit, do not render the contract of the loan usurious, provided that such commissions are not in any manner shared by the lender, and are not exorbitant or unreasonable in amount; or, if excessive, that they were exacted by the agent without the lender's knowledge or consent.<sup>3</sup> So the lender may, without incur-

missions paid by the lender, out of the loan, to third persons at the borrowers' request, and not for the benefit of the lender or his agents, do not make the loan usurious. *Kihlholz v. Wolf*, 103 Ill. 362.

1. *Dickey v. Brown*, 56 Iowa 426.

2. *Collamer v. Goodrich*, 30 Vt. 628; *McBroom v. Scottish Mortg., etc., Invest. Co.*, 153 U. S. 318.

An allowance to a mortgagee of four per cent. in addition to the legal rate of interest is usurious, although such allowance is called a "banker's commission." *Bowdoin v. Hammond* (Md. 1894), 28 Atl. Rep. 769.

**Gratuity.**—In *Eslava v. Crampton*, 61 Ala. 507, it was held that the fact that the loan broker, as a mere gratuity, shared his commissions with the lender, did not infect the loan with usury.

3. *Eddy v. Badger*, 8 Biss. (U. S.) 238; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Condit v. Baldwin*, 21 N. Y. 219; 78 Am. Dec. 137, *affirming* 21 Barb. (N. Y.) 181; *Austin v. Harrington*, 28 Vt. 130; *Brigham v. Myers*, 51 Iowa 397; *Mackey v. Winkler*, 35 Minn. 513; *Williams v. Bryan*, 68 Tex. 593; *New England, etc., Security Co. v. Townes* (Miss. 1887), 1 So. Rep. 242.

**Knowledge of Lender Essential.**—The following cases hold that to charge the lender with the agent's exactions, it must be shown that he had previously authorized them, or made the loan with knowledge of the facts. *Fisher v. Porter*, 23 Fed. Rep. 162; *Call v. Palmer*, 116 U. S. 98; *Palmer v. Call*, 2 McCrary (U. S.) 522; *Estevez v. Purdy*, 66 N. Y. 446; *Van Wyck v. Watters*, 81 N. Y. 352; *Phillips v. Mackellar*, 92 N. Y. 34; *Moore v. Bogart*, 19 Hun (N. Y.)

227; *Bliven v. Lydecker*, 55 Hun (N. Y.) 171; *Sniffin v. Koechling*, 45 N. Y. Super. Ct. 61; *Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Manning v. Young*, 28 N. J. Eq. 568; *Gray v. Van Blarcom*, 29 N. J. Eq. 454; *White v. Dwyer*, 31 N. J. Eq. 40; *Nichols v. Osborn*, 41 N. J. Eq. 92; *Lane v. Washington L. Ins. Co.*, 46 N. J. Eq. 316; *Baxter v. Buck*, 10 Vt. 548; *Cox v. Massachusetts Mut. L. Ins. Co.*, 113 Ill. 382; *Brown v. Scottish-American Mortgage Co.*, 110 Ill. 235; *Boylston v. Bain*, 90 Ill. 283; *Payne v. Newcomb*, 100 Ill. 611; 39 Am. Rep. 69; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69; *Callender v. Roberts*, 17 Ill. App. 539; *Telford v. Garrells*, 132 Ill. 550, *affirming* 31 Ill. App. 441; *Stein v. Swensen*, 44 Minn. 218; *Davis v. Sloan*, 27 Neb. 877; *Smith v. Wolf*, 55 Iowa 555; *Wyllis v. Ault*, 46 Iowa 46; *Ammerman v. Ross*, 84 Iowa 359; *Boardman v. Taylor*, 66 Ga. 638; *Merck v. American Freehold, etc., Co.*, 79 Ga. 213; *Pass v. New England Security Co.*, 66 Miss. 365; *Baird v. Milwood*, 51 Ark. 548; *Vahlberg v. Keaton*, 51 Ark. 534.

To sustain a plea of usury paid to the plaintiff's agent who negotiated the loan, the defendant must prove, not only that the agent retained money in excess of lawful interest, but that such act was either authorized, known, or ratified by the plaintiff. *Greenfield v. Monaghan* (Iowa, 1892), 52 N. W. Rep. 193.

Where the agent's charge for services is manifestly an excuse to cover the taking of a usurious bonus, it is immaterial whether the lender shared in it or not, if he knowingly allowed

its payment to be a condition of the loan, or assisted in its exaction at the time of the loan. *Pfenning v. Scholer*, 43 N. J. Eq. 15; *Borcherling's Ex'r v. Trefz*, 40 N. J. Eq. 502; *Demarest v. Vandenberg*, 41 N. J. Eq. 63; *Bennett v. Hadsell*, 23 N. J. Eq. 174; *Meeker v. Disse*, 26 N. J. Eq. 218.

In *Condit v. Baldwin*, 21 Barb. (N. Y.) 181; *affirmed* by the court of appeals in 21 N. Y. 219, the supreme court, by Johnson, J., said: "Courts ought and will look with jealous scrutiny upon all such practices by the agents of lenders, and see that the statute is not violated, and its provisions evaded under the cover of an agency. But they should be equally careful to protect the honest and innocent lender from the secret and unauthorized agreements between such agent and the borrower." The court in this case refused to hold that the lender had ratified the act of his agent by bringing an action to enforce the security, the evidence showing that the lender had no knowledge of the fact that his agent had taken commissions from the borrower. This case was *followed* in *North v. Sergeant*, 33 Barb. (N. Y.) 350; *Fellows v. Com'rs, etc.*, 36 Barb. (N. Y.) 655; *Bell v. Day*, 32 N. Y. 165. In the case last cited the court of appeals recognized the authority of *Condit v. Baldwin*, and followed it on the ground of *stare decisis*, though several members of the court expressed themselves strongly in disapproval of the reasoning by which that decision was reached.

The lender is not chargeable with his agent's unauthorized act in taking commissions, notwithstanding the borrower supposed the agent was the lender. *Lee v. Chadsey*, 3 Abb. App. Dec. (N. Y.) 43.

An exaction by the agent of the lender, without his knowledge or consent, of a sum of money from the borrower, under a false pretense that a part of it was a bonus for the lender, does not taint the debt or security given for the exact amount loaned. *Estevez v. Purdy*, 66 N. Y. 446.

In *Alger v. Gardner*, 54 N. Y. 360, it was held that a loan was void for usury, because the lender's agent, for his own benefit and without the knowledge or consent of his principal, agreed with the borrower for the payment of illegal interest, and appropriated the excess.

In *Iowa*, it is held that, in the absence of evidence that the principal author-

ized his agent to loan money for him at illegal interest, it will be presumed that no such authority was given. And, under such state of facts, a note payable to the principal for the amount loaned and an additional sum charged by the agent as his commission from the borrower, is not usurious in the hands of the principal. *Ammerman v. Ross* (Iowa, 1892), 51 N. W. Rep. 6; *Gokey v. Knapp*, 44 Iowa 32.

The rule applies, even though the agent and principal are husband and wife. *Brigham v. Myers*, 51 Iowa 397.

But where the agent conducts himself in the negotiations as the real creditor and takes unlawful interest, and the debtor, being unable to read, supposes that the note given by him for the loan is payable to the agent personally, but it is in fact payable to another, the alleged principal, the latter is bound by the acts of the agent. *Glick v. Bramer*, 78 Iowa 568.

**Question for Jury.**—Where the lender's agent charged the borrower, for whom he had rendered services in procuring the loan, the sum of \$1,700 for a loan of \$8,000, with the knowledge of the lender, it was held a question for the jury, whether the charge was a reasonable one and authorized by the borrower, or a mere cover for usury on the part of the lender. *New England, etc., Security Co. v. Gay*, 33 Fed. Rep. 636.

**Middlemen.**—Where a contract for a loan and the acceptance of the security were made by the owner of the money in person, who paid over the full amount of the loan to a middleman engaged in procuring it, the facts that without his knowledge the note and mortgage were taken in the name of one of the middlemen, and excessive commissions were deducted by them from the amount paid over, and shared among them, do not infect the loan with usury. *Hughes v. Griswold*, 82 Ga. 279; *Riley v. Olin*, 82 Ga. 312. These two cases also hold that the fact that the middlemen, in pursuance of a known custom in their business, but without express contract with any of the parties, rendered services beneficial to the lender in attending to the payment of taxes on the mortgaged property, and collecting and remitting installments of interest on the loan, but the value of which services was not shown, does not mark the loan as usurious.

**Lender's Agents.**—B applied to a firm



ring the consequences of usury, consent to the borrower's paying the lender's agent a fair and reasonable compensation for services actually rendered by the agent to the borrower in connection with the loan.<sup>1</sup> It does not follow, however, that because the lender is not chargeable with usury when his agent has made an agreement for his own benefit to receive an excessive bonus or commission from the borrower, such agreement can be enforced. On the contrary, it can be defeated by a plea of usury.<sup>2</sup> But a note given to an agent for his services in connection with the loan is presumptively valid when not shown to be excessive in amount.<sup>3</sup>

It may also be stated as settled doctrine, that if the lender's

of attorneys for a loan of \$1,000, agreeing to pay them twenty per cent. for acting as his agents in procuring it. After having the title examined at B's expense, the attorneys forwarded the application, the title papers, their contract with B for commission, and a certificate by them as to B's financial responsibility, to one O at Memphis, who forwarded all the papers to a bank in New York. The bank took the papers to a loan company in that city, and solicited the loan. This, the loan company agreed to make, and the bank caused interest-bearing notes for \$1,000 and a mortgage to be prepared, which, together with its check for \$1,000, it forwarded to O. O kept the check, and sent to B's attorneys his own check for \$800 with the notes and mortgage. The attorneys got B to execute these and gave him the check. They recorded the mortgage, had the abstract of the title completed, and forwarded the papers to O, who in turn forwarded them to the bank in New York who delivered them to the loan company and received \$1,000. During a period of eleven years previous to this transaction, the loan company had made about thirteen thousand loans, of which all but about five hundred had been negotiated through this bank. Members of the bank were also stockholders and directors of the company. The notes in this case, as in all the others, were made payable at the bank, and collections were made through it. O was employed by the bank to make loans, under an agreement that out of a commission of twenty per cent. to be exacted from borrowers, O was to pay the local attorney or agent two per cent., defray the expenses of his office, retain five hundred dollars per month for his services, and remit the balance to the bank. This arrangement was

carried out in making B's loan. The loan company denied any connection with the attorneys or with O, but it was shown that, in several cases of loans previously made in a similar way through the bank, the defense of usury had been interposed, and that the company were fully aware of the facts. It was held that the bank, O, and the local attorneys, were all agents of the loan company, and that the defense of usury could be set up against it. *Banks v. Flint*, 54 Ark. 40.

1. *Hopkins v. Baker*, 2 Patt. & H. (Va.) 110.

A loan and trust company procured a loan of \$15,000 for the defendant from a third party, the payment of which it guaranteed, and the proceeds of which it used, by previous agreement, in paying the defendant's debts. The loan was for five years, at six per cent., and the company, by the terms of the agreement, charged the defendant \$1,500 as "brokerage," covering its services in disbursing the money and guaranteeing the loan. The lender was a stockholder and director of the company. It was held that these facts did not show that the charge of \$1,500 was a mere device to evade usury. *Keagy v. Prout*, 85 Va. 390.

**Parol Evidence.**—It can always be shown by parol that the sum nominally paid by the borrower to an agent as commission for making the loan, was actually a part of the consideration for the loan, and a device to conceal usurious intent. *Stein v. Swensen*, 44 Minn. 218.

Also that a sum specified in writing as the price of goods sold in connection with a loan, actually included a usurious commission. *Lewis v. Willoughby*, 43 Minn. 307.

2. *Cheney v. Woodruff*, 6 Neb. 151.

3. *Thomas v. Miller*, 39 Minn. 339.

agent, with the knowledge and approval of his principal, exacts a bonus or commission from the borrower, though for the agent's sole benefit, which, together with the interest reserved, amounts to more than the legal rate, the lender is chargeable with usury. In other words, the borrower must not be required to pay the agent for services beneficial to the lender.<sup>1</sup> It is not necessary that the lender be actually a party to the taking of the usury; it is sufficient that he makes the loan with knowledge of the agent's act.<sup>2</sup> The decided tendency of the courts is to charge the lender as a party to the usury, where he has placed his money with an agent under an agreement that the agent is to secure for him the best possible rate of interest, and look to the borrower for his own compensation.<sup>3</sup> If the agency is general, embracing the business of making, managing, and collecting loans for the principal, and with large discretionary powers, an authority to make loans by exacting excessive commissions from the borrower may be presumed.<sup>4</sup> And it has been held that the exaction of usurious

1. *Meagoe v. Simmons*, 1 *Moody & M.* 121; *Banks v. Flint*, 54 *Ark.* 40; *Ammondson v. Ryan*, 111 *Ill.* 506.

2. *Borcherling v. Trefz*, 40 *N. J. Eq.* 502; *Meers v. Stevens*, 106 *Ill.* 549.

3. *Thompson v. Ingram*, 51 *Ark.* 546.

**General Authority to Agent.**—An agreement by a broker with a lender, to procure applications for loans, on condition that he will look to the borrowers exclusively for his compensation, together with the fact that the broker thereafter styles himself as the lender's agent in correspondence relating to loans, constitutes him the lender's agent, and commissions exacted by him must be regarded as exacted by the lender. *Fowler v. Equitable Trust Co.*, 141 *U. S.* 384; *Payne v. Newcomb*, 100 *Ill.* 611; 39 *Am. Rep.* 69.

Where a person appoints an agent with general power to lend money, under an agreement that the agent is not to make any charge against the principal, but to "make what he could out of it," and the agent exacts from a borrower an excessive and unreasonable commission for making the loan, the transaction is, as against the principal, tainted with usury. *Avery v. Creigh*, 35 *Minn.* 456.

In the earlier case of *Acheson v. Chase*, 28 *Minn.* 211, the same court held that where the agent is restricted by the lender to exacting "a reasonable commission" from borrowers, the lender is not chargeable with anything taken by the agent in excess of such compensation.

The mere fact that the lender sup-

posed that the agent was to receive some compensation from the borrower for his trouble in effecting the loan, is not of itself sufficient to charge the lender with knowledge of and assent to an exaction, by the agent, of a sum from the borrower in the nature of usury. *Stillman v. Northrup*, 109 *N. Y.* 473.

4. *Rogers v. Buckingham*, 33 *Conn.* 81; *Sherwood v. Roundtree*, 32 *Fed. Rep.* 113; *Kemmitt v. Adamson*, 44 *Minn.* 121.

To charge the lender with notice of usury in a loan made by his agent, evidence is admissible to prove the general manner in which the agent conducted the lender's business, that he used a certain kind of blanks, made loans only on one month's credit, and extensions for but one month at a time, and that he charged commissions of a percentage on the amount of each loan and extension. *Stein v. Swensen*, 46 *Minn.* 360. In this case the court, by Gilfillan, C. J., said: "The authority being general to conduct the business without any restrictions upon the agent in the manner of conducting it, the principal would be presumed to know the agent's general mode of carrying it on. If the agent conducted it usuriously, the principal would be presumed to know it, and, if he permitted it, he would be responsible to the same extent as if he authorized it in advance. If the general manner of doing it was by the use of particular blanks, by making loans and extensions for only one month at a time, charging upon each loan and extension, in addition to the

interest by the agent raises the presumption that the lender was aware of it.<sup>1</sup> The exorbitance of a charge by the lender's agent for commissions is evidence tending to prove that the charge was intended for the benefit of the lender, and a device to cover usury.<sup>2</sup> The fact that the borrower expressly designates the person receiving the commission as his own agent is of no consequence, if in reality the agent represented the lender.<sup>3</sup>

Of course, any commission or bonus beyond legal interest, taken either directly or indirectly by the lender for his own profit, in consideration of the use of the money, renders the loan usurious.<sup>4</sup> And to sustain a charge by the lender for "commissions," in addition to lawful interest, it must be shown to be based on some actual service rendered, some trouble encountered, or some risk assumed by the lender, apart from what is involved ordinarily in

full legal rate of interest, a percentage on the loan, he would be presumed to know it. Certainly, if the business was conducted in that manner, with his knowledge, it would have the same force as evidence upon a particular transaction in issue that his personal conduct of the business in that manner would have."

In *Lewis v. Willoughby*, 43 Minn. 307, Mitchell, J., in holding the principal liable for the act of his general agent in exacting a usurious bonus, the amount of which was included in the securities, said: "The presumption in such a case ought to be that what the agent assumed to do for his principal was done by his authority; and, if any facts exist which would relieve him from responsibility for the unlawful exactions of his agent, he ought to prove them."

Where a note was made for the payment of seventeen dollars, with interest at the highest legal rate, but was in fact given for a loan of fifteen dollars only, the extra two dollars being agreed upon as additional interest, the note was held usurious and void. Also that it was immaterial that the loan was made, not by the payee in person, but by an agent who held in his hands money belonging to the latter, with general authority to make loans. *Kemmitt v. Adamson*, 44 Minn. 121.

1. *Cheney v. Eberhardt*, 8 Neb. 423. See also *New England, etc., Security Co. v. Hendrickson*, 13 Neb. 574; *New England, etc., Security Co. v. Harris*, 13 Neb. 551.

In *Philo v. Butterfield*, 3 Neb. 256, the court said: "It is a settled rule of law, which will not be questioned, that

in all cases where a person employs another as his agent to loan money for him, and places the fund in the hands of the agent for such purpose, the principal is bound by the acts of his agent, and if the agent charges the borrower of such money unlawful interest, or even demands and receives from the borrower a bonus for such loan, and appropriates it to his own individual use, either with or without the knowledge of his principal, the principal is affected by the act of his agent." *Quoted with approval and followed in Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487.

2. *Stein v. Swensen*, 44 Minn. 218.

In the federal courts it is held that if the commissions are unreasonably large, it is the duty of the court to declare the transaction usurious as a matter of law, without submitting the question to the jury. See *Sherwood v. Roundtree*, 32 Fed. Rep. 113.

3. *Sherwood v. Roundtree*, 32 Fed. Rep. 113.

4. *Andrews v. Poe*, 30 Md. 485; *North v. Sergeant*, 33 Barb. (N. Y.) 350; *Cummins v. Wire*, 6 N. J. Eq. 73; *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78; *Hewitt v. Dement*, 57 Ill. 500.

**Pretense of Agency.**—Where a person, pretending to act as agent, made a loan, taking the note and mortgage in his own name, and deducted twenty-five dollars beyond lawful interest as his commission, and afterward transferred the securities to his principal, but at foreclosure sale bought the property for himself, the court held, on a plea of usury, that he was the real party in interest, and that the so-called commis-

the advance of money.<sup>1</sup> In cases where the fact of agency is concealed from the borrower, who deals with the agent supposing him to be the lender, and pays him a bonus beyond legal interest, the rule is that he may plead usury when sued on the contract by the actual principal.<sup>2</sup>

**3. Ratification of Agent's Act.**—Where the contract between the lender's agent and the borrower was made without the lender's authority or knowledge, an action by him to collect the debt or enforce the security does not constitute a ratification, so as to charge him with usury, even though he had knowledge of the transaction before bringing suit.<sup>3</sup>

**4. Bonus Added to Interest.**—It frequently occurs that in addition to the interest stipulated for, the parties have by agreement paid and received, or included in the note to be paid to the lender or his agent, a sum intended as a bonus or commission. The rule adopted by the courts in such cases is, that if the amount of the bonus, added to the interest reserved, does not exceed the maximum rate that might lawfully have been agreed upon for the entire period of the loan, the transaction is not usurious. It is otherwise if the amount is greater than such rate.<sup>4</sup>

sion rendered the loan usurious. *Sanford v. Kane*, 133 Ill. 199; 23 Am. St. Rep. 602.

1. *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283; *Harmon v. Lehman*, 85 Ala. 379; *Stark v. Sperry*, 6 Lea (Tenn.) 411; 40 Am. Rep. 47.

Exactng a commission upon the exchange of notes, not exceeding legal interest upon the notes of the party charging it, is not usury. *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182.

An agreement for reasonable commission to an agent for his services in accepting and paying bills with funds furnished by his principal, is not on its face usurious. *Suydam v. Bartle*, 10 Paige (N. Y.) 94.

2. *Erickson v. Bell*, 53 Iowa 627; 36 Am. Rep. 246; *Wilkes v. Coffield*, 3 Hawks (N. Car.) 28.

In the recent case of *Trimble v. Thorson*, 80 Iowa 246, an instruction that if an agent "ostensibly loans money for himself, but really for another, and exacts a commission in excess of the legal rate for his own benefit, without the knowledge of such other, it would not necessarily make the loan usurious, even though the borrower believed the agent was the principal," was held erroneous; but, as the evidence showed that the note which the borrower signed named the real principal as payee, it was decided

that he thereby received notice of the agency, and that the error in the instruction was not prejudicial.

3. *Estevez v. Purdy*, 66 N. Y. 446; *Fellows v. Longyor*, 91 N. Y. 324; *Jordan v. Humphrey*, 31 Minn. 495.

4. *Oyster v. Longnecker*, 16 Pa. St. 269; *Mills v. Johnson*, 23 Tex. 308. And see *Meaker v. Fiero*, 77 Hun (N. Y.) 65.

Thus, where upon a loan of \$1,100 for five years at the rate of six per cent. per annum, payable semi-annually, the borrower agreed to pay the agent \$200 to procure the loan, and that sum was included in the mortgage, it was held that as the bonus and interest together did not exceed the highest legal rate of ten per cent. per annum for the five years, there was no usury. *Upton v. O'Donahue* (Neb. 1891), 49 N. W. Rep. 267.

But a loan to a corporation is usurious where, in addition to the legal rate of interest, the lender exacts from the corporation a transfer of corporate stock having a cash value at the time; and the stock is properly treated as a payment *pro tanto* on the debt, although it may have become practically worthless since the loan was made. *Holiday v. Lowry Banking Co.* (Ga. 1894), 19 S. E. Rep. 28.

The reservation, by the agent of the holder of a promissory note held by the former for collection, of \$10, as a

**5. Contracts With Commission Merchants.**—Agreements entered into between owners of produce and commission merchants, by which the latter are to make advances upon the credit of consignments, and receive interest on the amounts advanced, and also commissions for their services in selling, are not usurious if made in good faith, and without design to conceal unlawful interest under the guise of commissions.<sup>1</sup>

A common feature of such agreements is that if the principal fails to consign the quantity of goods agreed upon, he shall pay to the commission men, in addition to interest on the advances, certain sums either as liquidated damages, or as commissions. The courts held that such provisions do not necessarily stamp the transaction as a cover for usury, but that the question of inten-

bonus for forbearing present payment of a balance due on the note, renders a note given for the balance usurious. *Anderson v. Vallery* (Neb. 1894), 58 N. W. Rep. 191.

On a loan of \$4,000 for five years at eight per cent., the lender as a bonus took notes from the borrower for \$350, with interest after maturity, payable within a year. In ascertaining whether more than ten per cent.—the highest legal rate—had been exacted for the loan, the court refused to compute interest on the bonus notes for the period of the loan. *Tepoel v. Saunders Co. Nat. Bank*, 24 Neb. 815.

Where ten per cent. per annum is lawful, the exaction of a commission of \$225 upon a loan of \$4,500 at nine per cent. for five years is not usurious. *Brown v. Scottish-American Mortgage Co.*, 110 Ill. 235. To the same effect, see *Fowler v. Equitable Trust Co.*, 141 U. S. 384.

For the purpose of determining whether the loan is usurious, the bonus is to be deducted as of the date when it is payable, and if payable at the time of the loan, it is to be deducted as of that date from the principal, and the remainder, which the borrower receives, is to be taken as the basis of computation. *Smith v. Parsons* (Minn. 1894), 57 N. W. Rep. 311.

1. In *Woolsey v. Jones*, 84 Ala. 88, the court, by Somerville, J., said: "If an extra and reasonable amount be charged for some incidental service, expense or risk assumed by the lender or his employees, this is not for the use of the money—it is not interest—and cannot render the contract of loan usurious, unless the transaction be a shift or device intended in substance and

legal effect to cover a usurious loan. Contracts to pay the usual commissions to a commission merchant for making advances of money and sales of products consigned, are of this character, and, though often liable to suspicion, are not necessarily usurious. The onus of proving them such is cast on the party seeking to impeach their legality, and this he can do only by showing the guilty intent to evade the laws against usury." And see *Morrissey v. Broomal* (Neb. 1894), 56 N. W. Rep. 383.

A commission merchant agreed to receive produce from a country dealer, and accept his drafts, the produce to be delivered before the drafts became payable. He reserved and charged a commission of two and a half per cent. on all advances made by him beyond the amount of produce or funds of the dealer in his hands at the time, and also legal interest upon all items of the account in his favor after maturity. It was held, that the commissions were not necessarily usurious. *Trotter v. Curtis*, 19 Johns. (N. Y.) 160; 10 Am. Dec. 211.

Extra charges for advances made in the course of a legitimate commission business, designed to cover both the use of the money and the trouble incurred in making sales and attending to the goods, are not usurious *per se*. *Seymour v. Marvin*, 11 Barb. (N. Y.) 80.

Where a commission merchant makes advances on consignments, and takes a note for the amount, including interest and a further sum as commissions for selling, the note is not necessarily usurious, even though the goods are withdrawn without sale. The

tion and good faith is for the jury.<sup>1</sup> But where, in addition to the regular commissions for selling, the factor stipulates for compensation for making advances at a rate greater than legal interest,

question of good faith is one of fact for the jury. *Bartlett v. Williams*, 1 Pick. (Mass.) 288.

1. *Norwood v. Faulkner*, 22 S. Car. 367; 53 Am. Rep. 717.

In *Harris v. Boston*, 2 Camp. 348, the plaintiffs were seed factors, and purchased large quantities of rape seed for the defendant, for which they advanced the money, charging the highest legal rate of interest for the advances, and in addition it was agreed that they should have a commission of two and a half per cent. upon all seed purchased. It was proved that the customary commissions for purchasing such seed did not exceed one per cent. Lord Ellenborough said: "It will first be a question of fact, whether the commission of two and a half per cent. exceeds what can be fairly and reasonably referred to the plaintiff's trouble and risk in making these purchases. If it does, then, by inference of law, it must be ascribed to the advance and forbearance of the money, and the contract is usurious. If the plaintiffs would have duly made the purchases for one per cent., but charge two and a half, besides legal interest, where they advance the money, this commission must be considered an expedient for enhancing the rate of interest beyond five per cent. and a mere color for usury."

**Failure to Make Consignments.**—An agreement to pay a commission merchant legal interest on advances, and also commissions, whether he makes sales or not, is not usurious unless shown to have been so intended by the parties. *Cockle v. Flack*, 93 U. S. 344.

So of an agreement to pay the usual commissions, though the debtor should fail to make shipments. *Pollard v. Baylors*, 6 Munf. (Va.) 433.

An agreement to deliver to the lenders, commission merchants, for every \$10 lent, one bale of cotton for storage and sale on commission, and also to pay legal interest on the loan, is not necessarily usurious where there was a reasonable expectation that the borrower would be able to deliver the cotton. But an agreement between commission merchants and a person to whom they were to advance money upon interest, that the borrower

should furnish them with cotton to sell on commissions averaging from thirty to fifty per cent. higher than the commissions usual where no advances are made, stamps the transaction as a cover for unlawful interest. *Harmon v. Lehman*, 85 Ala. 379.

A stipulation, coupled with a loan, that the borrower would deliver a large quantity of cotton for storage and sale by the lender, or pay storage and commission as liquidated damages for non-delivery, the lender not being engaged in the storage business, and the borrower having, as the lender well knew, no means of complying with the requirement, was held to be a cover for usury. *Uhlfelder v. Carter*, 64 Ala. 527.

Cotton factors agreed to advance money to a merchant, he to ship to them for sale on commission at least one bale of cotton for every \$10 advanced, and if he failed to do so, he should repay them the full amount advanced, with eight per cent. interest, and \$2 additional for each bale of cotton not shipped as agreed. Also to repay them for all advances at a certain time, and all costs and attorneys' fees in case of suit. It was held a question for the jury whether this agreement was intended as a cover for usury. *White v. Guilmartin*, 83 Ga. 640.

So of a contract to pay commission men, making advances in addition to the usual commissions, the sum of \$1.50 for each bale of cotton not delivered according to agreement. *Calaway v. Butler*, 79 Ga. 356.

Notes for a loan of money were given bearing the highest legal rate of interest, and at the same time the borrower agreed, in consideration of the loan, to ship the lenders a certain number of bales of cotton for sale at a stipulated commission, and in case of non-shipment, to pay them one dollar for each bale not shipped. In an action on the contract, after the payment of the notes, the transaction was held usurious. *Mackenzie v. Garnett*, 78 Ga. 251.

An agreement by a debtor to pay his debt, with interest, by shipments of tobacco, out of which the creditors were to take the usual factor's commissions, and, in case of non-shipment, to receive certain sums equivalent to and in lieu

he is guilty of usury;<sup>1</sup> and such compensation is none the less interest because the parties choose to designate it as additional commission.<sup>2</sup>

**XX. AGREEMENT FOR ATTORNEY'S FEES.**—Though the authorities are not entirely unanimous, the prevailing rule is that stipulations by the debtor to the effect that if the debt be not paid at maturity he will pay the creditor's attorney's fees or commissions for enforcing payment, are valid and free from usury if made in good faith, and not as a device to evade the statute.<sup>3</sup> Such agreements, it has been said, are not only not usurious, but are eminently just.<sup>4</sup>

In mortgages and trust deeds it is customary to insert a stipulation for payment by the debtor of the costs, and attorney's fees for foreclosing; and unless the amount specified is so unreasonable as to be suggestive of usury, the courts hold such stipulations valid and enforceable.<sup>5</sup>

It seems that, even though a mortgage debt be infected with usury, an agreement in the mortgage to pay a reasonable attorney's fee in case of foreclosure, can be enforced against the mortgagor.<sup>6</sup>

The fact that the statute declares usurious all contracts for additional interest or compensation on account of non-payment at maturity, does not render usurious a note providing for the

of such commissions, was held usurious. *Pollard v. Baylor*, 4 Hen. & M. (Va.) 223.

1. *Burton v. Blin*, 23 Vt. 151.

2. *Stark v. Sperry*, 6 Lea (Tenn.) 411; 40 Am. Rep. 47.

3. *Farmers', etc., Nat. Bank v. Barton*, 21 Ill. App. 403; *Matzenbaugh v. Troup*, 36 Ill. App. 261; *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180; 21 Am. Rep. 209; *Harris Mfg. Co. v. Anfinson*, 31 Minn. 182; *Duluth Loan & L. Co. v. Kloovdahl* (Minn. 1894), 56 N. W. Rep. 1119; *Krause v. Pope*, 78 Tex. 478; *Guinn v. New England, etc., Security Co.*, 92 Ala. 133; *Shelton v. Aultman*, 82 Ala. 315; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497; *McGill v. Griffin*, 32 Iowa 445; *Billingsley v. Dean*, 11 Ind. 331; *First Nat. Bank v. Canatsey*, 34 Ind. 149; *Churchman v. Martin*, 54 Ind. 380; *Race v. Bruen*, 11 La. Ann. 35; *Imler v. Imler*, 94 Pa. St. 372; *National Bank v. Danforth*, 80 Ga. 55; *Peyser v. Cole*, 11 Oregon 39; 50 Am. Rep. 451.

An agreement in a note to pay "all costs for collecting the above, not less than ten per cent.," does not render the note usurious; but only a reasonable attorney's fee can be collected as costs. *Williams v. Flowers*, 90 Ala. 136.

But see *Ohio v. Taylor*, 10 Ohio 378, where an agreement to pay five per cent. as collection fees, in addition to legal interest, was held usurious.

The voluntary payment by a debtor, of the creditor's attorney's fees for collecting, all of which fees are kept by the attorney, is not *per se* usurious. *Busby v. Finn*, 1 Ohio St. 409.

4. *Smith v. Silvers*, 32 Ind. 321; *Daniels v. Silvers*, 32 Ind. 322.

5. *Fowler v. Equitable Trust Co.*, 141 U. S. 384; *Nelson v. Everett*, 29 Iowa 184; *Williams v. Meeker*, 29 Iowa 292; *Dunn v. Rodgers*, 43 Ill. 260; *Clawson v. Munson*, 55 Ill. 394; *Holdeman v. Massachusetts Mut. L. Ins. Co.*, 120 Ill. 390; *Barton v. Farmers', etc., Nat. Bank*, 122 Ill. 352; *Siegel v. Drumm*, 21 La. Ann. 8; *Shelton v. Aultman*, 82 Ala. 315.

But in *Kentucky* it is held that an agreement in a note and mortgage to pay an attorney's fee in case of foreclosure is usurious, for the reason that to enforce it would be to recover more than the debt with legal interest and costs. *Thomasson v. Townsend*, 10 Bush (Ky.) 114.

6. *Matzenbaugh v. Troup*, 36 Ill. App. 261.

payment of an attorney's fee if placed in the hands of an attorney for collection, because this is neither interest nor compensation.<sup>1</sup>

If securities in the hands of the creditor's attorney are to be collected and the proceeds applied to the debt, it is not usury for the debtor to agree to pay the attorney a reasonable commission for making the collection.<sup>2</sup>

An agreement to pay expenses already incurred by the creditor in procuring judgment, and also to pay his attorney's collection fees, exceeding legal interest, in consideration of forbearance, has been held usurious in several cases,<sup>3</sup> but in one case it has been sustained.<sup>4</sup>

**XXI. EXPENSES INCURRED BY LENDER.**—The making of loans and the examination of the securities offered, frequently involve labor and expense on the part of the lender, which, according to good business principles, ought to be paid by the borrower, without being regarded as a part of the compensation for the use of the money; and accordingly, the courts hold that a fair and reasonable charge made by the lender for services actually rendered, or expenses incurred in connection with the loan, does not render it usurious.<sup>5</sup>

But because charges of this character are often resorted to as a plausible pretext for obtaining illegal interest, and are usually made at a time when the borrower is at a disadvantage, a very strict degree of proof is required of their reasonableness and of the *bona fides* of the lender, when challenged as usurious.<sup>6</sup>

It is a circumstance in the lender's favor, that the expenses were incurred, or the labor and services expended, at the instance and request of the borrower.<sup>7</sup>

1. *Barton v. Farmers', etc., Nat. Bank*, 122 Ill. 352.

2. *Hopkins v. Baker*, 2 Patt. & H. (Va.) 110.

3. *Toole v. Stephen*, 4 Leigh (Va.) 581; *Rosa v. Doggett*, 8 Neb. 48.

4. *Simmons v. Mississippi Union Bank*, 3 Smed. & M. (Miss.) 781.

5. *Bridges v. Sheldon*, 18 Blatchf. (U. S.) 507; *Eldridge v. Reed*, 2 Sweeny (N. Y.) 155; *Nourse v. Prime*, 7 Johns. Ch. (N. Y.) 69; 11 Am. Dec. 403; *Smith v. Wolf*, 55 Iowa 555; *Beadle v. Munson*, 30 Conn. 175.

It is not necessary for the purchaser of property at a judicial sale to allow the former owner to remain in possession under an agreement that in addition to legal interest on all advances made by the purchaser, the owner shall pay him an annual sum, reasonable in amount, to compensate him for the

trouble and responsibility incurred. *Case v. Fish*, 58 Wis. 56.

6. *Heldenheimer v. Mayer*, 42 N. Y. Super. Ct. 506; *Van Tassell v. Wood*, 12 Hun (N. Y.) 388. See also cases cited in preceding note.

To rebut the defense of usury against a debt larger than the sum actually loaned with legal interest, it was claimed that the excess was by way of compensation for services rendered by the creditor to the debtor, but it appeared that there was no prior agreement to pay for such services, which were of a neighborly character, and generally rendered without charge. The court held that the evidence did not disprove usury. *Humphrey v. McCauley* (Ark. 1891), 17 S. W. Rep. 713.

7. *Harger v. McCullough*, 2 Den. (N. Y.) 119; *Thurston v. Cornell*, 38 N. Y. 281; *Jones v. Berryhill*, 25 Iowa 289.



But an unconditional agreement by the borrower to pay expenses and commissions, whether or not they shall be incurred, is evidence of a usurious intent.<sup>1</sup>

It is for the jury to determine, in view of all the circumstances, whether the charges were fair and reasonable, and made in good faith, or were merely a usurious device.<sup>2</sup>

A very common item of expense incurred by the lender is in the examination of the securities, and the reasonableness of such charges depends upon the nature and extent of the labor involved. If the land is to be mortgaged, the borrower can lawfully be required to pay the usual and proper fee for examining the title and drawing the mortgage.<sup>3</sup>

So, the lender may lawfully charge for the expense of making a personal examination and inspection of the security.<sup>4</sup> And the cost of keeping the property insured,<sup>5</sup> and of paying taxes thereon,<sup>6</sup> may properly be charged to the borrower, who would naturally be at the same expense if the loan had not been made.

As the lender's funds are not always at hand, or available, at the time of the application, the courts hold that he may charge the borrower with the loss, expense, and trouble incurred at the latter's request in collecting or otherwise providing the ready money.<sup>7</sup> And it has been held that the expenses of a journey taken by the creditor, at the debtor's request, for the purpose of settling the demand, may be properly included in the securities so obtained,

1. *Heidenheimer v. Mayer*, 42 N. Y. Super. Ct. 506.

2. *Palmer v. Baker*, 1 M. & S. 56; *Custairs v. Stein*, 4 M. & S. 192; *McKesson v. McDowell*, 4 Dev. & B. (N. Car.) 120.

3. *Ammondson v. Ryan*, 111 Ill. 506; *Daley v. Minnesota Loan, etc., Co.*, 43 Minn. 517; *Dayton v. Moore*, 30 N. J. Eq. 543; *Eldridge v. Reed*, 2 Sweeney (N. Y.) 155.

4. *Smith v. Wolf*, 55 Iowa 555.

5. *New England, etc., Security Co. v. Gay*, 33 Fed. Rep. 636.

6. *Dutton v. Aurora*, 114 Ill. 138; *Kidder v. Vandersloot*, 114 Ill. 133.

An alternative agreement by the borrower to pay interest above the legal rate, or to pay whatever taxes might be "exactd" on the mortgaged property, is not usurious. *Home Ins. Co. v. Dunham*, 33 Hun (N. Y.) 415.

7. *Eaton v. Alger*, 2 Abb. App. Dec. (N. Y.) 5; *Thurston v. Cornell*, 38 N. Y. 281; *Atlanta Min., etc., Co. v. Gwyer*, 48 Ga. 11.

Where the lender sold stock in order to raise funds for the loan, upon the borrower's agreement to pay, in addition to the interest, any advance that

might occur in the market value of the stock during the period of the loan, it was held that a note given for the amount due, including an actual advance that occurred in such market value during that time, was not usurious. *Snow v. Nye*, 106 Mass. 413.

The defendant borrowed of the plaintiff \$3,600 and gave her a mortgage therefor. Afterward he applied to her for a further loan, which she was unable to make, but at his instance she sold the \$3,600 mortgage for \$3,400, to a third person whom he brought to her. She then loaned him this \$3,400, for which he gave her his note for \$3,600, he allowing her the \$200 to compensate her for the discount and for the expenses of examining the title to the new security. It was held that there was no usury in the second note. *Comstock v. Wilder*, 61 Iowa 274.

But where the borrower bound himself to pay the lender a certain sum as a compensation for his trouble and anticipated loss in selling securities to raise the money for the proposed loan, it was held that such agreement made the loan usurious. *Van Tassell v. Wood*, 12 Hun (N. Y.) 288.

the debtor having previously promised reimbursement.<sup>1</sup> It is otherwise, as to the traveling expenses of the creditor incurred in demanding security for a pre-existing debt, in the absence of such previous request or agreement.<sup>2</sup>

An agreement to the effect that if the creditor should find it necessary to sell certain collaterals given to secure the debt, he should be entitled to retain a commission of two and a half per cent. and the expenses of the sale, has been sustained, it appearing that the parties acted in good faith.<sup>3</sup>

Past services rendered by the creditor to the debtor in matters not connected with the debt, furnish a good consideration for a promise by the debtor, on obtaining forbearance, to pay for such services a sum exceeding lawful interest on the debt.<sup>4</sup>

**XXII. AGREEMENTS TO PAY TAXES.**—A requirement, as a condition of making a loan, that the borrower shall reimburse the lender whatever he may be compelled to pay in the way of taxes levied on the amount of the loan, is not *per se* usurious.<sup>5</sup>

It has been held, however, that an agreement on the part of the borrower to pay all taxes that might be assessed against the principal or interest is usurious.<sup>6</sup> But unless the interest reserved be at the maximum rate, such an agreement cannot be said as a matter of law to be usurious, because the amount of taxes actually levied, added to the agreed rate of interest, might not exceed the maximum rate.

**XXIII. COMPENSATION FOR USE OF CREDIT.**—It is not usury for a person, acting in good faith and without usurious design, to charge a compensation exceeding legal interest, for the use of his financial credit for the benefit or accommodation of another, whether as maker, acceptor, indorser, guarantor, or surety of commercial paper; the reason being that credit, a "capacity of being trusted," is neither money, goods, nor a chose in action, within the meaning of the statute.<sup>7</sup>

And in *Jackson v. May*, 28 Ill. App. 305, a note which included items of charges for the lender's expense and trouble in obtaining the money to make the loan, was held usurious.

1. *Harger v. McCullough*, 2 Den. (N. Y.) 119.

Where a note given for a pre-existing debt included a sum as compensation for the creditor's delay and expense in waiting, after the debt had become due, which sum was inserted at the debtor's request, and not in pursuance of any understanding or agreement to pay the same as interest for forbearance, the note was held free from usury. *Jones v. Berryhill*, 25 Iowa 289.

2. *Williams v. Hance*, 7 Paige (N. Y.) 581. But see *McKesson v. Mc-*

*Dowell*, 4 Dev. & B. (N. Car.) 120, where a small sum besides legal interest was taken to cover the trouble and expense of traveling to make a demand upon the maker of a note, and the court held that the question of usury should have been left to the jury as to the intention of the parties.

3. *Righter v. Philadelphia Warehouse Co.*, 99 Pa. St. 289.

4. *Trine's Appeal* (Pa. 1888), 13 Atl. Rep. 765.

5. *Banks v. McClellan*, 24 Md. 62; 87 Am. Dec. 594; *Dubose v. Parker*, 13 Ala. 779.

6. *Mortimer v. Pritchard*, 1 Bailey Eq. (S. Car.) 505.

7. *Bullock v. Boyd*, 1 Hoffm. Ch. (N. Y.) 294; *Ryckman v. Coleman*, 21 How. Pr. (N. Y.) 404; *Dry Dock Bank*

**XXIV. PARTNERSHIP TRANSACTIONS.**—Agreements between members of a partnership for the payment of more than legal interest on overdrafts or balances due from one member to the concern are not affected by the usury laws, for the reason that the relation of debtor and creditor does not exist, in the ordinary sense.<sup>1</sup>

*v. American L. Ins., etc. Co.*, 3 N. Y. 344; *Commercial Bank v. Cameron*, 29 N. Y. Supp. 505; *Mumford v. American L. Ins., etc., Co.*, 4 N. Y. 463; *Ketchum v. Barber*, 4 Hill (N. Y.) 224; *Flint v. Schomberg*, 1 Hilt. (N. Y.) 532; *More v. Howland*, 1 Edm. Sel. Cas. (N. Y.) 371; 4 Den. (N. Y.) 264; *Chatham Bank v. Betts*, 23 How. Pr. (N. Y.) 476; 37 N. Y. 356; *Kitchel v. Schenck*, 29 N. Y. 515; *DeForest v. Strong*, 8 Conn. 513; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 594; *Hutchinson v. Hosmer*, 2 Conn. 341; *Jones v. McLean*, 18 Ark. 456; *Brown v. Harrison*, 17 Ala. 774.

A provision in an agreement between an individual and a corporation, that the former will make or procure advances for the latter on its notes, and that in addition to interest he shall be paid a commission in case it becomes necessary for him to furnish credit as security in order to raise money on the notes, is not *per se* usurious. *McComb v. Barcelona Apartment Assoc.*, 134 N. Y. 598.

But where a borrower gave a guarantee company a note for \$210, for the purpose of obtaining a loan of \$600, which the company obtained for her from a bank in which its funds were deposited by indorsing her note for \$600, it was held, in an action by the guarantee company upon the \$600 note, which had been dishonored and taken up by it, that the transaction was usurious. *Gross v. Kellard*, 6 Misc. (N. Y.) 27.

The defendant made her note for \$3,000, payable to the plaintiff's order, which the plaintiff indorsed for her accommodation, and the defendant got it discounted, receiving for her own benefit but \$2,700. In an action to foreclose a mortgage given by the defendant to protect the plaintiff from liability under his indorsement, the defendant testified that she made no bargain with the plaintiff for commission, but that she heard her agent tell the plaintiff that he was to "have the three hundred dollars." It was held that no usurious contract was shown. *Culver v. Pullman*, 59 Hun (N. Y.) 615.

In *Moore v. Vance*, 3 Dana (Ky.) 361, an agreement to sign a replevin bond as surety, on condition that the principal would give the surety a note for the amount of the bond with about thirty per cent. added, to be collected by the surety in the event that he should be compelled to pay the bond, was held usurious.

**Guaranty as Cover.**—In *Linde v. Grant*, 59 Hun (N. Y.) 624, the evidence was that the plaintiffs did business, both as warehousemen and as bankers. They issued to the defendant a warehouse receipt for property deposited, and this he indorsed in blank and gave to them, together with his promissory note in blank, upon the receipt of which the plaintiffs paid him the face of the note, less six per cent. and certain commissions. They then guaranteed the note and got it discounted. Upon this state of facts, the defense being usury, the court refused to hold as a matter of law that the fact that the plaintiffs had advanced the money before the note had been negotiated, proved the transaction to be a cover for usury, and sustained a verdict for the plaintiffs.

**Exchange of Notes.**—The rule does not apply in favor of one who lends another his notes and takes the latter's notes in exchange therefor, and also charges a commission exceeding legal interest. *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283.

1. *Fereday v. Hordern*, Cro. Jac. 144; *Cunningham v. Green*, 23 Ohio St. 296; *Evans v. Negley*, 13 S. & R. (Pa.) 218; *Morriset v. King*, 2 Burr. 891; *Gilpin v. Enderbey*, 5 B. & Ald. 954; 7 E. C. L. 314; *Morse v. Wilson*, 4 T. R. 353; *Foote v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205.

**Retiring Partner.**—It has been held that a bond given to a retiring partner for the amount of capital he had advanced for the other partner, together with a share of the profits estimated at twelve per cent. on such amount, and a bond of indemnity against liability for the firm debts, was not usurious. *Huston v. Moorhead*, 7 Pa. St. 45.

**Overdrafts.**—An agreement between

Even in the absence of an actual partnership, a loan is free from usury where, in lieu of interest, a share of the profits expected to be realized by the borrower is agreed *bona fide* to be given to the lender as compensation for the loan.<sup>1</sup> But a stipulation for a share of the profits in addition to the principal and legal interest is plainly usurious.<sup>2</sup>

It seems that one partner cannot sue alone, either during the continuance of the firm or after its dissolution, to recover back usurious interest paid under a loan to the firm.<sup>3</sup>

**XXV. RENTS.**—The attempt is often made to conceal usury under the guise of rent; but whenever it can be shown that the relation of debtor and creditor existed, and that the so-called rent was intended as compensation to the creditor for forbearance, it

partners for the payment of more than legal interest on the amount of their respective overdrafts is not usurious, being merely a provision for contribution to profits equal to the estimated earning capacity of the capital so withdrawn. *Payne v. Freer*, 91 N. Y. 43; 43 Am. Rep. 640. In this case, Finch, J., in delivering the opinion of the court, said: "If such an arrangement is a loan, in any just and proper sense, and the rate allowed is interest for the use of money, the transaction is usurious; and right here comes the collision of the respective litigants. Is such an arrangement, therefore, a loan of which usury can be predicated? If the partner who makes the overdraft is borrower, he is, at least, that kind of borrower who to some extent borrows of himself. This fact interweaves his debt, so far as it is one, with the business results and risks. To call his overdraft a loan, and hold it tainted with usury, is in practical effect to say that one may take usury of himself. As a borrower he is a victim of usury, while as a lender he is one of the usurers. One who has paid usurious interest may sue to recover it back, but if he has paid it to himself jointly with others, his co-partners, he must sue himself jointly with them, if he sues the firm. Such an action would be at least a novelty." The same principle has been recognized and applied to the case of loans to a member of a mutual benefit society, in the leading case of *Silver v. Barnes*, 6 Bing. N. Cas. 180.

1. *Johnston v. Ferris*, 14 Daly (N. Y.) 302.

**Share of Profits.**—A merchant gave a bill of sale of his stock of goods to one who advanced him money, under an agreement that the merchant should

continue the business at a salary and one-half the profits, with the privilege of purchasing the stock back at the end of a year. It was held that the transaction was not usurious, even though one-half the profits greatly exceeded the legal interest on the sum advanced. *Goodrich v. Rogers*, 101 Ill. 523.

Where A agreed with B, in consideration of B's advancing him \$600, to make B his sole agent for selling his goods in a given locality for ten years, B to be responsible for all sales made by him, and to receive as his compensation twenty per cent. on all sales, and to apply one-third of the remaining net proceeds to payment of the \$600 advanced, it was held that the agreement was not usurious. *Hall v. Daggett*, 6 Cow. (N. Y.) 653.

Where A advances money to B to be used in the purchase and improvement of land for purposes of sale, an agreement that B shall pay A out of the proceeds of such sale the amount advanced, with interest, and in addition thereto one-third of all profits realized, is not usurious, because the parties are joint investors rather than debtor and creditor. *Niebuhr v. Schreyer*, 13 N. Y. Supp. 809.

A mortgage on a printing office, which had theretofore been carried on at a loss, stipulated that the mortgagee should not be required to account for any profit or revenues he might derive from its use. It was held to be not usurious. *Rapier v. Gulf City Paper Co.*, 77 Ala. 126.

2. *Sweet v. Spence*, 35 Barb. (N. Y.) 44.

3. *McFerrin v. Woods*, 3 Baxt. (Tenn.) 242; *Matthews v. Paine*, 47 Ark. 54.

will be treated as interest, no matter in what form the contract may be.<sup>1</sup> It will not be presumed, however, that rent was intended as a cover for usury unless it is so excessive as to indicate, in connection with all the facts, a corrupt intent.<sup>2</sup>

**XXVI. ANNUITIES.**—Contracts for annuities, if made in good faith and not designed to conceal usurious interest, are not within the statute, an annuity being regarded as property capable of being sold on such terms as the parties may agree upon.<sup>3</sup> It is regarded as a suspicious circumstance that the agreement for annuity grew out of an application for a loan, but this is not

1. *Wells v. Robinson*, 53 Vt. 202; *Morrison v. Markham*, 78 Ga. 161; *Mobile Bldg., etc., Assoc. v. Robertson*, 65 Ala. 382; *Montague v. Sewell*, 57 Md. 407; *Grand United Order, etc., Assoc. v. Merklin*, 65 Md. 579; *Hammond v. Alexander*, 1 Bibb (Ky.) 333; *Grimes v. Shrieve*, 6 T. B. Mon. (Ky.) 546; *Wright v. McAlexander*, 11 Ala. 236.

In *Baggett v. Trulock*, 77 Ga. 369, *Bleckley, C. J.*, said: "To stop interest by its own name and continue it under the name of rent, is one of the most common devices to cover up usury. The note for rent only serves to cover up the transaction a little more plausibly."

**Usurious Agreements for Rent.**—In the recent case of *Gaither v. Clarke*, 67 Md. 18, a lease of land from the vendee to the vendor for a term of ninety-nine years, at an annual rental of twelve per cent. on the sum for which the land was conveyed, was treated as a mere security for a loan, and held usurious.

Where property pledged to secure a loan is left in the possession of the borrower, an agreement by him to pay rent for its use, in addition to the highest legal rate of interest on the debt, is usurious. *Hill v. Maddox*, 11 La. Ann. 511.

So of a loan of money coupled with a deed from the borrowers to the lender, and the giving of a lease to the borrower at a rental equal to twelve per cent. on the amount loaned. *Phelps v. Bellows*, 53 Vt. 539.

In *Scofield v. McNaught*, 52 Ga. 69, an agreement by the vendee to pay the vendor ten per cent. per annum on the purchase price until final settlement, under the name of rent, was held usurious on its face.

So of an agreement for the use of a slave worth \$80 per year as compensation for a loan of \$200. *Richardson v. Brown*, 3 Bibb (Ky.) 207.

A contract by which property is conveyed as security for a loan, and the lender is to receive the rents and profits for the use of his money, is usurious where such rents and profits are reasonably sure to be much greater than legal interest on the debt. *Robertson v. Campbell*, 2 Call (Va.) 421; *Reynolds v. Carter*, 12 Leigh (Va.) 166. But other wise, if it is not clear that the value of the use of the property exceeds legal interest. *Joyner v. Vincent*, 4 Dev. & B. (N. Car.) 512; *Wurtz v. Thynes*, 2 Hill Eq. (S. Car.) 171.

**Valid Transactions.**—An agreement, on making a loan, to receive the rents and profits of land for a term of years in lieu of interest, is not usurious, though they amount to more than lawful interest, where no intention appears to evade the statute. *Cross v. Hepner*, 7 Ind. 359.

Under an order of court, a commissioner was appointed to rent lands belonging to the judgment debtor for a period of five years, at a rental sufficient to satisfy the judgment and costs. The commissioner rented the lands to the judgment debtor, who gave five bonds, without interest, in an amount sufficient to pay the judgment debt and interest, and these bonds were approved by the court. It was held that they were free from usury. *Moore v. Leftwich* (Va. 1889), 9 S. E. Rep. 1013.

2. *Sessions v. Richmond*, 1 R. I. 298; *Succession of Hickman*, 13 La. Ann. 364.

3. *Howkins v. Bennet*, 97 E. C. L. 507; 7 C. B. N. S. 507; *Finch's Case*, 1 And. 121, pl. 169; *Tanfield v. Finch*, Cro. Eliz. 27 E.; *Fuller's Case*, 29 Eliz., 4 Leon. 208; *Fountain v. Grymes*, Cro. Jac. 252; 1 Bulst. 36; *Cotterel v. Harrington*, Brownl. 180; *Murray v. Harding*, 2 W. Bl. 859; *King v. Drury*, 2 Lev. 7; *Ferguson v. Spring*, 1 A. & E. 576; 28 E. C. L. 154; *Chesterfield v. Janssen*, 1 Atk. 340; *In re Naish*, 7 Bing. 150; 20 E. C. L. 81; 20 Eq. Cas. 81; *Lloyd*

necessarily conclusive evidence of usury.<sup>1</sup> Nor does the fact that payment of the annuity is secured by mortgage, or by insurance upon the life of the grantor, necessarily make the transaction usurious.<sup>2</sup> It has been remarked by Lord Hardwicke, that when annuities are made redeemable, the court will regard them as an evasion of the statute, and only a loan of money.<sup>3</sup>

**XXVII. POST OBITS.**—Agreements by a borrower to pay a sum much larger than the amount loaned, upon the death of an ancestor or other person standing between the borrower and his estate in expectancy, are not within the statute, because of the uncertainty in the time of payment.<sup>4</sup> However, post-obit agreements have not been favored by the English courts, and in numerous

*v. Scott*, 4 Pet. (U. S.) 205; *Scott v. Lloyd*, 9 Pet. (U. S.) 418.

**Rent Charge.**—The purchase of a rent charge is not affected by the statute of usury, unless intended by the parties as a cover. *Gordon v. Dooley*, 3 Hughes (U. S.) 182; *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Rowe v. Bellaseys*, 1 Sid. 182.

1. *Symonds v. Cockerill*, Noy 151; *Cotterel v. Harrington*, Brownl. 180; *Fountain v. Grymes*, Cro. Jac. 252; 1 Bulstr. 36.

**Application for Loan.**—A clear statement of the rule applicable to annuities is the following: "Communications covering a loan have sometimes infected the case and turned it into usury. But then the communications must be mutual. Application for a loan is not such a case, provided the party applied to refuses a loan, and treats for an annuity. And this more especially where the party applied to is an attorney, and the real seller is ignorant of the whole conversation. I know of no case where even a meditated loan has been *bona fide* converted into a purchase and afterward held to be usurious. To be sure, it is a very strong and suspicious circumstance, but if the purchase comes out to be clearly a *bona fide* purchase, it will, notwithstanding, be good. Inequality of price is also a suspicious circumstance, especially if very inadequate. But this of itself will not make any contract usurious, though it may upon circumstances make it unfair and unconscientious, and, as such, relievable in equity. If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan." *De Gray, C. J.*, in *Murray v. Harding*, 2 W. Bl. 859; 3 Wils. 390.

2. *In re Naish*, 7 Bing. 150; 20 E. C. L. 81; 20 Eq. Cas. 81; *Tanfield v. Finch*, Cro. Eliz. 27 E.

**Secured by Insurance.**—In the case of *Howkins v. Bennet*, 7 C. B. N. S. 507; 97 E. C. L. 507, the payment of annual sums exceeding lawful interest upon the amount advanced was secured by an annuity deed upon land, and the principal was provided for by an insurance policy upon the life of one of the grantors, with a covenant for payment of the insurance premiums. It was held that there was some uncertainty and risk as to the principal, because the insurance policy might be avoided, and that therefore the transaction was not usurious.

3. *Floyer v. Sherard*, AmbL. 19; *Lawley v. Hooper*, 3 Atk. 278. But a power of redemption is not conclusive of a loan. *Murray v. Harding*, 2 W. Bl. 859; 3 Wils. 390; *Irnham v. Child*, 1 Bro. C. C. 93.

4. **Post Obits.**—*Batty v. Lloyd*, 1 Vern. 141, is the leading case upon the validity of *post obits*. There the plaintiff was entitled to a reversionary estate after the death of two persons, both advanced in years, and the defendant loaned her the sum of £350 upon her agreement to pay him therefor £700 upon the death of the life tenants, both of whom actually died within two years after the date of the loan. The plaintiff having brought a bill for relief from the bargain, Lord Keeper North refused to interfere, saying that although, as it happened, the defendant had made a very good bargain, yet it might have been that he would not have received his money under the terms of the agreement for twenty years, and that this risk, regarded as from the date of the loan, fully justified the agreement to repay

instances courts of equity have relieved against them as unconscionable bargains.<sup>1</sup>

**XXVIII. BOTTOMRY**—(See also **BOTTOMRY**, vol. 2, p. 483).—As there can be no usury where the principal sum is *bona fide* put in hazard, loans made on bottomry bonds, whereby the repayment of the loan is contingent upon the safe arrival of the vessel from a voyage, are not within the statute, and the parties are allowed to stipulate for more than the statutory rate of interest.<sup>2</sup>

double the amount advanced. To the same effect see *Chesterfield v. Janssen*, 2 Ves. 125; 1 Atk. 347; *Flight v. Chaplin*, 2 B. & Ad. 112; 22 E. C. L. 38; *Wharton v. May*, 5 Ves. 27; *Lushington v. Waller*, 1 H. Bl. 94; *Lamego v. Gould*, 2 Burr. 715.

1. See *Lushington v. Waller*, 1 H. Bl. 94; *Chesterfield v. Janssen*, 1 Atk. 347; *Mathews v. Lewis*, 1 Anstr. 7; *Wharton v. May*, 5 Ves. 27; *Comyn, Usury*, p. 42.

**Equitable Relief.**—Though not usurious within the meaning of the statute, courts of equity will relieve against *post-obit* contracts, where there is great inequality and hardship, and will not allow the creditor to have more than the sum loaned and lawful interest. *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Bill v. Price*, 1 Vern. 467; *Berny v. Pitt*, 2 Vern. 14; *Nott v. Hill*, 1 Vern. 167; *Ardglasse v. Muschamp*, 1 Vern. 237; *Knot v. Johnson*, 2 Vern. 27; *Lamplugh v. Smith*, 2 Vern. 77; *Wiseman v. Beake*, 2 Vern. 121; *Twistleton v. Griffith*, 1 P. Wms. 310; *Barnardiston v. Lingood*, 2 Atk. 133; *Hylton v. Hylton*, 2 Ves. 547. See also **CATCHING BARGAIN**, vol. 3, p. 37; **POST OBIT CONTRACT**, vol. 18, p. 871; **UNCONSCIONABLE BARGAINS**, vol. 27, p. 421.

2. *Sharpley v. Hunt*, Cro. Jac. 208; *Sawyer v. Gahn*, 1 Lev. 54; 1 Sid. 27; *Joy v. Kent*, Hardr. 418; *Button v. Downham*, Cro. Eliz. 643; *Fisher v. Conynham*, 2 Pet. Adm. 295.

**Contingency Must Be Actual.**—In order to bring a maritime loan within the protection of the rule, the condition for the loss of the principal, in case of loss of the vessel, must be actually and in good faith a part of the agreement, and not a mere cover. *Wynne v. Crosthwaite*, 4 C. & P. 178; 19 E. C. L. 329.

**What Is Bottomry.**—A loan secured by a bill of sale of a vessel and an assignment of policies of insurance upon the vessel and cargo is not a case of bottomry, and an agreement for more

than seven per cent. on the loan, as marine interest, is usurious. *Braynard v. Hoppock*, 32 N. Y. 571.

In *Thorndike v. Stone*, 11 Pick. (Mass.) 183, a bond recited that the defendant had borrowed of the plaintiff \$18,000, to enable the defendant to dispatch the ship "Israel" to sea, "which sum is to run at bottomry on the hull, appurtenances and freights" of the ship, at and from Boston to and in any ports and places, during the term of three years from the date of the bond, at the interest and premium of twelve per cent. per annum; also, that the defendant should, from time to time, pay the plaintiff one-half the gross earnings of the ship, to be applied on the loan; and that, whether the ship should be lost or not, the plaintiff should be entitled to retain all payments previously made. The condition of the bond was that, if the ship should safely pursue her voyages during the term, dangers of the sea excepted, and if the defendant should make the above-mentioned payments of one-half the gross earnings, and should, at or before the end of the three years, pay the plaintiff any balance of the \$18,000 and interest remaining due, after deducting all necessary payments for general average or partial loss that might occur during the voyages; or, in case of total loss of the vessel by marine perils, if the defendant should pay to the plaintiff such salvage as an insurer would be entitled to, and also one-half the gross earnings previously accrued, then the bond was to be void. The defendant at the same time further secured the bond by a mortgage on land, conditioned upon the performance of the bond. In an action of debt on the bond, it was objected that it was a usurious contract, and not a nine thousand bottomry bond, for the reason that the principal loaned was not put in hazard of marine loss, but the court held otherwise. *Putnam, J.*, speaking for the court, said: "It is

**XXIX. INSURANCE AS CONDITION OF LOAN.**—Where, as a condition of making a loan, the borrower is required to take policies of life insurance from the lender, and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, it is generally held that the profit thus derived by the lender is equivalent to additional interest, and therefore usurious.<sup>1</sup>

**XXX. SALE AS COVER FOR USURY.**—A device often resorted to for the purpose of concealing usury, is that of an apparent sale of property, the usury being hidden under the form of purchase-money. The universal rule applicable to such transactions is that no matter how positive and unambiguous the expressed intention of the parties to buy and sell may be, the court will examine all the circumstances of the transaction, lay hold of the usury, if it be found concealed therein, and enforce the statute against it.<sup>2</sup> In determining whether a transaction in form of a sale was intended as

argued that the payment of the money borrowed is secured in such manner as to make it a certainty that the plaintiff would receive his money, with twelve per cent.; that it is secured by a mortgage of real estate as well as by a mortgage of the ship, and an assignment of half the freight and earnings for the term of the loan; and it is further objected, that the loan is upon time and not for a voyage, as it is usually made. But the answer to these objections is, that if the ship should be lost within the time of three years, for which the money was lent, the plaintiff was to lose all the money which should be then due upon the bond. It is the essence of the contract of bottomry and respondentia, that the lender runs the marine risk, to be entitled to the marine interest. The rate of interest, and the manner of securing the payment of what may become due upon such contract, are to be regulated by the parties. Those considerations are not to be regarded by the court, excepting only to ascertain whether they were colorably put forth to evade the statute against usury. We do not perceive anything in the facts which would warrant that conclusion. If the ship had been lost immediately after she sailed, it is perfectly clear that the plaintiff would have lost all his money."

1. *Missouri Valley L. Ins. Co. v. Kittle*, 1 *McCrary* (U. S.) 234; *National L. Ins. Co. v. Harvey*, 2 *McCrary* (U. S.) 576; *Clague v. Creditors*, 2 La. 114; 20 *Am. Dec.* 300.

**Not Per Se Usurious.**—In *New York* and *New Jersey* it is held that conditions of this character are not *per se*

usurious, but depend upon the real intention of the parties. *Utica Ins. Co. v. Cadwell*, 3 *Wend.* (N. Y.) 296; *Washington L. Ins. Co. v. Paterson Silk Mfg. Co.*, 25 *N. J. Eq.* 160; *Homeopathic Mut. L. Ins. Co. v. Crane*, 25 *N. J. Eq.* 418.

2. *Morgan v. Schermerhorn*, 1 *Paige* (N. Y.) 544; 19 *Am. Dec.* 449; *Dowdall v. Lenox*, 2 *Edw. Ch.* (N. Y.) 273; *Anderson v. Rapelye*, 9 *Paige* (N. Y.) 483; *Cornell v. Barnes*, 26 *Wis.* 473; *Greenhow v. Harris*, 6 *Munf.* (Va.) 472; 8 *Am. Dec.* 751; *Stribbling v. Bank*, 5 *Rand.* (Va.) 132; *Barr v. Collier*, 54 *Ala.* 391; *Ellenbogen v. Griffey*, 55 *Ark.* 268. See also cases cited in the following notes.

In the unique language of Bleckley, C. J., in *Pope v. Marshall*, 78 *Ga.* 635, the question "whether a given transaction is a purchase of land or a loan of money with title to the land taken as security, depends, not upon the form of words used in contracting, but upon the real intent and understanding of the parties. No disguise of language can avail for covering up usury, or glossing over a usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance."

**Presumption of Usury.**—In *Davis v. Hardacre*, 2 *Camp. N. P. Cas.* 375, Lord Ellenborough said: "When a party is compelled to take goods in discounting a bill of exchange. I think a presumption arises that the



a cover for usury, it is deemed a very important and suspicious circumstance that the purchaser had first applied to the seller for

transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods by the person who sues on the bill. I must require such evidence to be adduced; and I wish it may be understood that, in all similar cases, this is the rule by which I shall be governed in the future."

**Rescission and New Sale.**—A vendee of land, after paying three fourths of the purchase price, applied to the vendor for an extension of time on the balance of \$710, then past due. As the result of the negotiations the vendor gave him a deed of the land and took back a mortgage payable in four months for \$1,010, with interest. In an action to foreclose the mortgage, the mortgagee claimed that the deed was given upon a resale, and that the original contract had been forfeited by reason of the vendor's failure to pay the balance of the purchase price at maturity. It was shown that when the vendor applied for the forbearance, the vendee had answered that he could not "fix it," so as to wait on him at the desired time, without making a new sale at the increased figure. It was held that the equitable title was in the vendee at the time of the pretended resale, and that the mortgage was usurious. *Crippen v. Heermance*, 9 Paige (N. Y.) 211, reversing *Clarke Ch. (N. Y.)* 133.

An executory contract for the sale of land, assigned by the purchaser, may, upon default in the terms of the sale, be surrendered by the assignee and a contemporaneous agreement entered into for a new sale of the same land to the assignee at larger price and upon a longer credit; and, in the absence of evidence of intent to evade the statute, such new sale will not be held usurious. *Farmers' L. & T. Co. v. Smith*, *Clarke Ch. (N. Y.)* 540.

Where an executory contract for the sale of land is, by agreement of both parties, rescinded on account of the vendee's failure to make the payments, and a new sale made to the same vendee at a higher price and longer time, with interest, proper credit being given for the amount paid by the vendee under the first contract, and there is nothing to indicate an intention to evade the statute, the transaction will not be held usurious. *Shirkey v. Hunt*, 18 Tex. 883.

**Statute of Frauds.**—Where a written contract for the sale of land was for a price equal to that previously agreed on by a parol contract, usurious in its terms, it was held not usurious, because the oral contract was void under the Statute of Frauds. *Newkirk v. Burson*, 28 Ind. 435.

**Bona Fide Sales.**—The following transaction was held to be a sale, and not a loan: One Mrs. Gilreath bid in a tract of land at a master's sale for \$1,045, but did not make the cash payment. She offered to transfer her bid to the defendant at the same price, provided she should be given five and one-half acres of the tract. The defendant, wishing longer time for payment than allowed by the terms of sale, applied to the plaintiff to advance the cash payment. This the latter agreed to do, and to sell the defendant the tract, less the five and one-half acres, for \$1,306, on the terms of \$400 cash, and the balance deferred. Upon receipt of the cash payment, the master conveyed the tract to Mrs. Gilreath, who conveyed all but the five and one-half acres to the defendant. Thereupon the defendant paid the plaintiff the \$400, and gave her a note for \$906, in return for which the plaintiff gave a written agreement to convey the land to the defendant on payment of the note. The court took the view that the defendant was not able to buy the land herself, and allowed the plaintiff to buy it, and then sell to her at a price agreed upon between them. *Wheeler v. Marchbanks*, 32 S. Car. 594.

The defendant, having purchased land covered by two mortgages of \$20,000 and \$10,000 respectively, and foreclosure being threatened, the defendant got the plaintiff to purchase the \$20,000 mortgage, which he obtained for \$15,000. The other mortgage was assigned to a third person. The plaintiff agreed to extend the time of payment, and the defendant agreed that the whole amount of \$20,000 was due and that there was no defense to it, and he executed a new bond and mortgage to the plaintiff for the full amount. It was held that the transaction was in effect a purchase of the original mortgage, and was free from usury. *Sweeney v. Peaslee (N. Y. Sup. Ct.)*, 17 N. Y. Supp. 225; 62 Hun (N. Y.) 621.

Though usurious interest be calcu-

a loan, and that he was known to the latter to be in a needy financial condition. The cases cited in the note show that proof of these facts is often decisive of the question of usurious intent.<sup>1</sup> Where, on an application for a loan of money, the lender requires

lated upon an existing indebtedness, and the amount of principal and interest adopted as the price for a reconveyance of land purchased by the creditor at a sheriff's sale, there is no usury in the transaction, it being a *bona fide* sale and not intended as a loan. *Mills v. Crocker*, 9 La. Ann. 334.

A sold B, on credit, certain bank stock at par, which was then worth in the market but eighty per cent., to enable B to raise money thereon at the bank. B pledged it at the bank as security for his note for the amount of the market value of the stock. It was held that there was nothing usurious in the sale. *Selby v. Morgan*, 3 Leigh (Va.) 577.

It is not usury to sell mortgage securities at a premium, whether such premium be computed at a rate of interest in excess of the legal rate for time past, or as compound interest, or stated at a gross sum. *Culver v. Bigelow*, 43 Vt. 249.

If it clearly appears that a sale of stock, on credit and at par, worth but ninety per cent. was not intended as a loan, though the purchaser gave his note at legal interest for the price, it will not be held usurious. *Willoughby v. Comstock*, 3 Edw. Ch. (N. Y.) 424.

A contract for sale of \$6,000 worth of *United States* eight per cent. bonds, to be delivered at a future day for \$6,000 in hand paid, is not usurious. *Bull v. Douglas*, 4 Munf. (Va.) 303; 6 Am. Dec. 518.

The owner of stock sold it for the same price he had paid, which was greatly in excess of the market price; but his purchaser afterward sold it for much less, the latter's loss being in excess of the legal rate of interest on a loan of the amount he paid. It was held that the transaction was not necessarily usurious, unless the parties intended it as a mere device to evade the statute. *Kelley v. Sprague*, 58 Hun (N. Y.) 611.

The fact that before a mortgage loan was made, a person other than the mortgagee had signified his willingness to purchase the debt and mortgage at a discount greater than legal interest, does not affect the validity of such pur-

chase, it not being otherwise shown to be intended as a loan. *Dunham v. Cudlipp*, 94 N. Y. 129.

Where property is sold absolutely in payment of a debt, the conveyance to the creditor is not vitiated by a subsequent agreement to reconvey to the grantor on payment of a sum larger than the original debt and lawful interest. *Barfield v. Jefferson*, 78 Ga. 220. To the same effect, see *Matlock v. Cobb*, 62 Miss. 43. And see *Frank v. Davis*, 23 Abb. N. Cas. (N. Y.) 419.

1. *Miller v. Coates*, 4 Thomp. & C. (N. Y.) 429; *Swanson v. White*, 5 Humph. (Tenn.) 373; *Anonymous*, 2 Desaus. (S. Car.) 333.

**Prior Application for Loan.**—The plaintiff, a college student, applied to a Jew to borrow money. The latter introduced him to some silk merchants who, after ascertaining that the plaintiff had an estate in expectancy, agreed to let him have a quantity of silks at a price which they fixed at £2,224, and he gave them his note payable in one year for that amount. The silks were then delivered to the Jew, who sold them on the plaintiff's account for £799, somewhat less than their actual value. Lord Chancellor Thurlow held that this was a usurious loan under the guise of a sale. *Barker v. Vansommer*, 1 Bro. C. C. 149.

A firm of merchants, learning that the defendant was in need of £200, sent word to his broker that they could let him have half that sum in money and the other half in goods, which they assured him were of choice quality, and that he would lose nothing by them. When he applied to them, however, they professed to be unable to let him have any money, and persuaded him to take the whole amount in goods, upon receiving which he gave them a bill of exchange for £220. The goods were immediately taken by his broker to an auctioneer, who sold them for £117. In an action on the bill, a verdict that the transaction was usurious was sustained. *Lowe v. Waller*, 2 Doug. 736.

The owner of certain stock, whose cash market value was ninety-one per cent., being applied to by the agent of A for a loan of money, replied that he

had none. The agent then suggested that perhaps A could use the stock, and the owner said that in that case he could accommodate him. As the result of these negotiations, the owner transferred a quantity of the stock to A, and took his note for its par value payable in three years with legal interest. It was held a fair sale. *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 21.

To require the borrower, as a condition of the loan, to purchase notes held by the lender against one known by him to be insolvent, would be usury. But if the lender *bona fide* supposed that the maker of the notes had requested the borrower to purchase them, and the lender did not know they were uncollectible, this would disapprove his intent to take illegal interest for the loan. *Shober v. Hauser*, 4 Dev. & B. (N. Car.) 91.

Where a note for \$350 was given for a loan of \$200 in cash, and a transfer by the lender to the borrower of a note, guaranteed by the lender, for \$150 against a third person who was then insolvent, an instruction was sustained to the effect that, though the transfer was coupled with the loan, and though the note finally proved uncollectible, by reason of the insolvency of the maker and indorser, this would not render the loan usurious, if the lender at the time believed the parties to be solvent, and if the transfer was made in good faith without unlawful intent. *Thomas v. Murray*, 32 N. Y. 605.

A and B desiring to purchase public lands upon which they had made improvements, applied to C to lend them \$1,100 for that purpose. He advanced the money, took the title in his own name, under an agreement by which A and B were to pay him \$330 per year for four years, and the principal at the end of that time, when he would convey to them. If they should fail to make the payments, the contract would be forfeited, and they would become his tenants at will at an annual rental equal to ten per cent. on \$2,400. It was held to be usurious. *Ferguson v. Sutphen*, 8 Ill. 547.

The defendant being desirous to buy a piece of land costing \$1,550, the plaintiff agreed to lend her \$1,800 at six per cent., and to retain \$75 as a bonus. The defendant bought the land for \$1,550, and assigned her contract to the plaintiff, who paid that amount to the owner, received a deed, and then conveyed to the defendant, who gave back a mort-

gage to the plaintiff for \$1,800. In addition to the \$1,550 paid for the land, the plaintiff gave the defendant only \$162. The consideration named in the deed to the defendant was \$1,625. It was held that the entire transaction was usurious and void, and that the plaintiff was not entitled to a lien for the \$1,550 purchase-money. *Terwilliger v. Beecher*, 58 Hun (N. Y.) 605.

A contract for the purchase of cotton on credit, at a price higher than the market value, is usurious, when it grew out of an application to the vendor for a loan, and he knew that the vendee intended to sell the cotton immediately for cash at a lower price, in order to raise money. *Collier v. Barr*, 64 Ala. 543.

The purchaser of a mule at the agreed price of \$102.50 applied to a merchant, who was advancing him means, for money to pay for the mule. The merchant paid the owner the \$102.50, and delivered the mule to his debtor. The latter gave him a mortgage, in which there was an item of \$130, which the merchant claimed was the agreed price at which he sold the mule to the mortgagor on credit. The latter testified that he made no agreement in relation to price. It was held that it was not a sale, but a usurious loan. *Meyer v. Cook*, 85 Ala. 417.

The plaintiff, a merchant, had been furnishing the defendant with goods on credit, under an agreement that he was to charge a profit of twenty per cent. on the cost of the goods. The defendant, wishing to buy a mule, applied to the plaintiff to borrow money for that purpose, which the plaintiff declined to lend him, but agreed to buy the mule for him, and charge to his account the usual twenty per cent. profit. In an action to recover the mule under a purchase-money mortgage, it was held that the evidence justified a verdict for the plaintiff. *Brakefield v. Halpern* (Ark. 1891), 15 S. W. Rep. 190.

The defendant desiring to purchase a lot and make improvements, requested the plaintiff, his employer, to loan him \$270 for that purpose at the highest legal rate of interest. The plaintiff refused, saying his money was worth more than that, but offered to advance the money, and take the title in his own name, the defendant to pay him, as rent, the sum of \$30 per month for twelve months, at the end of which time he would reconvey to the defendant. Accordingly the defendant

as a condition of making the loan, that the borrower shall buy something of him at an exorbitant price, and particularly where the borrower does not need or want the property offered, the transaction becomes thereby marked as a cover for usury.<sup>1</sup> The same principle applies to cases where the lender procures the

accepted the \$270. and a deed was executed to the plaintiff, though the grantor supposed it ran to the defendant. The defendant made the improvements. It was held a mere cover for usury. *Tillar v. Cleveland*, 47 Ark. 287.

1. *Quackenbos v. Sayer*, 62 N. Y. 344; *Earnest v. Hoskins*, 100 Pa. St. 551; *Eagleson v. Shotwell*, 1 Johns. Ch. (N. Y.) 536; *Valley Bank v. Stribbling*, 7 Leigh (Va.) 26; *Bank of Washington v. Arthur*, 3 Gratt. (Va.) 173; *Grosvenor v. Flax*, etc., Mfg. Co., 2 N. J. Eq. 453; *Tarleton v. Emmons*, 17 N. H. 43; *Rose v. Dickson*, 7 Johns. (N. Y.) 196.

**English Authorities.**—The English courts have always been very suspicious of transactions taking the form of a sale of goods on credit to a needy person, and wherever the circumstances indicate a probable device to obtain more than legal interest, the transaction has been treated as a loan. *Reynolds v. Clayton*, Moore 398; *Barker v. Vansommer*, 1 Bro. C. C. 149; *Lowe v. Waller*, Doug. 736; *Pratt v. Willey*, 1 Esp. N. P. Cas. 40; *Davis v. Hardacre*, 2 Camp. N. P. Cas. 375; *Coombe v. Miles*, 2 Camp. N. P. Cas. 553.

In *Rich v. Topping*, 1 Esp. N. P. Cas. 176, it was held to be the province of the jury to decide whether the difference in the price at which the goods were taken, and the price for which they were sold by the party taking them, was so great as to make it apparent that they were taken only as a cover for usury.

In *Chesterfield v. Janssen*, 1 Atk. 340, Lord Hardwicke said: "It is lawful, likewise, for a man to sell his goods as dear as he can in a fair way of sale; but if A applies to B to lend money, and offers to allow more than the real interest, and B says, 'No, I will not agree to your proposal on these terms, but I will give you cash or quantity, of goods, and you shall pay me so much at a future time for them beyond the price I now fix,' and then charge an extraordinary profit, this is a shift to get more than the legal interest, and is usurious."

A case difficult to reconcile with the doctrine of other English cases is that

of *Yeoman v. Barstow*, Lutw. 271. The plaintiff declared in *assumpsit* that he had sold and delivered to the defendant certain pieces of "hammered silver money, the coin of this realm, amounting to the sum of £300 English money," and that the defendant agreed to pay therefor "£300 in new milled English money, together with £4, 10s for every hundred, amounting to £13, 10s of the said new milled money by way of interest," at the end of eight months. The jury found for the plaintiff, and the court granted judgment accordingly, holding that, as the verdict established a sale, they would not presume usury. It was remarked by some of the judges that if a man had a great occasion for guineas, and could make great advantage of them, and for this he gave money for them beyond their value, this was not usury. The soundness of this decision is very questionable. A more palpable attempt to evade the statute would be difficult to conceive of. See criticism in *Marsh v. Martindale*, 3 Bos. & Pul. 154.

**Exorbitant Price.**—A sale of property to the borrower in connection with a loan, at a price much greater than its value, of which fact both parties were aware, though nothing was said as to its real value, is usurious. *Low v. Mussey*, 36 Vt. 183.

A tacit understanding, based on the lender's well-known practice, that the borrower would buy a horse of him at an exorbitant price, renders the loan usurious. *Douglass v. McChesney*, 2 Rand. (Va.) 109.

A note for \$2,800, at four months, was given for a pretended purchase of stock, which it was stipulated should not be delivered until the note was paid. At the same time the seller lent the buyer \$2,600 and took the stock as collateral, it being a condition of the loan that the borrower should buy the stock. It was held that the jury were warranted in finding that the note was usurious. *Black v. Ryder*, 5 Daly (N. Y.) 304.

In *Hathway v. Hagan*, 59 Vt. 75, one of the items of consideration in the note sued on was \$70 as the price of a

borrower to sell property to him at an inadequate price, either in connection with an actual loan of money, or in lieu of it, together with an agreement to reconvey for a higher price.<sup>1</sup>

The question whether, in view of all the facts, a *bona fide* sale or a usurious loan was intended, is in most cases to be submitted to the jury.<sup>2</sup>

sleigh worth about \$5. In delivering the opinion of the court, Rowell, J., said: "The defendant did not want the sleigh and had no use for it; but the orator took advantage of his situation, and compelled him to buy it at fifteen times its value in order to get extension on his notes, which were then in the hands of an attorney for collection. These circumstances make that transaction usurious, notwithstanding the subterfuge of a sale resorted to to cover it; for the law is quick to discern the intents of men, and piercing even to the dividing of the joints and marrow of sham and pretense."

1. *Sales to Creditor*.—A sale of chattels under an agreement that the seller may repurchase them within six months by paying the amount advanced with two and a half per cent. per month for the use thereof, is usurious on its face. *Starkweather v. Prince*, 1 *MacArthur* (D. C.) 144.

A sale of land by one known to be in embarrassed circumstances, with an accompanying guaranty that it would increase in value fifty per cent. per annum for two years, at the end of which time the purchaser was to tender back a deed and receive twice the amount he had paid, was held to be a usurious loan. *Delano v. Rood*, 6 *Ill.* 690.

A contract to purchase land at a very inadequate price and to reconvey to the vendor, if paid, a price larger than the sum advanced and legal interest, the vendor being at the time in necessitous circumstances, is a usurious loan. *Heytle v. Logan*, 1 *A. K. Marsh.* (Ky.) 529.

Buying a slave at half his value, and at the same time lending the seller a sum of money, with an agreement that if security is given for a sum larger than the price of the slave, the loan and interest, the slave shall be returned and the loan considered as paid, is a usurious transaction. *Shanks v. Kennedy*, 1 *A. K. Marsh.* (Ky.) 65.

A conveyed slaves to B for \$2,335, under an agreement that A should have the use of them on hire for one year, at the end of which time B would reconvey them to A, if he should pay B

\$2,935; but if he should fail to pay that sum punctually, the agreement to reconvey should be void. The sale was made for the purpose of enabling A to raise money. It was held that it was a mere cover for usury. *Clarkson v. Garland*, 1 *Leigh* (Va.) 162.

A debtor on a single bond transferred to his creditor other bonds of solvent and responsible parties with sureties, to an amount nearly double the amount of his own bond, but at an agreed price of only half their actual value; and for the difference between such price and his own bond he gave a new bond with sureties, payable at a future day, with legal interest. At the time of making this settlement, the debtor was about to leave the state, and was being urged by the creditor for payment. It was held that the transaction was a usurious agreement for forbearance. *Gibson v. Fristoe*, 1 *Call* (Va.) 62; 1 *Am. Dec.* 502.

*Fair Price*.—Though a loan was made conditional upon the borrower selling land to the lender at a specified price, it was not usury if the price paid therefor by the lender, was all the land was then worth. *Fellows v. American L. Ins., etc., Co.*, 1 *Sandf. Ch.* (N. Y.) 203.

A judgment debtor sold all her property to a friend for \$6,000, he agreeing to pay all liens and expenses against her out of that sum and give her the balance. He also executed an agreement to reconvey to her for \$7,000 in ten annual installments, with interest, the \$1,000 being designated as a fee for his services. It was held that there was no usury in the arrangement, which was in effect a contract to resell. *Myers v. Roller*, 85 *Va.* 621.

2. *Chase v. New York Mortg. Loan Co.* (Minn. 1892), 51 *N. W. Rep.* 816; *Tyson v. Rickard*, 3 *Har. & J.* (Md.) 109; 5 *Am. Dec.* 424; *Monroe v. Foster*, 49 *Ga.* 514.

*Question for Jury*.—Whether a transaction which was in form a sale was resorted to by the parties as a cover for a usurious loan, is a question to be determined by the jury from all the circumstances surrounding the transaction, and not from the secret

**XXXI. LOAN OF CHATTELS; PAYMENT IN KIND.**—Usury cannot be predicated of a loan of chattels, stocks, or choses in action, to be returned in kind, unless the appearance of a loan is resorted to as a cover for an actual usurious transaction.<sup>1</sup> The same

intention of one of the parties not communicated to the other. *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229.

**Burden of Proof.**—It is the settled rule in *New York* that the burden of proving that a sale of property in connection with a loan was a usurious transaction is upon the party who sets up that defense. *Stuart v. Mechanics, etc.*, Bank, 19 Johns. (N. Y.) 508; *Thomas v. Murray*, 32 N. Y. 605; *Frank v. Davis*, 23 Abb. N. C. (N. Y.) 419.

**Evidence of Intent.**—The exchange of a state bond of \$1,000 for a note of the same amount at three months, indorsed by a third party, the payee knowing that the maker of the note intended to sell the bond in open market immediately at ninety-three per cent. of its par value, is not usurious, in the absence of proof of intent to disguise a loan. *England v. Moore*, 4 Houst. (Del.) 289.

The facts that a sale was made on credit at a much higher price than the seller had offered to take in cash, and that he was in the habit of lending money at usurious interest, do not prove that the sale was a cover for usury. There must be some other evidence that a loan was intended. *West v. Belches*, 5 Munf. (Va.) 187.

1. *Dry Dock Bank v. American L. Ins., etc., Co.*, 3 N. Y. 344; *Hall v. Haggart*, 17 Wend. (N. Y.) 280; *Cumming v. Williams*, 4 Wend. (N. Y.) 680; *Perrine v. Hotchkiss*, 2 Lans. (N. Y.) 416; *Smith v. Price*, 2 Heisk. (Tenn.) 293.

**United States Bonds.**—The following contract was held to be not usurious: "Received, Nashville, August 9th, 1871, of Mrs. Maria Lou Lyle, one *United States* bond for one thousand dollars, No. 165,810, also one thousand U. S. bond, No. 879,748, making together two thousand dollars, the interest arising on said bonds, which are due January, 1872, belonging to said Mrs. Maria Lou Lyle, and any interest thereafter; also, if said G. Rice & Co. and Mrs. Lyle agree that G. Rice & Co. shall keep said bonds after January 1st, 1872, the interest every six months is thirty dollars in gold on each of said bonds, which we will pay to Mrs. Lyle. G. RICE & Co.

"N. B.—We also agree to pay six per

cent. interest on the above-named bonds, outside of the interest accruing on them. G. RICE & Co." The court, by Turney, C. J., said: "The contract was merely one of renting or hiring, and was legitimate, as would have been the hiring of a horse, or the renting of a house and lot, with the agreement that the party might pledge or sell, but at the same time undertaking, with security, the return of the property in kind to the original owner, or account for its value." *Marshall v. Rice*, 85 Tenn. 502.

**Use of Cattle.**—In *Bull v. Rice*, 5 N. Y. 315, the following agreement was held free from usury, no intention appearing to evade the statute: "Whereas John Bull . . . has leased unto Wilder Rice . . . eleven cows for the term of two or four years, at the option of the said Rice, for \$50.75 per year, to be paid on the first day of May in each year following this date; and I, the said Rice, hereby agree to deliver said cows to said John M. Bull, with calf, or with calves by their sides, on the first of May, 1836, or 8, as I shall elect, worth \$203, or that amount in cash, as I, the said Rice, shall choose. And the said John M. Bull hereby authorizes said Rice to exchange said cows, if he, the said Rice, shall deem it profitable for him, the said John M. Bull. The said John M. Bull to sustain all losses that shall appear to be providential, such as said cows being killed by lightning, murrain, etc."

It is not usury, upon the letting of a cow and calf, to stipulate for the return of the cow at the end of four years with another cow three years old. *Cummings v. Williams*, 4 Wend. (N. Y.) 679. Nor to stipulate for 30 additional shares of bank stock as compensation for a loan of 142 shares for a year. *Stephoe v. Harvey*, 7 Leigh (Va.) 501.

A contract for the letting of sheep, that the borrower should return the same number and quality of sheep on a year's notice, and in the meantime pay, annually, fifty cents per head for their use is not usurious, though such compensation exceeds legal interest on the value of the sheep. *Hall v. Haggart*, 17 Wend. (N. Y.) 280.

The sale of a number of cows, to be

rule applies to agreements made between the parties to pay a debt in commodities of fluctuating value.<sup>1</sup>

paid for at the end of four years by twice the number of the same quality, is not usurious. *Spencer v. Tilden*, 5 Cow. (N. Y.) 144.

A contract by the borrower of corn to return therefor at the end of the season a greater amount of corn, is not usurious. *Easterlin v. Rylander*, 59 Ga. 292; *Morrison v. McKinnon*, 12 Fla. 552.

A sale of sheep for a specified sum of money and "two pounds of wool per year for each sheep so sold and delivered, for two years," is not necessarily usurious. *First Nat. Bank v. Owen*, 23 Iowa 185.

Upon a sale of sheep on credit, at the then market price, an agreement by the buyer to deliver to the seller a certain quantity of wool per head, annually, during the period of credit, is not usurious, though the value of the wool is much greater than the highest legal rate of interest on the price. *Gilmore v. Ferguson*, 28 Iowa 220.

**Exchange of Securities.**—It has been held that an exchange of certain securities for others of a like nominal amount, but of much greater actual value, made in good faith and not as a cover for a loan, was not usurious, even though the assignee of the bonds and mortgages was required to guarantee their payment. *Western Reserve Bank v. Potter, Clarke Ch.* (N. Y.) 432; *Bank of U. S. v. Waggener*, 9 Pet. (U. S.) 378. See also *Willoughby v. Comstock*, 3 Edw. Ch. (N. Y.) 424; *Talmadge v. Pell*, 7 N. Y. 328; *Rockwell v. Charles*, 2 Hill (N. Y.) 499.

A loan or delivery of stocks to be replaced by a like number of shares at a future day, is not usurious, for the reason that it is uncertain whether the lender will gain or lose by the transaction. The stocks may be lower at the later day. But the transaction must be *bona fide*. *Tate v. Wellings*, 3 Tenn. 531; *Chesterfield v. Janssen*, 1 Atk. 340.

**Foreign Exchange.**—In *Leavitt v. DeLauny*, 4 N. Y. 363, where the question was whether foreign bills of exchange loaned by the drawees to a banking company, to be paid by a like amount in similar bills with seven per cent. interest and a commission of one and one fourth per cent. added, constituted a usurious loan, *Harris J.*, speaking for the court of appeals,

said: "I agree with the learned assistant vice chancellor by whom this cause was first heard, that these transactions were not sales of exchange, but were loans. There was no price fixed upon the transfer, but the bills were delivered to the banking company upon a contract to return the same amount, in kind, at a stipulated time. Can usury be predicated upon such a loan? I think not. It was well said by the counsel for the plaintiff, upon the argument, that 'the Statute of Usury applies only to a loan of money, or to a transfer of something else as money, for the purpose and as the means of obtaining money, on time.' A loan, therefore, to be usurious, must be in fact, if not in form, a loan of money. But here, unless the transactions were made to assume the shape they bear, merely to disguise their true character, there was no loan of money, either directly or indirectly. The defendants loaned to the banking company their bills, payable in Paris; an article of commerce, having no standard price or value, but, like other commodities, subject to the vicissitudes and fluctuations of trade. They were to receive in return, not a specified amount in money, or money's worth, but bills to the same amount, payable at the same place. Whether they would receive more or less than the value of their bills, with interest, would necessarily depend upon the comparative value of exchange, at the time of the loan, and when it should be repaid. It is very likely that, in the whole series of the transactions between the parties, the advantage was in favor of the defendants; but that no one could foresee this result, or that any one of the transactions would insure to the defendants more than the market value of their exchange, with legal interest, is entirely certain. The object of the banking company in making the loan was undoubtedly to raise money. Nor have I any doubt that the defendants knew this. If, therefore, they had stipulated for the repayment of the value of the bills loaned, with interest, in money, I am inclined to think the transactions would have been usurious. But this essential element of usury seems to be wanting."

1. *Partlow v. Williams*, 19 Ill. 132.

**XXXII. MUNICIPAL SECURITIES.**—It has been held usury for a city to issue its warrants at a discount of twenty-five per cent. in payment of a judgment against it;<sup>1</sup> also for a city to sell its bonds at auction for confederate money worth but ten cents on the dollar, though the bonds brought more than twice their face value.<sup>2</sup> Very recently, however, the doctrine has been judicially advanced that municipal securities may be sold in the first instance for whatever they will bring in the market.<sup>3</sup>

**XXXIII. CORPORATIONS.**—Unless specially protected by statute, corporations are subject to all the provisions of usury laws, the same as private persons.<sup>4</sup> They may be indicted and punished for

So of an agreement to give, in payment of a loan of money, a certain number of shares of stock at a future day, or their then market price in money. *Pike v. Ledwell*, 5 Esp. N. P. 164; *Maddock v. Rumball*, 8 East 304.

1. *Clark v. Des Moines*, 19 Iowa 199.

2. *Danville v. Sutherland*, 20 Gratt. (Va.) 555; *Lynchburg v. Norvell*, 20 Gratt. (Va.) 601.

3. See *Orchard v. School Dist.*, 14 Neb. 378.

**Sale of Bonds at Discount.**—In the case of *Memphis v. Bethel* (Tenn. 1875), 17 S. W. Rep. 191, it was held, that in view of the peculiar character of municipal bonds, it was not usury for the city of Memphis to sell its bonds having six per cent. interest, at a discount greater than the lawful rate. In delivering the opinion of the court, Nicholson, C. J., said: "It is well settled that if a person make his note for the purpose of raising money, and sell it at a discount greater than six per cent., the transaction is usurious, and neither the purchaser of the notes, nor his assignee with notice, can recover more than the amount paid, with legal interest. But does this rule apply to the city bonds issued by authority of law, having thirty years to run, bearing interest at six per cent., payable to bearer, and authorized to be issued by the city for the purpose of funding its indebtedness? It is fully established by a great preponderance of authorities that there is a marked difference between individual securities and the bonds of municipal corporations in their origin, character, and purposes. The bonds of municipal corporations are now recognized as negotiable in as full and complete a manner as bank-bills or the national currency of the country; and now they stand not only equal before the law to the negotiable paper pertain-

ing to the commercial business of the country, and to our circulating medium, but they are also, for their greater advantage and for the purpose of causing them to be accepted as money, the most desirable investments for capital in the monetary centers of the world, regarded as chattels, in so far as that character shall tend to relieve them from defenses and burdens incident to choses in action merely, and give to them a merchantable and vendible quality. *Griffith v. Burden*, 35 Iowa 143. Further, 'this character of chattels, which by the modern rule is attached to these securities, must also, upon principle, exempt them from the defense of usury; for, if they are regarded as chattels, then, since usury cannot be predicated upon a sale of chattels merely, neither can it be predicated upon a sale of bonds having the recognized character of chattels.' . . . Assuming that these authorities establish the entire negotiability of the city bonds, and the right of the city officers to sell them in the market as chattels, it is clear that under the authority to sell them at their market value, although that might be a greater discount than legal interest, the transaction would be neither usurious nor illegal, and therefore the city can neither raise a question of usury nor of scaling. The demurrer to this return was therefore properly sustained."

**Unexecuted Agreement.**—A board of education gave bonds at the highest legal rate of interest, but agreed to pay an additional sum for the loan. This agreement, however, was never executed. It was held that a recovery could be had on the bonds. *Ohio v. Board of Education*, 35 Ohio St. 519.

4. *Farmers', etc., Bank v. Harrison*, 57 Mo. 503; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Com-*



taking usury.<sup>1</sup> And corporate charters will not be construed to alter the usury laws in favor of the corporation, if a contrary construction is equally reasonable.<sup>2</sup> A statute authorizing railroad corporations to sell their own bonds at a discount will not be construed to embrace foreign corporations.<sup>3</sup> Statutes preventing corporations from pleading usury are constitutional, and are held to apply to actions pending at the time of their enactment.<sup>4</sup>

By statute in *New York*, it is provided that, "No corporation shall hereafter interpose the defense of usury in any action."<sup>5</sup> Similar statutes have been enacted in *Illinois*,<sup>6</sup> *Virginia*,<sup>7</sup> *West Virginia*,<sup>8</sup> and *Wisconsin*.<sup>9</sup> This prohibition prevents the corporation from bringing an action to cancel securities given by it, on the ground of usury.<sup>10</sup> It has been held that the *New York* statute applies to a foreign corporation maker of a usurious note executed and payable in *New York*, and sued on in another state.<sup>11</sup> The prohibition is held to extend to the collateral contracts of individuals as indorsers, grantors, or sureties for corporations.<sup>12</sup> The statutory prohibition, however, applies only to contracts made by

mercantile Bank *v.* Nolan, 7 How. (Miss.) 508.

An *Ohio* corporation empowered to make loans with "interest at the rate allowed by the laws of *Ohio*," cannot enforce a loan made by it in another state at interest legal there, but illegal in *Ohio*. *Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31.

1. *State v. Security Bank* (S. Dak. 1892), 51 N. W. Rep. 337; *State v. First Nat. Bank* (S. Dak. 1892), 51 N. W. Rep. 587. See also *ULTRA VIRES*, vol. 27, p. 351.

2. *Caldwell v. Commercial Warehouse Co.*, 4 Thomp. & C. (N. Y.) 179; 1 Hun (N. Y.) 718.

A bank charter authorizing it "to pay and receive such rate of interest as may be mutually agreed upon," does not relieve the bank from the usury law. *Tishimings Sav. Inst. v. Buchanan*, 60 Miss. 496.

3. *McGregor v. Covington, etc.*, R. Co., 1 Disney (Ohio) 509.

4. *Danville v. Pace*, 25 Gratt. (Va.) 1; 18 Am. Rep. 663.

5. *New York Laws* (1850), ch. 172.

6. *Starr & C. Illinois Annot. Stat.* (1885), ch. 74, §§ 4-11.

7. *Virginia Code* (1887), §§ 2814-2826.

8. *West Virginia Code* (1891), p. 500, § 22.

9. *Sanb. & B. Wisconsin Annot. Stat.*, §§ 1688-1692.

10. *Isle of Wight Co. v. Smith*, 51 Hun (N. Y.) 562.

11. *Lane v. Watson*, 51 N. J. L. 186. See also *Junction R. Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226.

But a contrary decision was reached by the supreme court of *North Carolina*, in *Com'rs of Craven v. Atlantic, etc.*, R. Co., 77 N. Car. 289, in which case *Rodman, J.*, said: "It is said, however, for the defendants that these bonds were delivered in *New York*, and are made payable there, and that consequently they are governed by the law of *New York* in respect to the rate of interest which they may legally be made to bear, and we are referred to a statute of *New York* by which corporations are forbidden to plead usury as a defense. It will be admitted that the statutes of the state can have no extra-territorial operation. The act cited cannot and does not profess to control corporations other than those created by the law of *New York*; or if it be regarded as an act regulating the practice of the courts of *New York*, it might perhaps apply to corporations created by a foreign state when sued in the courts of that state. It cannot govern a corporation of this state sued in this state."

12. *Stewart v. Bramhall*, 74 N. Y. 85; *Rosa v. Butterfield*, 33 N. Y. 669; *Smith v. Alvord*, 63 Barb. (N. Y.) 415. *Lane v. Watson*, 51 N. J. L. 186, follows the *New York* ruling as to the indorsers of a corporation's note.

It was held, however, at one time in *New York*, that accommodation

the corporation; hence, where it has succeeded to the rights of a party, who might have set up usury, the corporation may also set it up. Thus, where a corporation acquired the rights of a pledgor, it was held that the corporation could recover the property pledged on the ground of usury in the debt.<sup>1</sup>

Under the general principles of agency, knowledge by the president of a banking corporation of the usurious character of a note discounted by the bank, imputes knowledge on the part of the bank.<sup>2</sup>

**XXXIV. BUILDING ASSOCIATIONS.**<sup>3</sup> — (See BUILDING ASSOCIATIONS, vol. 2, p. 604.)

**XXXV. NATIONAL BANKS.** — (See also NATIONAL BANKS, vol. 16, p 143). The peculiar position occupied by national banks, in respect to usury, under the provisions of the Acts of Congress, has been fully discussed elsewhere,<sup>4</sup> and it is only necessary to refer the reader to that article.

An important decision has very recently been rendered by the supreme court of the State of *South Dakota*, involving the application to national banks of a state law making usury a criminal offense. This is apparently the first instance where such laws have been held to apply.<sup>5</sup>

indorsers of a corporation's note were not precluded from pleading usury in the note. *Hungerford's Bank v. Dodge*, 30 Barb. (N. Y.) 626.

1. *Merchants' Exch. Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. 635.

2. *Newport Nat. Bank v. Tweed*, 4 Houst. (Del.) 225.

3. See *International Bldg., etc., Assoc. v. Mayers* (Tex. Civ. App. 1894), 25 S. W. Rep. 1132.

A contract is not rendered usurious by a provision in a by-law of a building and loan association, giving a borrower an option to withdraw before the maturity of his obligation upon payment of a certain per cent. of the premium required for each year, although the amount he would thereby be required to pay, is in excess of the highest legal rate allowed, as he is not required to withdraw. *International Bldg., etc., Assoc. v. Biering* (Tex. Civ. App. 1894), 23 S. W. Rep. 621; *Abbott v. International Bldg., etc., Assoc.* (Tex. Civ. App. 1894), 23 S. W. Rep. 629.

A provision of a mortgage to a building and loan association for the payment of interest on premiums which are deducted from the amount paid the mortgagor for the mortgage at the time it is given, is usurious. *Goodman v. Durant Bldg., etc., Assoc.* (Miss. 1894), 14 So. Rep. 146.

An agreement that the premium payable by a borrowing member of a building and loan association, organized under the *New Jersey* statute providing that such associations may agree with their members for a premium upon their loan, shall be deducted from the sum loaned and the balance only be paid to him in cash, and to pay interest on the whole sum loaned, is valid and not usurious. *Bowen v. Lincoln Bldg., etc., Assoc.* (N. J. 1894), 28 Atl. Rep. 67. But in *Texas*, a building association will not be allowed to secure a price greater than that allowed by law for the use of the money, under the guise of a premium for the privilege of borrowing. *International Bldg., etc., Assoc. v. Biering* (Tex. 1894), 26 S. W. Rep. 39. Though in *Louisiana* a premium may be charged. *American Homestead Co. v. Linigan*, 46 La. Ann. —; 15 So. Rep. 369.

4. See NATIONAL BANKS, vol. 16, p. 143.

5. *State v. First Nat. Bank*, (S. Dak. 1892), 51 N. W. Rep. 587. The official syllabus in this case, prepared by Kellam, P. J., contains the reasoning of the court upon all the points raised, and is here given in full: "*United States Stat.* (1888), ch. 866, § 4, in respect to the jurisdiction of state courts in all actions by or against national banks, refers exclusively to civil actions, and the right

**XXXVI. JUDGMENTS TAINTED WITH USURY—1. In General.**—When a usurious debt has been sued on without collusion and put into judgment in an action wherein the debtor might have interposed the defense of usury, but neglected to do so, it is generally held that he cannot afterwards attack the judgment on that ground. He has had his day in court, and it was his own fault that he allowed the usury to go unchallenged.<sup>1</sup> Nor will a court of equity

of the state to punish a national bank for a violation of its police laws cannot be predicated upon it. For any public offense which it can commit, a corporation may be indicted the same as a natural person. A national bank, or any other corporation, which Congress, in the exercise of its legal powers, may authorize to be organized and operated, must be allowed to pursue the business and purpose of its organization, and exercise all the powers necessary or incident to such business without any restraint by or accountability to state laws; but, in the absence of other expression by Congress, this is the extent of its exemption from subjection to state legislation. The state law makes the taking of illegal interest a misdemeanor, and, in case of a corporation, punishes the same by fine. To require a national bank to so pay money to the state is not necessarily such an interference with the proper discharge of its duties to the government as will make such requirement invalid. One of the powers included in the authorized business of a national bank is to receive interest on loans, which power is thus defined in the law: 'Every association may take, receive, reserve, and charge, on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest allowed by the laws of the state or territory where the bank is located, and no more,' etc. A state law, making it a misdemeanor for the bank to do an act which the creative law has expressly refused to authorize or allow it to do, cannot 'interfere with or impair its efficiency in performing its functions,' or, if enforced against it, 'incapacitate it from discharging its duties.' With a few exceptions, having no pertinency to this case, the police power in the *United States* belongs to and resides in the states. The police power of the state yields to the act of Congress, for it is 'the supreme law of the land;' but it yields only when and to the extent that an enforcement of the police law would interfere with the act of Congress, or with the free

exercise of rights conferred, or the discharge of duties enjoined, by it. State sovereignty remains unabridged for the punishment of all crimes committed within the limits of a state, except so far as they have been brought within the sphere of federal jurisdiction by the penal laws of the *United States*. The provisions of section 30 of the act referred to, declaring what results should follow the taking by a national bank of a greater interest than that allowed by law, is only a declaration of the legal effect of taking such unlawful interest upon the rights of the parties under the contract. It is a civil punishment, as distinguished from a criminal punishment, and penal only in the sense that exemplary damages are penal. The provisions of said section 30, imposing consequences purely civil, were not intended to take the place or prevent the operation of the police laws of the state upon the act of taking illegal interest. It would be a strained and unwarranted deduction to conclude that, when Congress imposed the usual civil penalties for taking unlawful interest common to nearly all state usury laws, it meant to have such penalties cover other or different ground, or have other or different effect, from the same penalties when found in corresponding provisions of state laws."

1. *Bearce v. Barstow*, 9 Mass. 45; 6 Am. Dec. 25; *Thatcher v. Gammon*, 12 Mass. 268; *Schroepel v. Corning*, 10 Barb. (N. Y.) 576; *Smith v. Stoddard*, 10 Mich. 148; 81 Am. Dec. 778; *Hope v. Smith*, 10 Gratt. (Va.) 221; *McLaws v. Moore*, 83 Ga. 177; *Stewart v. Stisher*, 83 Ga. 297; *Nisbet v. Walker*, 4 Ga. 221; *Burwell v. Burgwyn*, 105 N. Car. 498; *Heath v. Frackleton*, 20 Wis. 320; 91 Am. Dec. 405.

**Unconscionable Defense.**—Usury is regarded as an unconscionable defense, and a judgment will not be opened for the purpose of enabling the debtor to interpose it. *Marsh v. Lasher*, 13 N. J. Eq. 253; *Hazelrigg v. Wainwright*, 17 Ind. 215; *Morris v. Slatery*, 6 Abb.

interfere to relieve him from the judgment under such circumstances, in the absence of a good excuse for failing to plead the usury.<sup>1</sup> And where the circumstances are such as to entitle the judgment debtor to equitable relief, it is never granted except upon the condition of his paying the amount justly due, with legal interest.<sup>2</sup> But it seems that a bill in equity will lie to recover back usury paid under a judgment at law.<sup>3</sup> Of course, where the

Pr. (N. Y.) 74; *Lovett v. Cowman*, 6 Hill (N. Y.) 226; *Quincy v. Foot*, 1 Barb. Ch. (N. Y.) 496; *Candler v. Pettit*, 1 Paige (N. Y.) 427; *Grant v. McCaughin*, 4 How. Pr. (N. Y.) 216.

**Usury on Face of Judgment.**—If the usury appears on the face of the judgment, it may be taken advantage of in collateral proceedings. *Cleghorn v. Greeson*, 77 Ga. 343.

**Judgment Securities.**—Usury in a judgment debt cannot be pleaded against a note or bond given in payment of it. *Gipson v. Shanklin*, 83 Ind. 147; *Montague v. McDowell*, 99 Pa. St. 265; *Phillipps v. Gephart*, 53 Iowa 396.

1. *Post v. Boardman*, Clarke Ch. (N. Y.) 333; *Day v. Cummings*, 19 Vt. 406; *Fisher v. Carroll*, 6 Ired. Eq. (N. Car.) 485; *Brown v. Toell*, 5 Rand. (Va.) 543; 16 Am. Dec. 759; *Terry v. Dickinson*, 75 Va. 475; *Smith v. Walker*, 8 Smed. & M. (Miss.) 131; *Lucas v. Spencer*, 27 Ill. 15; *Jones v. Kirksey*, 10 Ala. 579; *Mallory v. Matlock*, 10 Ala. 595; *Chinn v. Mitchell*, 2 Met. (Ky.) 92; *Greenfield v. Frierson*, 7 Heisk. (Tenn.) 633.

**Neglect to Defend at Law.**—It is no ground for relieving against a judgment at law on a usurious contract, that the debtor could not be present at the term at which the judgment was rendered, where he did not employ counsel nor take any steps to defend. *McCollum v. Prewitt*, 37 Ala. 573; 1 Ala. Sel. Cas. 498.

**New York Statute.**—By *New York Act of May 15th, 1837*, it was enacted that no bill should be maintained for relief on the ground of usury after a judgment by action at law, even by default, unless such bill could have been maintained before the judgment. See *Topping v. Van Pelt*, 1 Hoffm. Ch. (N. Y.) 545; *Skinner v. Christmas*, Clarke Ch. (N. Y.) 268.

In *Tennessee*, though a debtor has failed to make the defense of usury in an action at law, yet equity will entertain a bill for relief where the question of usury has become complicated

by a series of transactions and renewal notes. *Buchanan v. Nolin*, 3 Humph. (Tenn.) 63; *Frierson v. Moody*, 3 Humph. (Tenn.) 561. And by *Tennessee Act of 1846*, ch. 167, courts of equity were given jurisdiction of all questions of usury, without regard to previous proceedings at law. See *Gilham v. Moore*, 8 Humph. (Tenn.) 468.

2. *Taylor v. Bell*, 2 Vern. 171; *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283; *Eagleson v. Shotwell*, 1 Johns. Ch. (N. Y.) 536; *Crawford v. Harvey*, 1 Blackf. (Ind.) 382.

**Equitable Terms.**—In *Scott v. Nesbitt*, 2 Bro. C. C. 641; 2 Cox 183, Lord Thurlow observed "that if it be necessary for you to come into this court to dispute a judgment at law, you must do it upon the equitable terms of paying the principal money really due, with lawful interest. I have no idea of displacing a judgment upon any other terms;" and he directed that the judgment in that case should stand as security for the money actually paid, with legal interest.

3. *Bartholomew v. Yaw*, Clarke Ch. (N. Y.) 16; *Doub v. Barnes*, 1 Md. Ch. 127; *Threadgill v. Timberlake*, 2 Head (Tenn.) 395; *Wood v. Todd*, 59 Tenn. 89; *Dooley v. Stipp*, 26 Ill. 86; *Lawless v. Blakey*, 4 T. B. Mon. (Ky.) 488; *Pearce v. Hedrick*, 3 Litt. (Ky.) 109.

In *Moss v. Rowland*, 1 Duv. (Ky.) 321, it was held, that if the judgment creditor afterward became a non-resident, equity had jurisdiction to set off the usury against the judgment.

**Recovery Back.**—On the other hand, some courts hold that after the judgment has been paid, it is too late for the debtor to sue to recover back the usury. *Schroeppel v. Corning*, 10 Barb. (N. Y.) 576; *Smith v. Stoddard*, 10 Mich. 148; 81 Am. Dec. 778. See also *Calvin v. Blymyer*, 121 Pa. St. 582; *Carlisle v. Bindley*, 91 Pa. St. 229.

**Failure to Appeal.**—In an action to foreclose a mortgage, usurious interest paid on the debt was deducted by the court at the instance of another

defense of usury was interposed in the action and failed, it cannot afterwards be raised in equity against the judgment.<sup>1</sup>

**2. Judgments by Confession.**—When it is made to appear that a judgment by confession upon a usurious debt was entered collusively, or in pursuance of the usurious agreement, as a device to conceal the taint, it ought not in principle to stand upon any better footing than other usurious securities; but the courts are not entirely agreed either as to the proper method of proceeding for relief, or as to their right to interfere at all.<sup>2</sup>

creditor and against the objection of the mortgagor, who, however, took no appeal. It was held that he could not afterward sue to recover back the usury. *McDonald v. Smith*, 53 Vt. 33.

1. *Lamme v. Saunders*, 1 T. B. Mon. (Ky.) 263.

2. The following cases hold that judgments by confession cannot be attacked for usury in the debt: *Bell v. Fergus* (Ark. 1892), 18 S. W. Rep. 931; *Fowler v. Henry*, 2 Bailey (S. Car.) 54; *Goff v. Dabbs*, 4 Baxt. (Tenn.) 300; *Hightower v. Beall*, 66 Ga. 102; *Twogood v. Pence*, 22 Iowa 543; *Miller v. Clark*, 37 Iowa 325.

**Evidence of Collusion.**—In *Kendig v. Marble*, 58 Iowa 529, it was held that where a mortgage was given to secure a judgment confessed for a usurious debt, an action to foreclose could not be defeated on the ground of such usury, where it did not appear that the judgment was entered collusively.

But in the later case of *Stoddard v. Lloyd*, 79 Iowa 11, *Robinson, J.*, said: "If, as is claimed by appellants, the judgments were confessed merely as a means of evading the law against usury, appellants would be entitled to defend on the ground of usury in the notes on which the judgments were rendered." Citing *Kendig v. Marble*, 55 Iowa 386; *Ohm v. Dickerman*, 50 Iowa 671; *Kendig v. Linn*, 47 Iowa 62; *Mullen v. Russell*, 46 Iowa 386. The result of the Iowa cases is that if the debtor can show that his confession of judgment was collusive, he is entitled to relief; but that the burden of proving this is on him, and if he fails, the judgment must stand.

**At common law**, judgments by confession could not be avoided for usury, by a plea to *scire facias*. *Middleton v. Hill*, Cro. Eliz. 588; *Rowe v. Bellasup*, 1 Sid. 182; *Bush v. Gower*, *Strange*, 1043; *Cooke v. Jones*, Cowp. 727; *Matthews v. Lewis*, 1 Anstr. 7. But it was suggested by Lord Hardwicke in

*Bush v. Gower*, *Strange* 1043, that the usury "might be got at by a motion to vacate the judgment." And in several cases the courts of common pleas and King's Bench entertained motions to set aside judgments entered upon warrants of attorney, and awarded feigned issues to try the question of usury. *Duke of Bolton v. Williams*, 2 Ves. 156; *Machin v. Delavel*, *Barnes' Notes* 52, 277; *Edmondson v. Popkin*, 1 B. & P. 270; *Hindle v. O'Brien*, 1 Taunt. 413. The nature of the relief granted in these cases in the common-law courts was equitable, by requiring the defendant to pay the sum actually advanced, with legal interest.

In the case of *Machin v. Delavel* in the common pleas, *Barnes' Notes* 52, 277, the court went further and set aside the judgment, and directed the warrant of attorney and the bond on which the judgment was entered, to be delivered up, and made the plaintiff pay the costs.

In *New York*, the old supreme court formerly followed the English practice, by awarding feigned issues to try the question of usury against a judgment by confession. *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 258; *Gilbert v. Eden*, 2 Johns. Cas. (N. Y.) 280; *Slate v. Schuyler*, 3 Johns. (N. Y.) 139.

In *Hewett v. Fitch*, 3 Johns. (N. Y.) 250, the judgment was set aside without the formality of a feigned issue the usury being undisputed. The practice, however, seems to have been abandoned early in the present century, the defendant being left to seek relief in a court of equity. See the observations of Chancellor Kent, in *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283.

But where a judgment has been entered on a usurious note, and a bond given in satisfaction, under a previous agreement made to evade the usury law, such judgment is no bar to the defense of usury in an action on the bond. *Moses v. McDivitt*, 88 N. Y. 62.

3. **As to Other Creditors.**—If a judgment estops the debtor from attacking it for usury in the debt, it would seem that another creditor, in the absence of collusion, can have no better right, and it has been so held.<sup>1</sup>

**XXXVII. EQUITABLE RELIEF**—1. **Jurisdiction.**—The ground of equitable jurisdiction to relieve the debtor from a usurious contract is, that for some reason he cannot have a full, adequate, and complete remedy at law.<sup>2</sup>

**Pennsylvania.**—Upon a loan of \$500, a judgment note for \$680 was given, upon which the creditor subsequently entered judgment. Upon an application to open the judgment on the ground of usury, the court refused to do so, the creditor having disclaimed any interest in the judgment other than as collateral security for the loan of \$500 and legal interest. *Real Estate Inv. Co. v. Roap*, 132 Pa. St. 496; 25 W. N. C. (Pa.) 380.

The revival of a judgment after the payment of usurious interest thereon, without deducting such payments, prevents the debtor from having them deducted from the proceeds of execution. He should apply to open the revived judgment. *Rutherford v. Boyer*, 84 Pa. St. 347.

In *Shafer's Appeal*, 99 Pa. St. 246, it was held that payments of usurious interest, made after entry of judgment on a judgment note, should be treated as payments on the judgment debt to the extent of the excessive interest, and that it was not necessary to have the judgment opened in order to afford the debtor relief. See also *Anderson's Appeal* (Pa. 1885), 1 Atl. Rep. 329.

**Other States.**—In other states, judgments by confession in pursuance of usurious agreements are relieved against in equity. *Fisher v. Carroll*, 6 Ired. Eq. (N. Car.) 485; *West v. Beanes*, 3 Har. & J. (Md.) 568; *Lee v. Peckham*, 17 Wis. 383.

1. *Pickett v. Pickett*, 2 Hill Eq. (S. Car.) 470.

But see *Brooke v. Morris*, 2 Cin. Sup. Ct. Rep. 528, which holds that a judgment of foreclosure of a usurious mortgage does not prevent other judgment creditors, before final distribution of the proceeds of sale, from attacking the mortgage on the ground of usury.

**Judgment as Collateral Security.**—In *Wyeth v. Braniff*, 84 N. Y. 627, reversing 14 Hun (N. Y.) 537, an assignment of a foreclosure judgment taken as collateral security for a usuri-

ous loan was held void, together with all proceedings under it.

2. *Holmes v. Dole*, Clarke Ch. (N. Y.) 71; *Morse v. Hovey*, 1 Sandf. Ch. (N. Y.) 187; *Trowbridge v. Christmas*, Clarke Ch. (N. Y.) 271; *Kelly v. Weaver*, 37 Miss. 631; *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Fox v. Taliaferro*, 4 Munf. (Va.) 243.

**Remedy at Law.**—Equity will not relieve a party from a usurious agreement or security to which he has a good defense at law, unless the instrument is a cloud on title, or some other necessity for equitable interference is established. *Allerton v. Belden*, 49 N. Y. 373.

In *New York*, the right of a transferee of property, pledged to secure a usurious note, to bring an action to have the note canceled and the property surrendered, is expressly conferred by Code Civ. Proc., § 1911, and it is, therefore, error to dismiss such an action on the ground of an adequate remedy at law. *Dickson v. Valentine*, 6 N. Y. Supp. 540.

**Cancellation.**—Equity has jurisdiction of a bill to cancel notes given upon a usurious agreement for forbearance of a judgment, and to apply payments made on the notes in satisfaction of the judgment. *Coughman v. Drafts*, 1 Rich. Eq. (S. Car.) 414.

**Subrogation.**—The defendant gave a deed, absolute on its face, to secure a loan; subsequently he borrowed money at usurious rates from the plaintiff, who, at the defendants' request, paid off the first loan and took a deed from the creditor as security. The latter deed being void on account of the usury, it was held that the plaintiff was not entitled to be subrogated to the rights of the first creditor, because equity will not lend its assistance to one who is compelled to prove an illegal contract as the basis of his claim. *Nichols v. Tribble* (Ark. 1890), 13 S. W. Rep. 796.

**Concurrent Jurisdiction.**—A complainant need not give any reason for

Except where usury renders the contract void, an injunction will not be granted to restrain a sale under a trust deed, on the ground that usurious interest has been reserved or included in the note secured. The trustee has still the right, and it is his duty, to exercise the power of sale, and apply the proceeds to the payment of the amount legally due. But if he should attempt to apply any portion of the proceeds in payment of the usury, the court would interfere.<sup>1</sup>

Where the statute declares all usurious contracts void, the exercise of the power of sale in a usurious mortgage will be restrained, notwithstanding the debtor might have some remedy at law.<sup>2</sup>

**2. Oppressive Contracts.**—Even in the absence of any statute of usury, courts of equity will, under circumstances of oppression, undue influence, or unconscionable advantage, set aside or otherwise afford relief from a contract for the payment of exorbitant interest, and allow the creditor only a fair and moderate compensation for the use of his money; this being done upon the theory that the contract is tainted with fraud.<sup>3</sup>

not defending at law. He has his election; but he cannot avail himself of both the legal and equitable remedies. *Pearce v. Hedrick*, 3 Litt. (Ky.) 109; *Morrison v. Miller*, 46 Iowa 84.

**Relief Pending Action at Law.**—Pending an action at law upon a note on which usurious interest has been paid, a bill will lie to have the amount so paid allowed as a credit on the principal debt. *Day v. Cummings*, 19 Vt. 496.

Though the defense of usury might be interposed in a pending action at law, a bill will lie to deliver up the securities. *Peters v. Mortimer*, 4 Edw. Ch. (N. Y.) 279.

**Enjoining Transfer of Notes.**—The maker of usurious notes, which are about to be transferred before maturity to innocent purchasers without notice, is entitled to have such transfer enjoined, where the law prevents settling up usury against such innocent purchasers. *Wilhelmson v. Bentley*, 25 Neb. 473.

1. *Tooke v. Newman*, 75 Ill. 215; *Jones on Mortgages* (4th ed.), § 1808.

**Enjoining Sale.**—On a bill filed to enjoin a sale under a usurious deed of trust, on the ground that the complainant had no opportunity to plead the usury at law, he alleged that he had proof of the fact, but did not pray for discovery. It was held that he ought not to be relieved upon condition of paying the principal, but that he was entitled

to an injunction to restrain the trustee from selling until the *cestui que trust* could by some proper proceeding establish the validity of the contract. *Marks v. Morris*, 2 Munf. (Va.) 407; 5 Am. Dec. 481. This decision was *followed* with approval in *McPherrin v. King*, 1 Rand. (Va.) 172, 182, but was afterward *criticised* or *restricted* in *Young v. Scott*, 4 Rand. (Va.) 415; *Thornton v. Gordon*, 2 Rob. (Va.) 719, and *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 25, and was finally *overruled*. See *Bank of Washington v. Arthur*, 3 Gratt. (Va.) 173; *Bell v. Calhoun*, 8 Gratt. (Va.) 22. But in the recent case (1875) of *Belton v. Apperson*, 26 Gratt. (Va.) 218, it is said that, notwithstanding the disapproval of *Marks v. Morris*, 2 Munf. (Va.) 98, it has "been adopted by statutory enactment and is now the law of the state, not to be questioned by this or any other court."

2. *Burnet v. Dennison*, 5 Johns. Ch. (N. Y.) 35; *Hyland v. Stafford*, 10 Barb. (N. Y.) 558.

Where the circumstances are strongly suggestive of usury, a temporary injunction against the foreclosure of the mortgage will be continued in force until the trial. *Ehrgott v. Forgotston* (N. Y. Super. Ct.), 17 N. Y. Supp. 381.

3. *Howley v. Cook*, 8 Ir. Rep. Eq. 571; *Aylesford v. Morris*, 28 L. T. N. S. 541; L. R., 8 Ch. 484; *Moore v. McKay*, 1 Beatty 282; *Eslava v. Lepretre*,

**3. Debt and Interest Must Be Tendered.**—Cases of usury furnish perhaps the most frequent application of the maxim that "he who seeks equity must do equity." Whenever the debtor asks the aid of a court of equity to give him affirmative relief from a contract on the ground of usury, he is required, as a condition of obtaining it, to pay the sum actually due, together with legal interest.<sup>1</sup>

21 Ala. 504; 56 Am. Dec. 266; Culbertson v. Lennon, 4 Minn. 51; Banker v. Brent, 4 Minn. 521; Bidwell v. Whitney, 4 Minn. 76. See generally UN-DUE INFLUENCE, vol. 27, p. 452; UN-CONSCIONABLE BARGAINS, vol. 27, p. 421; CATCHING BARGAIN, vol. 3, p. 37.

A court of equity will not enforce a contract to pay interest at the rate of two and a half per cent. per month, and to compound it, though such a contract be valid by the *lex loci contractus*. It is unconscionable and deceptive. *Sime v. Norris*, 8 Phila. (Pa.) 84.

**Relief Refused.**—An agreement under which one furnishes the capital to carry on a business, takes a chattel mortgage on the property to secure payment of the money advanced, and is to receive two-fifths of the profits, is not usurious, nor is it so hard a contract that a court of equity will refuse to enforce it. *Lilliendahl v. Stegmair*, 45 N. J. Eq. 648. Nor will equity relieve a debtor from a stipulation in his note that if not paid at maturity it shall draw interest at the rate of thirty per cent. per annum, as liquidated damages, even though by neglecting to read the note he was ignorant of this provision. *Downey v. Beach*, 78 Ill. 53. But see *Bidwell v. Whitney*, 4 Minn. 76.

Where the borrower procures a loan for the purpose of making a profitable speculation, and not on account of financial pressure, it is not a case of taking advantage of his necessities, and the court will not interfere to relieve him; though the lender made very advantageous terms, including in the security a pre-existing debt. *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267.

1. *Turnough v. Cooper*, 31 Eng. L. & Eq. 526; *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 368; *Thompson v. Berry*, 3 Johns. Ch. (N. Y.) 394; *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122; 9 Am. Dec. 283; *Mitchell v. Oakley*, 7 Paige (N. Y.) 68; *Williams v. Fitzhugh*, 37 N. Y. 444; *McDaniels v. Barnum*, 5 Vt. 279; *Miller v. Ford*, 1 N. J. Eq. 358; *Ware v. Thompson*, 13 N. J. Eq. 66; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87, 547; *Legoux v. Wante*,

3 Har. & J. (Md.) 184; *Thomas v. Doub*, 8 Gill (Md.) 1; *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Powell v. Hopkins*, 38 Md. 1; *Walker v. Cockey*, 38 Md. 75; *Warfield v. Ross*, 38 Md. 85; *Hill v. Reifsnider*, 39 Md. 429; *Ferguson v. Sutphen*, 8 Ill. 547; *Parmelee v. Lawrence*, 44 Ill. 405; *Tooke v. Newman*, 75 Ill. 215; *Stevens v. Meers*, 11 Ill. App. 138; *Rosencrans v. Schnacke*, 13 Ill. App. 216; *Eiseman v. Gallagher*, 24 Neb. 79; *Matthews v. Warner*, 6 Fed. Rep. 461; *Norman v. Peper*, 24 Fed. Rep. 403; *Morrison v. Miller*, 46 Iowa 84; *Rietz v. Foeste*, 30 Wis. 693; *Pearson v. Bailey*, 23 Ala. 537; *Hunt v. Acre*, 28 Ala. 580; *Noble v. Walker*, 32 Ala. 456; *McGehee v. George*, 38 Ala. 323; *Eslava v. Cramp-ton*, 61 Ala. 507; *Anonymous*, 2 De-saus. (S. Car.) 334; *Taylor v. Smith*, 2 Hawks (N. Car.) 465; *Ballinger v. Edwards*, 4 Ired. Eq. (N. Car.) 449; *Purnell v. Vaughan*, 82 N. Car. 134; *Boyers v. Boddie*, 3 Humph. (Tenn.) 666; *McRaven v. Forbes*, 6 How. (Miss.) 569; *Whately v. Barker*, 79 Ga. 790; *Evans v. Dial*, 88 Ga. 209; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Anthony v. Lawson*, 34 Ark. 628.

In *Fitzroy v. Gwillim*, 1 T. R. 153, in trover for goods which had been pledged for money advanced on a usurious contract, it was held that the plaintiff could not recover without showing a previous tender of the amount actually due, although the statute made all usurious contracts void. This was a recognition by a court of law of the principle adopted in equity.

Where the borrower sues to have a contract annulled on the ground of usury, he cannot insist upon the benefit of an extension of credit, for which the usurious interest was given. *Raspberry v. Jones*, 7 Ired. Eq. (N. Car.) 146.

**Accounting Without Tender.**—If a mortgagor seeking equitable relief on the ground of usury, does not offer in his bill to pay what is justly due with legal interest, the court will refuse to order an account taken, even though the defendant's answer declares his



The fact that the statute forfeits all interest for usury does not affect this equitable rule;<sup>1</sup> nor does the fact that the statute declares all contracts and securities void for usury.<sup>2</sup> But it

willingness to accept the sum borrowed with legal interest. *Eslava v. Elmore*, 50 Ala. 587.

**Opposing Claimants.**—The rule that a party seeking equitable relief must be willing to allow the debt and legal interest, applies to a case where two creditors, the usurer and another, are each claiming priority over a fund, the second creditor being the complainant and the usurer the defendant. *Spain v. Hamilton*, 1 Wall. (U. S.) 604.

**Sureties.**—Where sureties on a usurious bond are sued thereon in equity, they are entitled to file a cross bill setting up the usury and praying for relief, without tendering the amount justly due. *Bank of Wooster v. Stevens*, 6 Ohio St. 262.

**Waiver of Condition.**—Where a bill to cancel as usurious, certain notes secured by mortgage, had been granted, the court refused to entertain a subsequent application by the mortgagee to have the decree so modified as to require the debtor, as a condition of relief, to pay the amount actually due; the refusal being put on the ground that no such condition of relief had been asked for in the original action. *Wilhelmson v. Bentley*, 27 Neb. 658.

**Pleading.**—The complainant must aver, if such is the fact, that he has already paid the debt and legal interest; and that if anything remains of these unpaid, he is ready and willing and now offers to pay whatever remains unpaid. *Pencock v. Terry*, 9 Ga. 137.

An averment that the complainant "hereby offers to pay the real advance and lawful interest thereon," is sufficient. *Miller v. Bates*, 35 Ala. 580.

**New York Statute.**—Where a usurious note was given prior to the enactment of the *New York* statute allowing relief without a tender of the debt, but was renewed with additional usury, subsequent to that act, it was held that the maker was entitled to relief without making a tender. *Folsom v. Blake*, 3 Edw. Ch. (N. Y.) 442.

1. *Cushman v. Sutphen*, 42 Ill. 256; *Carver v. Brady*, 104 N. Car. 219.

In *Mississippi*, however, it is held that as the statute forfeits all the interest, the complainant need not offer to pay any. *Parchman v. McKinney*, 12

*Smed. & M. (Miss.)* 631; *Long v. McGregor*, 65 Miss. 70; *Norcum v. Lum*, 33 Miss. 299. See also *Chapman v. State*, 5 Oregon 432.

2. *Ruddell v. Ambler*, 18 Ark. 369; *Jones v. McLean*, 18 Ark. 456.

**Minnesota Rule.**—The extent to which the equitable requirement that he who seeks relief against usury must offer to do equity by paying the actual debt with legal interest, may be modified by statutory construction, is well illustrated by recent decisions of the supreme court of *Minnesota*. The statute of that state declares that all usurious notes, conveyances, contracts, and securities shall be void, except as to bona fide purchasers of negotiable paper before maturity. Also that if the debtor be compelled to pay a usurious note in the hands of an innocent purchaser, he may recover the amount so paid from the original holder. In the case of *Scott v. Austin*, 36 Minn. 460, the facts were that Scott had given a note, fair on its face, but in fact usurious, to one Hayes, secured by mortgage upon real property. Before maturity, Scott sold the note and mortgage for value to the defendant, Austin, who had no knowledge of the usury. Default having been made, Austin foreclosed and bought in the property at the sheriff's sale. Prior to the foreclosure, however, the existence of the usury was brought to his knowledge. Thereafter Scott brought an action to avoid the mortgage sale and for the surrender and cancellation of the note and mortgage. He made no offer to pay any part of the debt or legal interest, and for this reason the trial court held that he was not entitled to any equitable relief. On appeal the supreme court rendered a decision affirming the judgment below, holding that the statute had not changed the equitable rule. Judges Mitchell and Berry dissented. Subsequently the court of its own motion ordered a reargument, and overruled its former decision, and decided that under the statute the debtor's right to be relieved from a usurious contract was absolute; that the equitable doctrine was founded upon the court's abhorrence of forfeitures; and that the legislature must have intended that the debt should be

sometimes expressly provided by statute that the debtor shall be entitled to relief by paying the principal without interest.<sup>1</sup>

Where the debtor seeks to enjoin the enforcement of usurious securities, and tenders the amount actually due, as a condition of granting the relief, judgment should be rendered for the defendant in accordance with the tender.<sup>2</sup>

As a general rule, the amount of principal and interest must be brought into court.<sup>3</sup>

The equitable rule under consideration has no application to cases where the debtor, instead of applying for affirmative relief, acts strictly on the defensive, and asserts his legal right to set up the plea of usury. In such cases he is not required to tender anything.<sup>4</sup> But a defendant will not be allowed to put in an amended answer, or an answer after default, setting up usury, unless he tenders the debt and legal interest.<sup>5</sup>

**4. Recovery of Usurious Payments.**—Though there is some conflict of opinion as to whether the debtor can maintain a suit in equity to recover back voluntary payments of usury,<sup>6</sup> it is clear that as defendant he is entitled to have deducted from

forfeited, by the provision authorizing the debtor to recover it back from the creditor after paying it to an innocent purchaser. This decision was followed in the case of *Exley v. Berryhill*, 37 Minn. 182.

1. Such provisions are construed in the following cases: *Spann v. Sterns*, 18 Tex. 556; *Walker v. Cockey*, 38 Md. 75; *Young v. Scott*, 4 Rand. (Va.) 415; *Marks v. Morris*, 4 Hen. & M. (Va.) 463; *Campbells v. Patterson*, 11 Leigh (Va.) 93; *Haggerson v. Phillips*, 37 Wis. 364.

But notwithstanding the statute, if the debt has been paid and the debtor sues to recover back, the measure of relief is the excess above legal interest, with interest thereon. *Spengler v. Snapp*, 5 Leigh (Va.) 478.

2. *Cook v. Patterson*, 103 N. Car. 127; *Eiseman v. Gallagher*, 24 Neb. 79; *Whately v. Barker*, 79 Ga. 790; *Matthews v. Warner*, 6 Fed. Rep. 461; *Norman v. Peper*, 24 Fed. Rep. 403.

3. *Cunningham v. Davis*, 7 Ired. Eq. (N. Car.) 5; *Muir v. Clark*, 7 Blackf. (Ind.) 423; *Williams v. Fitzhugh*, 37 N. Y. 453.

**Bond in Lieu of Money.**—Upon an application to enjoin the collection of a judgment on the ground of usury, the plaintiff will not be allowed to give a bond in lieu of bringing the amount of the judgment into court, as required by statute, unless he consents to waive the

forfeiture and pay what is justly due. *Gee v. Southworth*, 10 Paige (N. Y.) 297. Where, however, the plaintiff, before the suit was brought and also in his bill, has offered to pay the amount justly due, the defendant cannot, after answering, object that the money has not been paid into court. *Morgan v. Schermerhorn*, 1 Paige (N. Y.) 544; 19 Am. Dec. 449.

4. *Union Bank v. Bell*, 14 Ohio St. 200; *Gore v. Lewis*, 109 N. Car. 539; *Kuhner v. Butler*, 11 Iowa 419.

**Plea in Ejectment.**—A plea in ejectment that the plaintiff's deed was part of a usurious contract is a strictly legal defense, and no tender of the debt is necessary, even though the deed amounts in equity to a mortgage. *Sugart v. Mays*, 54 Ga. 554.

**Discovery.**—A defendant who has pleaded usury need not offer to pay the debt and legal interest in order to entitle him to read the answers of the plaintiff to interrogatories taken in support of his plea. Such payment is a condition of relief, but not of discovery. *Zeigler v. Scott*, 10 Ga. 389; 54 Am. Dec. 395.

5. *Remer v. Shaw*, 8 N. J. Eq. 355; *Newman v. Kershaw*, 10 Wis. 333; *Dole v. Northrop*, 19 Wis. 249; *Jones v. Walker*, 22 Wis. 220. See also *Bates v. Voorhess*, 7 How. Pr. (N. Y.) 234.

6. See *supra*, this title, *Recovery of Payments of Usury*.

the balance due on the debt, whatever usurious interest he has paid.<sup>1</sup>

5. **Enforcement of Usurious Contracts.**—Where the statute does not avoid the principal debt for usury, equity will not refuse its aid to enforce payment thereof.<sup>2</sup> But if usury is disclosed by the bill, the lender must allege his willingness to abandon the usurious portion, otherwise the bill is demurrable.<sup>3</sup> In one case, a court of equity refused to aid the lender by foreclosing a mortgage given to secure a usurious debt.<sup>4</sup>

**XXXVIII. PLEADING—1. Requirements of Plea.**—As a general rule, usury cannot be taken advantage of by the defendant in an action on the debt, unless it has been specially and clearly pleaded.<sup>5</sup> The plea of usury has been said to be *sui generis*, and

1. *Reger v. O'Neal*, 33 W. Va. 159; *Jenkins v. Greenbaum*, 95 Ill. 11; *Cross v. Mann*, 53 Vt. 501.

2. *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367.

3. *Phelps v. Pierson*, 1 Greene (Iowa) 121.

**Offer to Abate All Interest.**—In the recent case of *Hawkins v. Pearson* (Ala. 1892), 11 So. Rep. 304, the court, by McClellan, J., declared the following rule: "A contract which stipulates for the payment of a greater rate of interest than eight per cent. is tainted with an evil and unlawful intent, in such sort that while the payor, if he invokes equitable interposition upon it in his behalf, must do equity by offering to pay the legal rate of interest, the payee, when he becomes the actor in a court of equity, must always remove the taint by an offer to abate the whole of the interest, since the principal is all that he is entitled to recover, and without such abatement he cannot be said to come into the court with clean hands. And it is immaterial what the relief presently sought may be, whether an immediate enforcement of the debt or some collateral advantage—as, for instance, in the case at bar, the reformation of the contract in matter of description. Whether direct and ultimate, or mediate and collateral, a court of conscience will not respond to the prayer of one who stands before it in the attitude of insisting upon any relief on a claim thus infected with this element of *quasi* criminality. The bill in this case showing that the mortgage sought to be reformed was tainted with usury, and containing no offer to abate the whole interest, complainant was not entitled to any relief upon it, and the demurrers which were addressed to this

point were properly sustained." *Citing* 2 Brick. Dig., p. 124; 3 Brick. Dig., p. 572; *Hunt v. Acre*, 28 Ala. 580; *Noble v. Walker*, 32 Ala. 456. See also *EQUITY*, vol. 6, p. 707, and notes.

4. *McBrayer v. Roberts*, 2 Dev. Eq. (S. Car.) 75.

**Subrogation.**—The plaintiff, under a usurious agreement, advanced money to the defendant to pay off a mortgage, and took a deed of the land as security. This deed being void because of the usury, the plaintiff sought to be subrogated to the rights of the former creditor, and to have the mortgage foreclosed. This the court refused to allow, on the ground that a court of equity would not lend its aid to one who was obliged to prove his own illegal contract as the basis of his claim to relief. *Trible v. Nichols*, 53 Ark. 271; 22 Am. St. Rep. 190.

5. *Vroom v. Dittmas*, 4 Paige (N. Y.) 526; *Morford v. Davis*, 28 N. Y. 481; *Sexton v. Bennett* (Supreme Ct.), 9 N. Y. Supp. 394; *Dyer v. Lincoln*, 11 Vt. 300; *Bandel v. Isaac*, 13 Md. 202; *McKim v. Mason*, 2 Md. Ch. 510; *Chalmers v. Chalmers*, 4 Gill & J. (Md.) 420; 23 Am. Dec. 572; *Martin Brown Co. v. Perrill*, 77 Tex. 199; *Bush v. Bush*, 7 T. B. Mon. (Ky.) 53; *Balfour v. Davis*, 14 Oregon 47; *Murry v. Crocker*, 2 Ill. 212; *Smith v. Whitaker*, 23 Ill. 367; *Hadden v. Innes*, 24 Ill. 381; *Schoonhoven v. Pratt*, 25 Ill. 457; *Roberts v. Mathews*, 77 Ga. 458; *Haas v. Camp*, 40 Minn. 329; *Bowman v. Miller*, 25 Gratt. (Va.) 331; 18 Am. Rep. 686; *Boyt v. Cooper*, 2 Murph. (N. Car.) 286; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Martin v. Pugh*, 23 Wis. 184; *Bond v. Worley*, 26 Mo. 253; *Pilsbury v. McNally*, 22 Ark. 409.

**Necessity of Special Plea.**—Where

commissions paid to a factor are set up in a plea of usury, it must be averred that the parties intended such commissions as a premium for advances, beyond legal interest. *Suydam v. Bartle*, 10 Paige (N. Y.) 94. And if the usury has been paid to the lender's agent, it should be pleaded as having been paid to the lender. *Jones v. Herndon*, 7 Ired. (N. Car.) 79.

**Defective Pleas.**—The following allegations in pleas of usury have been held insufficient:

A plea that the payee of the note sued on exacted from the maker "illegal and usurious interest for the loan and forbearance of the moneys mentioned in the note." *Watson v. Bailey*, 2 Duer (N. Y.) 509.

In an action against an indorser, that the "plaintiff reserved a greater rate of interest than is allowed by law, at the time of discounting said note for the defendant, to-wit," a certain sum. *Clarke v. Hastings*, 9 Gray (Mass.) 64.

That the plaintiff in an action on a note "unlawfully, corruptly, and usuriously" contracted with the defendant, the maker, where no facts are averred, showing of what the usury consisted. *Durham v. Tucker*, 40 Ill. 519.

That the plaintiff "usuriously took" a certain per cent. premium. *Mullanphy v. Phillipson*, 1 Mo. 188.

That the bond sued on "was given in payment of usurious interest by a contract for the payment of the same." *Anglo-American Land, etc., Co. v. Brohman*, 33 Neb. 409.

That "the bond was executed by this defendant to the said R. H. Rountree for an illegal and usurious consideration." *Rountree v. Brinson*, 98 N. Car. 107.

A plea that the plaintiff loaned the defendant a certain sum of money and "exacted and extorted" a bond and mortgage for a larger sum, is insufficient, in that it negatives the idea of consent to the exaction, and without a contract there can be no usury. *Westerfield v. Bried*, 26 N. J. Eq. 357.

**Plea in Bar.**—Where the statute does not render a usurious note void, but only affects the interest, a plea in bar setting up the usury is bad, being too broad. *Lockwood v. Woods*, 3 Ind. App. 258.

Where usury is a defense only as to the illegal excess, a plea in an action on a debt which professes to answer the whole cause of action, is demurrable. *Tittle v. Bonner*, 53 Miss. 578.

Where the effect of the statute is to prevent only the collection of the excess over legal interest, usury is only a partial defense, and if pleaded as a complete defense to the action, the answer cannot stand as a partial defense. *McDaniel v. Pressler*, 3 Wash. 636.

**Verification.**—An affidavit to a plea of usury upon belief merely, is insufficient under a statute requiring the defendant to "verify the truth" of his plea. *Kingsland v. Cowman*, 5 Hill (N. Y.) 608.

But an averment by the borrower, in a bill for relief, of facts in relation to usury, made upon information and belief, was held sufficient, it being further alleged that the information was derived from the lender. *Cole v. Savage*, Clarke Ch. (N. Y.) 361.

**Verification of Joint Plea.**—Under *Texas Rev. Stat.*, art. 2981, requiring a plea of usury to be verified "by the affidavit of the party wishing to avail himself of such defense," a plea set up by several defendants, but verified only by one who refuses to join in it, or to avail himself of it, cannot be used by the others. *Cherryhomes v. Carter*, 66 Tex. 166.

**Amendment.**—It is proper to allow a plea held bad on demurrer to be amended upon reasonable terms. *Williams v. Little*, 11 N. H. 66.

**Objection, How Raised.**—The objection to a plea on a note alleged by the defendant to be the last of a series of usurious renewals, that the plea does not give the dates of the various renewals or of the payments of usury, should be raised by motion to make more specific, and not by demurrer. *Holcraft v. Mellett*, 57 Ind. 539.

**Sufficient Pleas.**—A plea is sufficiently specific which states the sum actually borrowed, the date when the usury commenced, the various computations of excessive interest, and the payments made. *Smith v. Stevens* (Tex. 1891), 16 S. W. Rep. 986.

In an action on a note of \$500 due in three months, a plea is sufficient which alleges that the plaintiff bank discounted the note upon a corrupt agreement that the defendant should receive \$300 and leave the remaining \$200 in the bank until maturity, to be then used toward paying the note. *Butterworth v. Pecare*, 8 Bosw. (N. Y.) 671.

A plea is not bad for failing to aver the rate of interest agreed upon, where it states the amount of the original

to resemble a declaration in an action for the statutory penalty, more than an ordinary plea in bar.<sup>1</sup> The principle adopted by nearly all the courts is that the plea must aver with distinctness and particularity all the essential elements of the usurious contract, so that an inspection of the plea will reveal the entire transaction, and leave nothing to conjecture.<sup>2</sup> The plea should state the date and amount of the original loan, and the amount of usury paid or reserved.<sup>3</sup> It must also allege that the excessive interest was taken or reserved with a corrupt or usurious intent,<sup>4</sup> and upon

notes, and the date and amount of the renewal note, from which it can be ascertained that the latter is for more than the originals with the highest legal interest added. *First Nat. Bank v. Waybourn* (Tex. 1891), 16 S. W. Rep. 554.

A plea that the plaintiff deducted from the amount loaned and expressed in the note sued on, as usurious interest, "about enough, as he said, to get him a barrel of flour, which amount the defendant believes was about seven or eight dollars," sufficiently set forth the usury, though not with commendable precision. *Dagal v. Simmons*, 23 N. Y. 491.

Though a plea of usury does not conform to the statute requiring it to "set forth the sum upon which it was paid, or to be paid, the time when the contract was made, where payable, and the amount of usury agreed upon," yet if it states the agreed rate, and that usury in the contract exceeds the amount claimed to be due, it is sufficient in the absence of demurrer or exception. *Siesel v. Harris*, 48 Ga. 652.

Where by statute all titles are declared void for usury, a plea of usury in a deed relied on for title, need not specify dates or amounts with the same particularity as is required in similar pleas to actions on the debt. *Carswell v. Hartridge*, 55 Ga. 412.

**Replication.**—A replication to a plea of usury must, of course, put in issue all its material allegations, but need not go further, or offer explanations. *Wright v. Minter*, 2 Stew. (Ala.) 453; *Darling v. Homer*, 16 Mass. 288; *Copeland v. Jones*, 3 N. H. 116; *Tappan v. Sargeant*, 14 N. H. 299; *Waterman v. Haskin*, 7 Johns. (N. Y.) 283; *1. Copeland v. Jones*, 3 N. H. 116; *Williams v. Little*, 11 N. H. 66.

The plea is in the nature of a penal action, and much strictness is required in pleading it. *Hancock v. Hodgson*, 4 Ill. 333.

2. *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Banks v. Van Antwerp*, 5 Abb. Pr. (N. Y.) 411; *Vroom v. Dittmas*, 4 Paige (N. Y.) 526; *Curtis v. Masten*, 11 Paige (N. Y.) 15; *Griggs v. Howe*, 31 Barb. (N. Y.) 100; *Manning v. Tyler*, 21 N. Y. 567; *Olcott v. Alden*, 6 N. H. 516; *Livermore v. Boswell*, 4 Mass. 437; *Livingston v. Indianapolis Ins. Co.*, 6 Blackf. (Ind.) 133; *Indianapolis Ins. Co. v. Brown*, 6 Blackf. (Ind.) 378; *Engler v. Collins*, 16 Ind. 189; *Smith v. Nicholas*, 8 Leigh (Va.) 330; *Holton v. Button*, 4 Conn. 437; *Copperthwait v. Dummer*, 18 N. J. L. 258; *Weimer v. Shelton*, 7 Mo. 237; *Davis v. Tuttle*, 10 Mo. 201; *Laird v. Hodges*, 26 Ark. 356; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Newman v. Kershaw*, 10 Wis. 333; *Willis v. Jefferson*, 75 Ga. 743; *Kilpatrick v. Henson*, 81 Ala. 464.

The plea must negative every supposable fact in connection with the transaction, which if true would render it innocent. Thus, a plea that a note was ante-dated, must allege that the loan was not closed, or the money set aside for the benefit of the borrower, from such earlier date. *Banks v. Van Antwerp*, 5 Abb. Pr. (N. Y.) 411.

3. *Rowe v. Phillips*, 2 Sandf. Ch. (N. Y.) 14; *Little v. White*, 8 N. H. 276; *Tappan v. Prescott*, 9 N. H. 531; *Clark v. Moses*, Kirby (Conn.) 143; *Hancock v. Hodgson*, 4 Ill. 330; *Collins v. Makepeace*, 13 Ind. 448; *Winkler v. Scudder*, 1 Ga. 108.

In *Georgia*, it is required by statute that the plea of usury shall state the sum upon which the usury was paid or to be paid, the time when the contract was entered into, when payable, and the amount of usury taken or agreed upon. See *Trammell v. Woolfolk*, 68 Ga. 628.

4. *National Bank v. Lewis*, 10 Hun (N. Y.) 468; *Crane v. Homeopathic Mut. L. Ins. Co.*, 27 N. J. Eq. 484; *Cohee v. Cooper*, 8 Blackf. (Ind.) 115;

a corrupt agreement.<sup>1</sup> But if the plea clearly shows that unlawful interest was agreed upon, it is not bad for failing to designate the transaction as "usurious."<sup>2</sup> On the other hand, if the facts pleaded do not amount to usury, no averment that the transaction was usurious can make the plea good.<sup>3</sup> The courts also hold that the evidence in support of the plea must agree strictly with the allegations, and any substantial variance is fatal.<sup>4</sup> This is particularly true of allegations in respect to the amount of usury taken or received,<sup>5</sup> the time of forbearance,<sup>6</sup> and the parties to the alleged usurious agreement.<sup>7</sup> Keeping in view the necessity of pleading all the essential elements of the usurious contract, it may be stated that the usual rules for the construction of pleadings apply as well to a plea or answer of usury as to one setting up any other defense,<sup>8</sup> and that although the pleading may be lacking in precision and certainty, it is sufficient if it be not misleading as to the defense intended, or as to the facts and circumstances relied upon to support it.<sup>9</sup>

Some courts, however, hold that where the effect of usury is

Shook v. State, 6 Ind. 113; Stark v. Sperry, 2 Tenn. Ch. 304; McFarland v. State Bank, 4 Ark. 44; 37 Am. Dec. 761; Moody v. Hawkins, 25 Ark. 191.

1. Tappan v. Sabin, 15 N. H. 79. But it is not necessary to recite the corrupt agreement *in hac verba*. Cope-land v. Jones, 3 N. H. 116; Olcott v. Alden, 6 N. H. 516.

2. Kurz v. Halbrook, 13 Iowa 562; Fanning v. Pritchett, 6 T. B. Mon. (Ky.) 79.

It is not necessary to add to a plea of usury that the contract was made in error. The law affords relief where there is no error. Waters v. Briscoe, 11 La. Ann. 639.

3. Wadsworth v. Champion, 1 Root (Conn.) 393; Mullanphy v. Phillips, 1 Mo. 188.

4. Long Island Bank v. Boynton, 105 N. Y. 656; Hetfield v. Newton, 3 Sandf. Ch. (N. Y.) 564; Vroom v. Ditmas, 5 Paige (N. Y.) 528; Smith v. Brush, 8 Johns. (N. Y.) 84.

In an action to recover the agreed price of a sale, under a general averment of usury, the defendant cannot show that the sale was intended by the parties as a mere cover for a usurious loan. Holford v. Blatchford, 2 Sandf. Ch. (N. Y.) 149. See generally VARIANCE, vol. 28.

5. Smith v. Brush, 8 Johns. (N. Y.) 84; Rowe v. Phillips, 2 Sandf. Ch. (N. Y.) 14; Kilpatrick v. Henson, 81 Ala. 464.

Under a plea that the plaintiff dis-

counted the notes in suit at from ten to fourteen per cent., evidence tending to prove that they were discounted at the rate of sixteen per cent., is a fatal variance. Farmers' etc., Bank v. Lang, 22 Hun (N. Y.) 372.

So of a plea that \$150 usury was paid where the evidence showed that only \$125 had been paid. Frank v. Morris, 57 Ill. 138; 11 Am. Rep. 4.

But a slight variance as to the amount is not fatal unless it appears that the plaintiff was misled. Katz v. Kuhn, 9 Daly (N. Y.) 166.

6. Allen v. Ferguson, 6 Ired. (N. Car.) 17, where a variance of one day in favor of the creditor was held fatal.

7. Jones v. Canady, 4 Dev. (N. Car.) 86.

A plea of usury in that the note sued on was given for an extension of time on another note of the maker held by a third party, must be supported by proof that the person who procured the execution of the note in suit was the agent of the payee of the other note referred to. First Nat. Bank v. Bonawitz, 47 Iowa 322.

In an action on a note, the defendants pleaded that it was given for accommodation, and that the plaintiff discounted it at a usurious rate. It was held that usury between the original parties to the note could not be shown under the plea. Taylor v. Jackson, 5 Daly (N. Y.) 497.

8. National Bank v. Lewis, 75 N. Y. 516; 31 Am. Rep. 484.

9. Lewis v. Barton, 106 N. Y. 70.

to render the contract void, a plea of the general issue in an action, either directly on the contract or necessarily depending upon its validity, entitles the defendant to avail himself of the defense of usury.<sup>1</sup>

The rules applicable to defensive pleadings also apply to declarations or complaints in actions to recover back usury; and particularly the rule requiring a statement of the amount paid.<sup>2</sup>

**2. Demurrer.**—If the usury clearly appears on the face of the declaration or complaint, the defense may be raised by demurrer or exception.<sup>3</sup>

**3. In Equity.**—Unless the bill itself clearly shows a usurious contract, the defense of usury must, as a general rule, be specifically pleaded in the answer.<sup>4</sup> But in some cases, as in a creditor's bill involving the priority of liens, the defense may be made by

1. *Levy v. Gadsby*, 3 Cranch (U. S.) 186; *Gaillard v. Le Seigneur*, 1 McMull. (S. Car.) 225; *Pond v. Horne*, 65 N. Car. 84; *Williams v. Smith*, 65 N. Car. 87; *Cleaden v. Webb*, 4 Houst. (Del.) 473; *Hamill v. Mason*, 51 Ill. 488; *Fulton Bank v. Stafford*, 2 Wend. (N. Y.) 483; *Cotton v. Lake*, 2 Mass. 540; *Hills v. Elliot*, 12 Mass. 26; 7 Am. Dec. 26; *Jackson v. Stetson*, 15 Mass. 48; *Culver v. Robinson*, 3 Day (Conn.) 68; *Starr v. Laws*, 4 Ind. 192; *Hanrick v. Andrews*, 9 Port. (Ala.) 9.

**General Issue.**—In *Solomons v. Jones*, 3 Brev. (S. Car.) 54; 5 Am. Dec. 538, *Brevard, J.*, said: "Usury is clearly admissible in evidence under the plea of the general issue. The effect of such evidence is to prove that the promise was not obligatory, but void in its origin; and that there never was any such legal undertaking as that which the plaintiffs claim to recover on."

In an action of replevin, by a chattel mortgagee to recover possession of the goods, alleging title and ownership in general terms, the defendant may show, under a general denial, that the mortgage debt was void for usury. *Adams v. Wiggins*, 45 Minn. 448. In this case, it was said by *Vanderburgh, J.*, "Where the action is brought to set aside an instrument as usurious, of course the facts must be specifically alleged, and so, in an action brought to recover upon or to enforce a contract claimed by defendant to be void for usury, such affirmative defense is new matter in confession and avoidance, which must be affirmatively alleged in the answer. But where, as in this case,

the plaintiff alleges title generally to the property in question, the defendant may deny generally the allegations of title and ownership, and, under such denial, he may attack the contract or instrument upon which plaintiff relies to prove his title, and show that it is void for usury, as well as for fraud. And there is no distinction in such cases between the defense of usury and other defenses which tend to disprove the plaintiff's case, and show that he had no title."

**In Trover.**—In an action of trover for property claimed by the plaintiff under a bill of sale from a third person, but which bill is not set out, the defendant, without filing a plea of usury, may show that the bill of sale was given as security for a usurious debt, and therefore, under the *Georgia* law, insufficient to give the plaintiff any title. *Jaques v. Stewart*, 81 Ga. 81.

**In Ejectment.** the defendant may avail himself of usury to defeat the plaintiff's claim of title under a mortgage, without having given notice of such defense. *Halton v. Button*, 4 Conn. 437.

**In Real Actions.**—Under a plea of *nil disseisin*, a defendant may show usury to defeat a prior conveyance from his grantor. *Hills v. Elliot*, 12 Mass. 26; 7 Am. Dec. 26.

2. *Knaur v. Bartlett*, 18 Ind. 221; *Collins v. Roberts*, *Brayt*. (Vt.) 235.

3. *Krause v. Pope*, 78 Tex. 478; *Mattlock v. Mallory*, 19 Ala. 694; *Langridge v. Cobbs*, 23 Ark. 549.

4. *Chambers v. Chalmers*, 4 Gill & J. (Md.) 420; 23 Am. Dec. 572; *Vroom v. Ditmas*, 4 Paige (N. Y.) 533; *Luce v. Hinds*, *Clarke Ch.* (N. Y.) 453.

written exceptions to a commissioner's report, though not specially pleaded.<sup>1</sup>

Usury is not regarded as an equitable defense, and therefore courts of equity are not disposed to allow an amendment for the purpose of interposing it,<sup>2</sup> nor to extend the time of answering.<sup>3</sup>

When permission is granted to amend or to have a default opened for the purpose of such a plea, the defendant is required to pay the amount justly due.<sup>4</sup> A lack of certainty or precision in stating the defense, however, cannot be objected to after issue has been joined.<sup>5</sup> And where the evidence does not strictly conform to the answer, the defendant will be allowed the benefit of an amendment.<sup>6</sup>

When the debtor brings a bill in equity for relief, he must put the question of usury clearly and directly in issue,<sup>7</sup> the same particularity being required as in defensive pleadings.<sup>8</sup>

**XXXIX. EVIDENCE—1. Burden and Degree of Proof.**—The burden of proving usury is always upon the party who alleges it,<sup>9</sup> and it must be established by a strong and clear preponderance of evidence.<sup>10</sup> If, upon the whole case, the evidence is as consistent with the absence as with the presence of usury, the party alleging

1. *Barbour v. Tompkins*, 31 W. Va. 410.

Where a bill in equity discloses a usurious mortgage, the defense may be raised by exceptions to the master's report allowing interest at the usurious rate, though not put in issue by the pleadings. *Drake v. Latham*, 50 Ill. 270.

On *scire facias* to revive a decree, the defendant may plead usury in the original contract. *Lane v. Ellzey*, 4 Hen. & M. (Va.) 504.

It is proper to allow the defense to be pleaded at any time before final decree, especially where the bill itself suggests the truth of the plea. *Ellzey v. Lane*, 4 Munf. (Va.) 66.

2. *Marsh v. Lasher*, 13 N. J. Eq. 253; *Campion v. Kille*, 15 N. J. Eq. 476; *Lovett v. Cowman*, 6 Hill (N. Y.) 223; *Wolcott v. McFarlan*, 6 Hill (N. Y.) 227.

3. *Collard v. Smith*, 13 N. J. Eq. 43.

4. *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *National F. Ins. Co. v. Sackett*, 11 Paige (N. Y.) 660.

5. *Chambers v. Chalmers*, 4 Gill & J. (Md.) 420; 23 Am. Dec. 572.

6. *Gladding v. Cubberly*, 29 N. J. Eq. 104; *Cox v. Westcoat*, 29 N. J. Eq. 551.

7. *Bloss v. Hull*, 27 W. Va. 503; *Freeman v. Brown*, 7 T. B. Mon. (Ky.) 263.

8. In *Cole v. Savage*, Clarke Ch. (N. Y.) 361, which was a bill for relief on

the ground of usury, the vice chancellor said: "In *Vroom v. Ditmas*, 4 Paige (N. Y.) 533, the chancellor says that the defense of usury must be distinctly set up in the plea or answer; and the terms of the usurious contract and the *quantum* of the usurious interest or premium must be specified and distinctly and correctly set out. The corrupt agreement must also be stated. The chancellor is here speaking of a defense; but I can see no good reason, either in principle or common sense, why the same governing principles will not apply to any pleading which relies upon usury as its substance."

9. *Berdan v. School Dist.* No. 38, 47 N. J. Eq. 8; *Kihlholz v. Wolf*, 103 Ill. 362; *Rappanier v. Bannon* (Md. 1887), 8 Atl. Rep. 555.

In *Smith v. Lehman*, 85 Ala. 394, Stone, C. J., said: "When parties enter into a contract which, on its face, contains no stipulation which is *per se* or *prima facie* illegal, and only becomes so by the existence of certain extrinsic facts, the court must, in the absence of extrinsic proof, pronounce the contract legal, *ut res magis valeat, quam pereat*. The burden of making the extrinsic proof must rest on him who assails the validity of such contract. Usury is a defense, and must be satisfactorily proved when set up."

10. *Bayliss v. Cockcroft*, 81 N. Y. 363. **Answer in Equity.**—Evidence in sup-



it has failed in his proof.<sup>1</sup> The courts will never infer usury if the opposite conclusion can reasonably and fairly be arrived at.<sup>2</sup> It has been held that the plea of usury must fail where the only evidence is the testimony of the borrower and the lender, who squarely contradict each other.<sup>3</sup>

It has sometimes been said that usury must be proved beyond a reasonable doubt, but what is meant is that there must be a clear and unmistakable preponderance of evidence in support of the plea, and not that the same degree of strictness is required as in criminal cases.<sup>4</sup>

**2. Presumptions.**—The payment and acceptance of unlawful interest is *prima facie* evidence of a prior agreement therefor.<sup>5</sup> But evidence of previous usurious transactions between the parties

port of a defense of usury is not aided by the defendant's answer, unless he is called upon by the bill to disclose. *McDaniels v. Barnum*, 5 Vt. 279; *Barnum v. McDaniels*, 6 Vt. 177.

1. *Booth v. Swezey*, 8 N. Y. 276; *Valentine v. Connor*, 40 N. Y. 248; 100 Am. Dec. 476; *In re Consalus*, 95 N. Y. 340; *Morris v. Talcott*, 96 N. Y. 100; *Stillman v. Northrup*, 109 N. Y. 473.

2. *Homeopathic Mut. L. Ins. Co. v. Crane*, 25 N. J. Eq. 422; *Gillette v. Ballard*, 25 N. J. Eq. 491; *Lurette v. Wilson*, 13 Oregon 514; *Holladay v. Holladay*, 13 Oregon 523; *Van Beil v. Fordney*, 79 Ala. 76.

**Sufficiency of Evidence.**—Usury is not proved by showing that an agreement for a usurious bonus was made, but which appears never to have been carried out or insisted upon. *Brestle v. Mehaffie*, 19 Pa. St. 117. Nor is it proved by showing that the face of the note sued on is larger than the sum received by the maker, without any explanation of the circumstance. *New England, etc., Security Co. v. Sandford*, 16 Neb. 689.

In *Brolasky v. Miller*, 8 N. J. Eq. 790, Potts, J., said: "Usury must be strictly proved. It is not sufficient for the party who sets it up to make out a probable case. We cannot undertake to guess away men's rights upon vague or doubtful testimony." And in *Berdan v. School Dist. No. 38*, 47 N. J. Eq. 8, McGill, Ch., in delivering the opinion of the Court of Chancery, stated the rule as follows: "The burden of proof is upon the parties setting up usury. The facts necessary to constitute it must be clearly established, beyond reasonable doubt, by the decided preponderance of evidence. It is

not enough that the circumstances proved render it highly probable that there was a corrupt bargain. Such a bargain must be proved, and not left to conjecture."

3. *Morris v. Taylor*, 22 N. J. Eq. 438.

4. *Wheatley v. Waldo*, 36 Vt. 237; *Holland v. Chambers*, 22 Ga. 193; *New Jersey Patent Fanning Co. v. Turner*, 14 N. J. Eq. 326; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Williams v. Banks*, 19 Md. 22; *Orr v. Lacey*, 2 Dougl. (Mich.) 230; *Harnsbarger v. Kinney*, 6 Gratt. (Va.) 287.

In *Lukens v. Hazlett*, 37 Minn. 441, Mitchell, J., said: "The rule of evidence in these usury cases is the same as in any other civil action. All that is required is a fair preponderance of evidence."

The proof must be "clear and cogent, not by inferences, probabilities, or conjectures." *Pappleton v. Nelson*, 12 Oregon 349.

It must exclude every other fair and reasonable hypothesis. *Gillette v. Ballard*, 25 N. J. Eq. 491.

5. *Cummins v. Wire*, 6 N. J. Eq. 326.

**Presumptions.**—The payment of usurious interest from time to time, in accordance with a common course of dealing between the parties, but without express agreement, authorizes the jury to find that there was a prior tacit agreement for such interest. *Quarles v. Brannon*, 5 Strobb. (S. Car.) 151. And it will be inferred that usurious interest was reserved in the contract, when it is shown that such interest was demanded by the creditor and paid by the debtor. *Stout v. Wright*, 6 Litt. (Ky.) 481.

Evidence that when the debt became due the creditor demanded and received from the debtor usurious interest, and

is not admissible to prove that the contract in question was also usurious.<sup>1</sup> Nor can the defense be made out by evidence that the plaintiff had taken usury in other loans at or about the time of the loan in question.<sup>2</sup> Where it is not shown that the contract in suit was made at a time when the rate of interest stipulated for was illegal, it will be presumed to have been made at a time when the statute authorized such rate.<sup>3</sup>

**3. Parol Evidence**—The rule that parol evidence is not admissible to vary the terms of a written contract, has no application to evidence of usury. The statute would be a dead letter if its penalties could be evaded by simply omitting the usurious agreement from the written part of the contract.<sup>4</sup>

**4. Parties as Witnesses.**—The common-law disability of interested parties to testify was largely removed as to usury in several of the states at an early day; but the tendency of the courts has been to interpret such statutes somewhat strictly.<sup>5</sup>

**XL. PROVINCE OF JURY.**—The question whether a transaction apparently valid was actually intended by the parties as a cover for usury, is, in all cases of doubt or conflict of evidence, a question

gave a receipt therefor as being money "due" on the contract, establishes an original usurious agreement. *Smith v. Hathorn*, 88 N. Y. 211, reversing 25 Hun (N. Y.) 159.

1. *Eagle Bank v. Rigney*, 33 N. Y. 613; *Brinckerhoff v. Foote*, 1 Hoffm. Ch. (N. Y.) 291.

Proof that the plaintiff had agreed to loan money to the defendant at five per cent. per month, does not tend to prove that the draft in suit, which was subsequently drawn, was drawn in pursuance of such agreement. *Warren v. Coombs*, 20 Me. 139.

2. *Ottillie v. Waechter*, 33 Wis. 255.

3. *Hughes v. Marquette*, 85 Tenn. 127.

Where deeds absolute are held to be a mortgage, the courts, in cases where the consequence of usury is the forfeiture of both debt and interest, will, in the absence of clear and satisfactory proof to the contrary, presume that a legal rate of interest was reserved. *Vangilder v. Hoffman*, 22 W. Va. 2.

4. *Massa v. Dauling*, 2 Str. 1243; *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Tucker v. Wilamouicz*, 8 Ark. 157; *Levy v. Brown*, 11 Ark. 16; *Train v. Collins*, 2 Pick. (Mass.) 145; *Smith v. Stevens* 81 Tex. 461; *Wilkinson v. Wooten*, 59 Ga. 584; *Denyse v. Crawford*, 18 N. J. L. 325; *Lear v. Yarnel*, 3 A. K. Marsh. (Ky.) 419; *Grayson v. Brooks*, 64 Miss. 410; *Luckett v. Henderson*, 12 Smed. & M. (Miss.) 334.

**Parol Evidence.**—In an early *Massachusetts* case, it was held that an absolute conveyance of land could not be shown by parol to have been intended as security for a debt drawing usurious interest. *Flint v. Sheldon*, 13 Mass. 443; 7 Am. Dec. 162.

In *Butterfield v. Kidder*, 8 Pick. (Mass.) 512, it was held that a verbal promise to pay unlawful interest on a contemporaneous note, expressed for the sum lent and lawful interest, "ought not to vitiate the note, for it was wholly without consideration, and cannot be taken as part of the contract, which was in writing, and must be considered as evidence of the intention of the parties."

In *Bowers v. Douglass*, 2 Head (Tenn.) 376, it was held that an oral contract made by one partner to pay usurious interest upon a note executed by him at the same time in the name of the partnership, could not be shown to defeat the note.

These cases are not in harmony with the great majority of the authorities, and it may be doubted whether they ought now to be recognized as sound. They certainly leave the door wide open for the usurer to escape from the consequences of the statute.

5. See *Goodwin v. Appleton*, 22 Me. 453; *Myrick v. Hasey*, 27 Me. 9; 46 Am. Dec. 583; *Frye v. Barker*, 2 Pick. (Mass.) 65; *Knights v. Putnam*, 3 Pick. (Mass.) 171; *Little v. Rogers*,

of fact for the jury.<sup>1</sup> And their finding will not be reviewed on appeal, even though the evidence to support the verdict appears vague, indefinite, and unsatisfactory.<sup>2</sup>

**XII. TRANSACTIONS HELD USURIOUS.**—A number of cases not capable of classification elsewhere, which have been held to be within the usury laws, are given in the note.<sup>3</sup>

1 Met. (Mass.) 108; *Brickett v. Minot*, 7 Met. (Mass.) 291.

1. *Davis v. Garr*, 6 N. Y. 124; 55 Am. Dec. 387; *Vail v. Heustis*, 14 Ind. 607; *Woolsey v. Jones*, 84 Ala. 88; *McKesson v. McDowell*, 4 Dev. & B. (N. Car.) 120; *Kilcrease v. Johnson*, 85 Ga. 600.

2. *Valker v. First Nat. Bank*, 26 Neb. 602; *Klosterman v. Olcott*, 25 Neb. 382.

**Disturbing Verdict.**—Where the jury has found that a renewal note included usurious interest, their verdict will not be disturbed on appeal, though the evidence in support of it is not very strong or convincing, and though the alleged excess is quite small. *Mitchell, J., dissenting. Cowles v. Canfield*, 49 Minn. 496.

The defendant delivered to the plaintiff five notes of \$100 each, at ninety days, for which the plaintiff gave him \$400. At the maturity of the notes, the defendant gave the plaintiff in lieu of them, and without additional consideration, other notes for \$625. Similar renewal notes were made at short intervals, until the amount represented by the last notes was \$875. In an action on these notes, it was held that a charge to the jury which assumed the possibility of a fair transaction was erroneous, and that a verdict for the plaintiff could not stand. *Lawrence v. Griffin*, 30 Tex. 400.

3. Stipulating for more than current premium on gold. *Austin v. Walker*, 45 Iowa 527.

An agreement to pay on a loan of currency one-half of one per cent. per month in currency and seven per cent. per annum in gold, the latter being at a premium of thirty-nine and one-half. *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308.

A loan by a bank at the highest rate of interest allowed by its charter, on condition that the borrower would secure it by first a mortgage on land, and further that he would execute a second mortgage to secure a debt due to the bank by a third person. *New Orleans Canal, etc., Co. v. Hagan*, 1 La. Ann. 62.

An agreement by the borrower to pay the debt of another, in addition to legal interest and the principal sum loaned. *Brown v. Baer*, 79 Ga. 347.

An agreement in consideration of £800 in cash to pay a debt of £1,200 due to a third person in three years. *Watkins v. Taylor*, 2 Munf. (Va.) 234.

Setting off a debt against a claim of illegal interest. *Dean v. Herrick*, 54 Vt. 573.

But the mere fact that a loan is made conditional upon the execution of some other and contemporaneous contract between the lender and the borrower, does not necessarily infect the loan with usury. The test is the nature of such contract, the advantages or disadvantages to the respective parties, and all the attendant circumstances and objects. *Clarke v. Sheehan*, 47 N. Y. 188.

Taking in settlement of a debt, besides legal interest, drafts at par which the creditor knew were at a premium in the market. *Seneca Co. Bank v. Schermerhorn*, 1 Den. (N. Y.) 133.

Giving a usurious note and mortgage to a third person, by whom they are immediately assigned without consideration to the lender. Transaction cannot be saved by such device. *Johnson v. Smith*, 39 Iowa 549.

An agreement that A, who had been compelled to pay usury on borrowed money by reason of B's failure to pay a debt which he owed A, might retain out of certain of B's rents, as they became due, a sufficient amount to reimburse him for the excessive interest so paid. *White v. Ault*, 19 Ga. 551.

Stipulation made at the time of mortgage loan that the lender shall be allowed to retain a part of the land mortgaged after being repaid the principal and legal interest. *Gleason v. Burke*, 20 N. J. Eq. 300.

The exaction by the lender from his borrower of the same illegal rate which the former has agreed to pay to a third person. *Dowell v. Vannoy*, 3 Dev. (N. Car.) 43.

An agreement by the borrower, who had loaned the money to others at usu-

rious interest, to pay his lender the same rate. *Levy v. Gadsby*, 3 Cranch (U. S.) 180.

The defendant, at the request of the plaintiff and for his benefit, borrowed money and lent it to the plaintiff, who agreed to pay the defendant therefor the same rate of interest that the latter had agreed to pay, and an additional two per cent. for his credit and incidental expenses. The court held that while there was nothing usurious in the agreement for the two per cent., yet, if the defendant might, by the exercise of reasonable diligence, have borrowed the money at legal rates, but in fact did borrow it at unlawful rates, it was usury for him to exact such rates from the plaintiff. *Ricker v. Clark*, 54 Vt. 289.

The certificates of deposit, payable at a future day, with interest at four and one-half per cent., payable semi-annually, were issued as consideration for a mortgage of the same amount, bearing interest at the highest legal rate. It was held to be usury. *New York L. Ins., etc., Co. v. Beebe*, 7 N. Y. 364.

Where A gave B his note and a mortgage for a certain amount payable in one year without interest, for which B gave A his note for the same amount due in six months without interest, which latter note A raised money on, it was held to be usury for B to exact a compensation greater than legal interest for the six months following the maturity of his own note. *Williams v. Fowler*, 22 How. Pr. (N. Y.) 4.

A applied to B for a loan, but B said he had no money, but thought perhaps he could get some from his son-in-law, who, he said, would want seven per cent. above legal interest. A made out a note for the amount wanted and left it with B, under an agreement to return it if B failed to get the money. B then borrowed the amount from his son-in-law, giving his own note therefor, which he afterward paid, and delivered to A the amount of A's note, after deducting the premium agreed upon, and kept A's note in his own hands. It was held that B must be deemed the lender, and the note usurious. *Reed v. Smith*, 9 Cow. (N. Y.) 647.

The defendant agreed to pay orders issued by the plaintiff out of money deposited with him, for a compensation of one-fourth of one per cent.; for payments made when no funds therefor were on deposit, one-half of one per cent., if the amount so paid should

be made good the following day; and if not so made good, then one and one-half per cent. per month. It was held that the last provision was for a rate of interest for the use of money greater than eight per cent., and therefore was usurious. *Burwell v. Burgwyn*, 100 N. Car. 389.

A sold his land, which was then mortgaged to D, to B and C, and the purchase price, consisting in part of cash and in part of notes payable to D in ten years with legal interest, was given to D in payment of his mortgage. It was held that it was usury for D to charge A, in settlement, with one per cent. interest on the notes of B and C. *Hawkins v. National L. Ins. Co.*, 57 Vt. 591.

A debt being due, the debtor, by agreement, indorsed and delivered to the creditor notes not due against third parties, in payment of the debt, at a discount of four per cent. per month for the period the notes had to run, and also, by the same agreement, procured another indorser on the notes. It was held that the transaction was usurious, and that the second indorser could take advantage of it. *Campbell v. Read*, Mart. & Y. (Tenn.) 392.

The plaintiff had taken a mortgage for \$700 at the highest legal rate of interest, but the evidence showed that his draft to the defendant, the mortgagor, given at the time of making the loan, was for but \$680, and the defendant testified that that was all he had ever received. It was held that the loan was usurious, notwithstanding the plaintiff swore that he subsequently sent the defendant the remaining \$20, but produced no vouchers. *Lombard v. Gregory*, 81 Iowa 569.

**Interest Disguised as Wages.**—Where a loan is made on condition that the lender shall be given an official position in the borrower's employ, where he is not needed and where there is practically nothing to do, and is paid a very large salary. See *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49.

But an agreement, by which a person was to take the office of treasurer of a corporation, and advance money for it, in consideration of \$300 per year as salary and twelve per cent. on advances, is void only as to the interest. *Waite v. Windham Co. Min. Co.*, 37 Vt. 608.

An agreement by the borrower to allow the lender a salary as a clerk in his brewery, which would yield him more than legal interest on his money,

**XLII. TRANSACTIONS HELD NOT USURIOUS.**—In the instances specified in the following note, the statutes of usury have been held not to be infringed.<sup>1</sup>

it not being intended that he should perform any services, was admitted to be corrupt and illegal, in *Wright v. Wheeler*, 1 Camp. 165.

So where the borrower appointed the lender receiver of his rents, with a pretended salary, which appointment was in fact only used as a means of paying him exorbitant interest. *Scott v. Brest*, 2 Tenn. 238.

1. It is not usury for a borrower, in consideration of a further loan, to agree to pay the principal and legal interest of a valid preëxisting debt. *Marsh v. Howe*, 36 Barb. (N. Y.) 649. Nor is a loan rendered usurious because, in violation of its terms, the lender withholds a portion of the amount agreed to be advanced. *Auble v. Trimmer*, 17 N. J. Eq. 242.

On a loan of \$2,800, a mortgage was given for \$3,000, and it was provided that interest on the sum loaned should be added until it increased the principal to \$3,000, and that then interest should begin to run on the last mentioned sum. It was held not usurious. *Mount v. Suydam*, 4 Sandf. Ch. (N. Y.) 399.

A bond given in 1782, conditioned for the payment of £1,000, "or such further sum as shall be equal to the said £1,000 in 1774, that is to say, to purchase as much land, and as many negroes, as it might have done at that time," is not on its face usurious. *Faulcon v. Harriß*, 2 Hen. & M. (Va.) 550.

A mortgage was given to secure a preëxisting debt, and also to secure the mortgagee for a note he had signed for the mortgagor's accommodation. A discount exceeding legal interest was allowed when the mortgagee paid the latter note. It was held that a mortgage subsequently given to secure the amount then due on the first mortgage, with further advances, was valid. *Staley v. Kneeland*, Clarke Ch. (N. Y.) 30.

A provision in a bond that "the lawful interest on the whole principal sum shall be paid annually, together with one-third of the said principal sum at the end of each year, until the whole is paid off," is not usurious, as the agreement contemplates only the interest each year on the amount of principal remaining unpaid. *Gibbs v.*

*Chisholm*, 2 Nott. & M. (S. Car.) 38; 10 Am. Dec. 560.

On a loan of \$3,000, a promise to give the lender during the period of the loan all future dividends on certain bank stock of the nominal value of \$3,000, is not usurious, where the average dividends up to that time had been seven per cent. per annum, and there was no evidence of intent to evade the statute. *Potter v. Yale College*, 8 Conn. 52.

A lessor agreed with his lessee that if the latter would build houses on the leased premises within a certain time, he should receive a conveyance of a tract of land in fee. The houses not being finished in time, the lessee, in consideration of further time, released his claim to the fee. It was held that there was no usury in the release. *Rust v. Chisolm*, 57 Md. 376.

One Hollenback gave his note to the plaintiff for \$275, and also executed a deed of certain land for an expressed consideration of \$200, in connection with which the plaintiff executed an agreement to reconvey on payment of the note at maturity and the taxes. The plaintiff also indorsed upon the agreement the following: "I hereby agree to receive payment on the within bond as follows: at thirty-seven and one-half per cent. on \$200, from the date of the above bond to the date of payment." Usury being interposed as a defense, the court, by Beck, J., said: "The only evidence upon this branch of the case is this: The deed executed by Hollenback to plaintiff names the consideration at \$200, and the indorsement upon the agreement provides that it may be paid at any time, with thirty-seven and one-half per cent. interest. There is not one word more of testimony upon the question of usury. No presumption is raised, no inference can be drawn, contradicting the face of the note, from the fact that the deed recites its consideration to be \$200. An additional consideration may have existed, and may have been included in the note. The indorsement on the note has no force to establish usury. It binds plaintiff to receive, at any time, payment of the note, with thirty-seven and one-half per centum on \$200. This appears somewhat as though the \$200

may have been the original contract. But it is consistent with other suppositions. We are not authorized to find upon this evidence that the contract was usurious. Surely, if there is usury in the transaction, the defendants would have shown it by the parties to the contract, both of whom were witnesses on the trial. We cannot, upon the extremely meager and uncertain evidence offered to us, find the existence of usury, when it was in the power of the defendants to give us clear and convincing testimony upon the question. It will be observed that the indorsement upon the agreement of plaintiff does not bind Hollenback to pay the interest named; plaintiff simply agrees to accept it." *Brush v. Peterson*, 54 Iowa 243.

**Reimbursement of Surety.**—An insolvent bank held a judgment against A, drawing twelve per cent. interest, upon which B was liable as surety. B had a deposit in the bank, for which a third person had offered to allow him in trade its face value. B agreed with A to pay the judgment by permitting the bank to charge the amount thereof against B's deposit, and A agreed to repay him the full amount so charged, with six per cent. interest. The insolvent bank never paid but about sixty per cent. on the dollar of its indebtedness. It was held that there was no usury in the agreement between A and B. *Southall v. Farish*, 85 Va. 403.

**Loan to Pay Usurious Debt.**—A note or bond given to a third person who, at the debtor's request, advanced money to pay the latter's usurious debt, is not affected by such usury. *Cottrell v. Southwick*, 71 Iowa 50; *Vaught v. Rider*, 83 Va. 659; 5 Am. St. Rep. 305. And it makes no difference that the person advancing the money knew that the debt was usurious. *Coffman v. Miller*, 26 Gratt. (Va.) 698; *Drake v. Chandler*, 18 Gratt. (Va.) 909.

**Payments to Third Person.**—Unauthorized payments of excessive interest were made by a mortgagor to the husband of the mortgagee for the purpose of obtaining his consent to extensions of time, but the mortgagee was not shown to be a party to the transaction, and did not receive any part of such payments. It was held that this was not usury. *Mahoney v. Mackubin*, 54 Md. 268.

**Payment by Third Person.**—An agreement by a third person to pay extra interest, in consideration of the creditor's giving the debtor an extension of

time, does not render the contract usurious, where the debtor is not a party to such agreement. *Gleason v. Childs*, 52 Vt. 421.

Where A agreed to buy B's farm for \$2,500, if he could borrow the money, and the lender asked \$30 in excess of legal interest, which A refused to pay, whereupon B agreed to pay the lender the \$30, and a note and mortgage were given for \$2,500, and A paid B \$2,470 for his deed, it was held that the transaction was free from usury. *McArthur v. Schenck*, 31 Wis. 673; 11 Am. Rep. 643.

**Use of Collaterals by Creditor.**—The fact that collaterals, given to secure a note, are converted into cash by the creditor prior to the maturity of the note, and the proceeds retained and used by him during the interval, does not make the note usurious, unless such use was agreed upon by the parties when the note was given. *Morgan v. Mechanics' Banking Assoc.*, 19 Barb. (N. Y.) 584.

**Indemnifying Creditor from Loss.**—A owed B \$100,000, and in consideration of forbearance agreed to continue to pay interest thereon, and also to give B his notes for \$40,000, to be disposed of by B for his own use at such discount as he should see fit, such notes to be taken up by B at maturity, and new ones given by A, to be disposed of in the same way; also, to pay B all sums in excess of legal interest, which B might be obliged to allow in disposing of them. It was held that this agreement was not usurious, in the absence of evidence of an intention to evade the statute. *Kimball v. Boston Athenæum*, 3 Gray (Mass.) 225. To the same effect, see *Stevens v. Davis*, 3 Met. (Mass.) 211.

So where a debtor, being unable to raise the money with which to pay his creditor, directed the latter to raise it elsewhere, promising to pay him whatever rate of interest he might be obliged to pay, and thereupon the creditor borrowed the money at usurious rates, it was held that he was acting merely as the agent of his debtor, and could recover of him the full amount of interest paid. *Shirley v. Spencer*, 9 Ill. 583.

**Assumption of Another's Debt.**—A loan is not rendered usurious *per se* by reason of the fact that the lender exacted, as a condition of making the loan, that the borrower should secure to the lender the payment of a subsisting and

genuine debt due the lender from a third person. *Valentine v. Conner*, 40 N. Y. 248; 100 Am. Dec. 476.

**Payment of Unearned Fees.**—To avoid having an execution put into the hands of an officer, the debtor gave the creditor a note for the amount of the judgment and costs, and also a note for a further sum equal to the fees which would have been charged by the officer for collecting the execution. But it was at the same time agreed in substance that, if the debtor would pay the note within a certain time, the creditor would receive in full payment the amount of the judgment without interest or the officer's fees. It was held not usurious. *Cutler v. How*, 8 Mass. 257.

**Testimony of Lender.**—In an action to foreclose a mortgage, there was evidence that one Van Winkle agreed to loan \$1,500 to a school district for the purpose of erecting a schoolhouse, and that he paid out the money at intervals as the building progressed. The mortgage was made out for \$1,650 to one Baxter as mortgagee, by whom it was afterward assigned to Van Winkle. He denied any knowledge of the fact that the mortgage was for more than the sum loaned until after it was assigned to him, and he testified that Baxter told him the additional \$150 was to be used by the school trustees to buy furniture; that he thereupon paid Baxter, who was then school clerk, the \$150 less the amount of accrued interest on the \$1,500. It did not appear that Baxter had authority to receive the money, or that it was ever put into the school treasury. Subsequently Van Winkle accepted payment of interest for the same period covered by the interest claimed to have been previously deducted, and did not disclose the transaction with Baxter. One of the school trustees swore that the \$150 was

a bonus agreed upon, at the time of the loan, between the trustees, Van Winkle and Baxter. On this state of facts, McGill, Ch., held that usury was not sufficiently proved, saying: "The evidence raises in my mind a strong suspicion that Van Winkle entered into a corrupt, usurious agreement with the defendant, but it is not sufficiently convincing to overcome Van Winkle's positive oath to the contrary." *Berdan v. Trustees School Dist. No. 38*, 47 N. J. Eq. 8.

**Interest on Overdrafts.**—An agreement between a bank and its depositor to charge the latter, at the end of each month, with interest for the month on the amount of his overdrafts, and include such charge as a part of the overdraft, does not constitute usury, even though the overdraft may not have existed during the whole month for which the interest is charged, where the arrangement is made *bona fide* for the purpose of avoiding involved calculations. *Timberlake v. First Nat. Bank*, 43 Fed. Rep. 231.

A note given by a depositor to his bank, for, as he supposed, the amount of his overdraft, at the highest legal rate of interest, is not rendered usurious by the fact that without his knowledge the bank had charged him with interest on the overdrafts at the rate of one per cent. per month, and included it in the amount of the note. There was no contract made to pay the usurious interest. *First Nat. Bank v. Moore*, 83 Iowa 740.

**Custom of Merchants.**—A custom among merchants of taking a commission above the legal rate of interest on the exchange or discount of notes, does not remove the illegality of such transactions. *Dunham v. Gould*, 16 Johns. (N. Y.) 367; 8 Am. Dec. 323; *Ex p. Aynsworth*, 4 Ves. 678.

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